

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TROY DE BROUOX	:	Civil Action
a.k.a. ANTHONY STOKES	:	
Plaintiff	:	
	:	
	:	
v.	:	NO. 04-3523
	:	
Supt. ERICKSON, et. al.	:	
Defendants	:	

Norma L. Shapiro, S.J.

September 29, 2004

MEMORANDUM AND ORDER

Petitioner was convicted of aggravated assault and violating the Uniform Firearms Act in the Court of Common Pleas for Philadelphia County (C.P. No. 020105951-1). The court sentenced him to a term of imprisonment of five to fifteen years on April 3, 2002. Petitioner filed a motion for reconsideration and/or to modify his sentence which was denied on June 9, 2004. Petitioner did not appeal to the Superior Court of Pennsylvania but instead filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Petitioner's failure to appeal to the Superior Court allegedly resulted from his misreading the June 9, 2004 Order denying his Motion for Reconsideration and/or to modify his sentence. In the Order denying relief, the Court of Common Pleas for Philadelphia County stated that it had no jurisdiction to modify or reconsider his sentence. Petitioner mistakenly concluded that the Superior Court "would not of [sic] accepted an appeal where no jurisdiction from the lower court would have

been acknowledged.” Petitioner’s belief that he could not appeal to the Superior Court because the trial judge had no jurisdiction over his Motion for Reconsideration convinced him to file a Federal Habeas Corpus for relief. The record offers no indication of why Petitioner never asserted his Sixth Amendment right to assistance of counsel on a first appeal.

Under 28 U.S.C. § 2254(b)(1)(A), a federal court may not entertain the merits of a prisoner’s petition for a writ of habeas corpus unless available state court remedies have been exhausted. A petitioner will not be deemed to have exhausted available state court remedies so long as he has the right under state law to raise, by any available procedure, the question presented. By not appealing to Superior Court, petitioner has failed to exhaust his state remedies.

Petitioner may file a petition under the Pennsylvania’s Post Conviction Relief Act (“PCRA”) 42 Pa.C.S.A. §§ 9541-9551, but an adequate and independent finding of procedural default will bar federal habeas review of the federal claim unless the habeas petitioner can either show cause for the default and prejudice to the federal claim, or demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice. Harris v. Reed, 489 U.S. 255, 262, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). An appropriate order follows.

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Plaintiff

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Civil Action

NO. 04-3523

ORDER

AND NOW, this ____ day of September, 2004, upon careful and independent consideration of the pleadings and record therein, and after review of the Report and Recommendation of Thomas Rueter, United States Magistrate Judge, and the objections thereto, it is **ORDERED** that

1. The Report and Recommendation is **APPROVED** And **ADOPTED**;
2. The petition for writ of habeas corpus is **DISMISSED**, without prejudice, for failure to exhaust state court remedies; and
3. No certificate of appealability is granted.

BY THE COURT

NORMA L. SHAPIRO, S.J.