

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

ROBERT RILEY	:	CIVIL ACTION
	:	
v.	:	NO. 04-2577
	:	
THOMAS LAVAN, <u>et al.</u>	:	

MEMORANDUM AND ORDER

Kauffman, J.

August 16, 2005

Now before the Court is the Petition of Robert Riley (“Petitioner”) for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently incarcerated in the State Correctional Institution in Dallas, Pennsylvania. For the reasons that follow, the petition will be denied.

I. Procedural History

Petitioner pled guilty to criminal trespass and simple assault on March 8, 1998, and was sentenced to nine to twenty-three months in prison, to be followed by three months of probation. Thereafter, Petitioner was charged with violation of probation on May 4, 2000, and again on May 8, 2000. On both occasions, the trial court declined to revoke probation. However, when Petitioner was charged with violation of probation a third time, the trial court revoked his probation and sentenced him to five to ten years imprisonment.

Petitioner failed to file a post-sentence motion or a direct appeal. He did, however, file a pro se petition under the Pennsylvania Post Conviction Relief Act (“PCRA”) on January 9, 2002. See 42 Pa. C.S.A. § 9541, et seq. Counsel was appointed, and filed a letter pursuant to Commonwealth v. Finley, 550 A.2d. 213 (Pa. Super. 1988), advising Petitioner and the PCRA

court that there was no merit to the issues in Petitioner's PCRA petition. The PCRA court granted counsel's request to withdraw and dismissed the petition on November 6, 2002. See Commonwealth v. Riley, 844 A.2d 1287 at *2 (Pa. Super. 2003).

Petitioner appealed the dismissal to the Pennsylvania Superior Court, arguing that: (1) "he was denied due process because the lower court did not conduct a hearing under Gagnon prior to the revocation of his probation"; and (2) "the [trial] court's September 25, 2001 sentence was excessive because it was more severe than the sentence which was originally imposed." Id. at 1. On December 3, 2003, the Superior Court affirmed the dismissal of the PCRA petition, holding that Petitioner had waived both of his claims before the Superior Court by failing to raise them on direct appeal. Id. at 3-4. The Pennsylvania Supreme Court denied the petition for allowance of appeal on June 2, 2004. Commonwealth v. Riley, 852 A.2d 312 (Pa. 2004) (table).

Petitioner filed the instant application for a Writ of Habeas Corpus on June 14, 2004 based on the same two claims he had raised in Superior Court. The Court designated United States Magistrate Judge Arnold C. Rapoport to submit a Report and Recommendation. See 28 U.S.C. § 636(b)(1)(B); Local R. Civ. P. 72.1(I)(b). In his Report and Recommendation, Magistrate Judge Rapoport found that Petitioner's claims had been procedurally defaulted, and accordingly recommended that the Court deny the Petition. Petitioner filed timely objections in which he challenges Magistrate Judge Rapoport's findings. Because Petitioner has objected to the Report and Recommendation, the Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C).

II. Legal Standard

28 U.S.C. § 2254 limits habeas relief to those petitioners who have first “exhausted the remedies available in the courts of the States.” 28 U.S.C. § 2254(b)(1)(a). A petitioner has exhausted his state remedies only when all avenues for review of his claim in state court have been foreclosed. 28 U.S.C. § 2254(b)(3). Courts, however, have added an additional condition for post-conviction relief: the habeas court must “ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts[.]” O’Sullivan v. Boerckel, 526 U.S. 838, 848 (1999).

A petitioner “properly exhausts” his state court remedies only when he gives “the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” Id. at 845 (emphasis added). Exhaustion has not been properly achieved when the state court denies relief on independent and adequate procedural grounds without reaching the merits of the constitutional claim. This “improper” exhaustion constitutes a procedural default, which acts as a bar against federal habeas relief. Bronshstein v. Horn, 404 F.3d 700, 707 (3d Cir. 2005) (quoting Coleman v. Thompson, 501 U.S. 722, 729 (1991)) (“The procedural default doctrine precludes a federal habeas court from ‘reviewing a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.’”).

III. Analysis

After carefully reviewing the record in this case, it is clear that Petitioner’s claims have been procedurally defaulted. As noted above, Petitioner first raised his two habeas claims on

PCRA review, where the Superior Court denied both claims without reaching the merits based on 42 Pa. C.S.A. § 9543(a)(3). Riley, 844 A.2d 1287 at *2 (table). Section 9543(a)(3) provides, inter alia, that PCRA review is not available for any issue that has been waived during previous review. 42 Pa. C.S.A. § 9543(a)(3). “For purposes of [PCRA review], an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state postconviction proceeding.” 42 Pa. C.S.A. § 9544(b). Petitioner, the Superior Court found, could have raised his claims on direct appeal but failed to do so; accordingly, it concluded, the claims were waived and not subject to PCRA review. Riley, 844 A.2d 1287 at *2 (table).

The waiver rule on which the Superior Court based its decision was clearly an independent and adequate state procedural ground. Petitioner’s claims are therefore procedurally defaulted and must be denied. See Bronshstein, 404 F.3d at 707.

IV. Conclusion

Because both of Petitioner’s claims have been procedurally defaulted, his application for Writ of Habeas Corpus will be denied. An appropriate Order follows.

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ORDER

AND NOW, this 16th day of August, 2005, upon consideration of the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport (docket no. 10) and Petitioner's Objections thereto (docket no. 12), and after de novo review of the pleadings and record in this case, it is **ORDERED** that:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. The Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, is **DENIED** and **DISMISSED**;
3. Because Petitioner has failed to make a substantial showing of the denial of a constitutional right, no certificate of appealability shall issue.

BY THE COURT:

s/Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.