

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

NEAL LEWIS : CIVIL ACTION
 :
 v. :
 :
 HARRY WILSON, et al. : NO. 98-3905

MEMORANDUM AND ORDER

BECHTLE, J. JANUARY , 1999

Presently before the court in this 28 U.S.C. § 2254 action are petitioner Neal Lewis's ("Petitioner") Petition for Writ of Habeas Corpus, the Commonwealth of Pennsylvania's response thereto, the Report and Recommendation of United States Magistrate Judge Jacob P. Hart ("Report and Recommendation") and Petitioner's Objections thereto. For the reasons set forth below, the court will not adopt the Report and Recommendation and will remand the case back to the Magistrate Judge to conduct a hearing on whether Petitioner's failure to exhaust state remedies should be excused.

I. BACKGROUND

On April 6, 1990, Petitioner was convicted of voluntary manslaughter and possession of an instrument of crime. On November 7, 1990, Petitioner was sentenced to a mandatory term of five to ten years imprisonment for voluntary manslaughter and to a concurrent term of one and a half to three years for the weapons offense. Petitioner did not appeal any aspect of his sentence.

On December 12, 1996, Petitioner filed a petition for collateral relief pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. § 9541, et seq., claiming that trial counsel "may have been" ineffective for failing to object to the trial judge's comments during the jury instruction. (Rep. & Recomm. at 1.) However, Petitioner did not have the trial notes of testimony to support this argument. Id. New counsel was appointed to represent Petitioner on his PCRA petition. Petitioner then requested that his trial counsel furnish him a copy of the notes of testimony, but counsel failed to provide them. On August 4, 1997, Petitioner moved the PCRA court to provide him with the transcripts. The PCRA court has not yet ruled on this motion. (Rep. & Recomm. at 2.)

Although the case appeared before the PCRA court for status hearings frequently, the docket reflects that several delays occurred on 3/20/97, 4/22/97, 5/21/97, 6/19/97, 7/21/97, 9/22/97 and 11/13/97 because Petitioner's counsel needed additional time to prepare his amended Petition. (Resp. to Pet. for Writ of Hab. Corp. Ex. A.) On December 20, 1997, Petitioner filed a motion in the PCRA court requesting that his counsel be withdrawn and new counsel be appointed. (Obj. to Rep. & Recomm. Ex. A.) According to Petitioner, the PCRA court has not yet ruled on this motion.

Despite the pending motion for new counsel, on December 31, 1997, Petitioner's counsel filed an amended PCRA petition.

On March 16, 1998, the Commonwealth filed a motion to dismiss the PCRA petition. That motion has also not been ruled on. The case was listed for status on May 18, 1998, continued until July 7, 1998 and relisted for status again on September 18, 1998. According to Petitioner, the September 18, 1998 hearing date passed without a hearing and there has been no indication that the case was relisted. (Trav. to Resp. to Pet. for Writ of Hab. Corp. ¶ 3 & n.1.) The Commonwealth has not challenged Petitioner's assertion.

On July 27, 1998, Petitioner filed the instant Petition for Writ of Habeas Corpus. Petitioner reasserts the substantive claims still pending in his PCRA petition and adds a claim that the delay in the proceedings of his PCRA petition constitutes a violation of due process. In addition, Petitioner requests that the court excuse the exhaustion of state remedies requirement of 28 U.S.C. § 2254 due to inordinate delay.

On September 29, 1998, the Magistrate Judge issued a Report and Recommendation recommending that § 2254's exhaustion requirement not be excused and thus, the Petition for Writ of Habeas Corpus be dismissed. The Magistrate Judge found that the twenty-one month delay in the PCRA petition proceedings did not represent a failure of the PCRA court to address the matter. Instead, the court noted that some of the delay occurred because new counsel was appointed to Petitioner and because his amended PCRA petition was not filed until December 31, 1997. In addition, the Magistrate Judge found that the "fact that the case

has been listed for status is evidence that the PCRA court is attempting to expedite the matter." (Rep. & Recomm. at 4.) Thus, the Magistrate Judge concluded that the case was not "stalled" in the PCRA court and that this court should not excuse the exhaustion of state remedies requirement under 28 U.S.C. § 2254. Id.

II. DISCUSSION

A petitioner seeking federal habeas corpus relief pursuant to 28 U.S.C. § 2254 must have exhausted his remedies in state court before a federal court will entertain the petition. Carter v. Vaughn, 62 F.3d 591, 594 (3d Cir. 1995) (citing Story v. Kindt, 26 F.3d 402, 405 (3d Cir. 1994)). However, the exhaustion requirement will be excused in certain circumstances, such as when inordinate delay renders the state remedy "effectively unavailable." Wojtczak v. Fulcomer, 800 F.2d 353, 354 (3d Cir. 1986). Petitioner does not argue that he has exhausted his state remedies in this case. (Trav. to Resp. to Pet. for Writ of Hab. Corp. ¶ 3.) Instead, he asserts that inordinate delay in the PCRA court excuses him from doing so. Id.

Because the court finds that the record, as currently developed, is insufficient to show whether or not inordinate delay exists in this case, it will remand the case back to the Magistrate Judge to conduct a hearing regarding the status of Petitioner's PCRA petition. The Magistrate Judge attributed some

delay in Petitioner's PCRA proceedings to the fact that he was appointed new counsel and that an amended PCRA petition was not filed until December 31, 1997. This delay, however, could be interpreted in different ways. For example, the delay could be Petitioner's fault and, thus, his failure to exhaust state remedies should not be excused. See Wojtczak, 800 F.2d at 354-55 (stating in dicta that delay in proceedings caused by petitioner would not excuse failure to exhaust state remedies). Or, the delay could be due to "disinterest on the part of court appointed counsel and to a failure on the part of the court to require them to provide minimally effective representation." Id. at 356. In such a case, Petitioner's failure to exhaust state remedies could be excusable. Currently, the record reflects only that the PCRA court's docket lists several dates extending the time for Petitioner to file an amended PCRA petition on 3/20/97, 4/22/97, 5/21/97, 6/19/97, 7/21/97, 9/22/97 and 11/13/97. (Resp. to Pet. for Writ of Hab. Corp. Ex. A.) Without further explanation for these extensions of time, the court cannot evaluate whether there is any excusable reason for them.

The Magistrate Judge also relied on the fact that the case was listed for status as evidence that no inexcusable delay existed in the state proceedings. See Walker v. Vaughn, 53 F.3d 609, 615 (3d Cir. 1995) (stating that district court should "stay its hand once there is reliable evidence that the state action has been reactivated" even after lengthy delay). However, that a case is listed for status is not, in and of itself, evidence that

a case has been reactivated. Although it is true that the case has been listed for status recently, the record reflects only that the case has been continued or relisted for status in the future. (Resp. to Pet. for Writ of Hab. Corp. Ex. A.) There is no evidence reflecting why the case is continued or relisted, nor is there any evidence of what action, if any, occurs at the status hearings. In fact, Petitioner asserts that his September 18, 1998 status hearing never occurred and that there is no indication of a future hearing. (Trav. to Resp. to Pet. for Writ of Hab. Corp. ¶ 3 & n.1.) Without an explanation of why the case continues to be relisted for status without any action being taken, the court cannot evaluate whether any excusable reason for delay exists.

Furthermore, three motions in Petitioner's PCRA petition remain unresolved. First, Petitioner's August 4, 1997 application to obtain the court records and transcribed notes of the trial testimony has yet to be ruled on by the PCRA court.¹ (Rep. & Recomm. at 2.) Second, Petitioner's December 20, 1997 motion to appoint new counsel has yet to be ruled on by the PCRA court. (Obj. to Rep. & Recomm. Ex. A.) Third, the Commonwealth's March 16, 1998 motion to dismiss has yet to be ruled on by the PCRA court. Again, without an explanation of why these motions remain unresolved, the court cannot evaluate

¹ The Magistrate Judge also noted that "[i]t is unclear from Lewis's petition whether his PCRA counsel actually has a copy of the notes of testimony which he could give to the petitioner." (Rep. & Recomm. at 2 & n.1.)

whether any excusable reason for delay exists.

It has now been over two years since Petitioner filed his first PCRA petition. Due to the uncertainty as to how Petitioner's PCRA claims are proceeding, the court will remand the case back to the Magistrate Judge for a status hearing. The Magistrate Judge should require the attendance of Petitioner, counsel for Petitioner and such additional witnesses as are necessary from the Commonwealth with knowledge regarding the troublesome record of delay in Petitioner's PCRA proceedings. The parties and witnesses should testify and provide other evidence explaining the reasons for the delay in the PCRA proceedings. The Magistrate Judge should also require the parties to provide an update on the current status of Petitioner's PCRA petition, including any recent actions taken or any reasons for further delay. After the hearing, the Magistrate Judge should review the evidence produced and the testimony heard and then issue a report and recommendation addressing whether the court should excuse the requirement that Petitioner exhaust his remedies in state court before bringing a habeas petition under 28 U.S.C. § 2254.

III. CONCLUSION

For the foregoing reasons, the court will not adopt the Report and Recommendation and will remand the case back to the Magistrate Judge to conduct a hearing on whether Petitioner's failure to exhaust state remedies should be excused.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
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ORDER

AND NOW, TO WIT, this day of January, 1999, upon consideration of petitioner Neal Lewis's Petition for Writ of Habeas Corpus, the Commonwealth of Pennsylvania's response thereto, the Report and Recommendation of United States Magistrate Judge Jacob P. Hart and petitioner Neal Lewis's Objections thereto, IT IS ORDERED that:

1. The Report and Recommendation is NOT ADOPTED; and
2. the action is REMANDED to the Magistrate Judge who shall, within sixty (60) days from the date of this Order, conduct a hearing and issue a Report and Recommendation consistent with the accompanying memorandum.

LOUIS C. BECHTLE, J.