

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

JAMES CAMPBELL : CIVIL ACTION
 :
 v. :
 :
 ROBERT W. MEYERS, et al. : No. 97-4984

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

October 5, 1999

Petitioner James Campbell has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254, as well as a motion for judgment on the pleadings with respect to that petition. By order of August 18, 1998, the court referred his petition to United States Magistrate Judge Charles B. Smith ("Judge Smith") for a Report and Recommendation. Judge Smith recommended dismissal of the petition without prejudice; both the petitioner and the respondent filed objections to that recommendation. After de novo consideration of the objections of both the petitioner and the respondent, the motion for judgment on the pleadings will be denied, and the petition will be remanded to the United States Magistrate Judge.

PROCEDURAL HISTORY

On October 10, 1991, following a bench trial in the Court of Common Pleas of Philadelphia County, petitioner was convicted of attempted rape, attempted involuntary deviate

sexual intercourse, attempted statutory rape, indecent exposure and corruption of minors. The petitioner was sentenced to an aggregate term of seven to fifteen years imprisonment, which he is currently serving at the State Correctional Institution-Rockview.¹

Petitioner's habeas petition presents four claims:

1) Petitioner was deprived of his constitutional right to a public trial when the trial judge closed the courtroom to the public during the testimony of the complainant without a proper basis in the record;

2) Ineffective assistance of trial counsel, in that said trial counsel failed to investigate defendant's criminal matter;

3) Ineffective assistance of counsel, in that said counsel's ineffectiveness deprived defendant of state and federal rights;

4) Ineffective assistance of trial counsel for said counsel's failure to file pretrial motions on behalf of petitioner.

Petitioner has exhausted his state court remedies with respect to the first claim by seeking relief under the Pennsylvania Post Conviction Relief Act, 42 Pa. Cons. Stat. Ann. § 9541 et seq. (West 1998) ("PCRA"). Petitioner failed to exhaust his remaining claims.

¹ A more detailed account of the background of this case can be found in the Magistrate Judge's Report and Recommendation.

Petitioner, moving for judgment on the pleadings, argues that a delay in this court's processing of his habeas petition constituted a violation of his constitutional right to due process.

DISCUSSION

I. Motion for Judgment on the Pleadings

In his motion for judgment on the pleadings, petitioner cites this district court delay as well as a delay in the forwarding of the state court records.

Respondent is correct in that the delay, if any, in the forwarding of the state court record does not entitle the petitioner to habeas relief. According to the record, Judge Smith ordered the state court records produced on October 13, 1998, within 20 days; he received them on November 30, 1998. While there does not appear to be any explanation for this failure to comply with the 20-day period required by the Order, the actual "overdue" period was less than one month. The issue became moot upon Judge Smith's receipt of the state court record. There was an unexplained delay of over one year between the filing of the habeas petition and the referral of the case to Judge Smith.

Neither delay can lead us, as petitioner argues, to grant him the writ outright. Delay by a district court may violate a prisoner's fundamental right to due process. Madden v. Myers, 102 F.3d 74, 76 (3d Cir. 1996). A writ of

mandamus may issue in response to such delay, but habeas relief is not an appropriate remedy even if the delay has risen to the level of a due process violation. Hassine v. Zimmerman, 160 F.3d 941, 953 (3d Cir. 1998). The role of federal courts in reviewing habeas petitions is limited to evaluating what occurred in state or federal proceedings that led to the prisoner's conviction rather than what happened in collateral attacks on that conviction. Hassine, 160 F.3d at 954. The motion for judgment on the pleadings will be denied.

II. Failure to Exhaust State Remedies

A federal court will not entertain claims of a habeas petitioner until he has exhausted state remedies available at the time of his federal petition. 28 U.S.C. § 2254 (b); see Picard v. Connor, 404 U.S. 270, 275 (1971); Brown v. Cuyler, 669 F.2d 155, 157 (3d Cir. 1982). This petition contains both exhausted and unexhausted claims.

Petitioner's first claim is really the alleged ineffective assistance of counsel for failure to object when the trial court judge closed the courtroom to the public; this was raised under the PCRA. Following denial of relief by the Superior Court allocatur was denied by the Pennsylvania Supreme Court. However, none of the remaining claims were raised at all in state post-conviction relief proceedings.

Petitioner argues in his objections to the Report and

Recommendation of Judge Smith that "inordinate delay," an "error by the clerk of this court," and "multiple medical problems that further prevent him from defending himself in proceedings" excuse his failure to exhaust state remedies on the unexhausted claims.

A delay in post-conviction relief at the state level may be sufficient to excuse non-exhaustion of state remedies in some circumstances. See, e.g., Wojtczak v. Fulcomer, 800 F.2d 353 (3d Cir. 1986) (33-month delay between filing of state postconviction petition and filing of federal habeas petition where nothing in record suggested petitioner was responsible for delay). But the year-long delay in the district court clerk's office does not excuse petitioner's failure to have pursued a claim at the state level.

When a petition contains both exhausted and unexhausted claims, the district court must ordinarily dismiss for failure to exhaust state court remedies. Rose v. Lundy, 455 U.S. 509 (1981). But where returning to exhaust claims in state court would be futile because they are procedurally barred, the district court may decide the merits of the claims that are exhausted and not barred. Toulson v. Beyer, 987 F.2d 984, 986 (3d Cir. 1993) (citing Teague v. Lane, 489 U.S. 288 (1989)). The district court may also consider the merits of the unexhausted, procedurally barred claims but only if the petitioner shows good cause for the procedural default and prejudice, or actual innocence. Bousley v.

United States, 118 S.Ct. 1604, 1611 (1998). If the district court is uncertain about whether the state court would refuse to hear the claims because of the procedural bar, it should dismiss the petition without prejudice to give the state court a chance to hear the unexhausted claims in case they are not procedurally defaulted for some reason.

Toulson, 987 F.2d at 989; see 28 U.S.C. § 2254 (b).

Previously, the Court of Appeals instructed district courts to dismiss petitions with both exhausted and unexhausted claims that might be procedurally defaulted under the PCRA if the district court was uncertain about how the state court would resolve the procedural default issue. See Doctor v. Walters, 96 F.3d 675, 681 (3d Cir. 1996). At the time of the holding in Lambert v. Blackwell, 134 F.3d 506 (3d Cir. 1997) (grant of habeas reversed for failure to exhaust state remedies), "no Pennsylvania court [had] been asked to decide under what circumstances it would excuse an untimely PCRA petition under the new statute of limitations provision." Id. at 524 (3d Cir. 1997). But the Court of Appeals also recognized that "future experience [may] show that the Pennsylvania Supreme Court consistently and regularly applies the 1995 amendments to the PCRA" Banks v. Horn, 126 F.3d 206, 214 n.3 (3d Cir. 1997) (district court erred in holding petitioner's unexhausted claims were procedurally barred) (citation omitted).

Since the Lambert and Banks decisions, the Pennsylvania

Supreme Court has on numerous occasions consistently and regularly applied the PCRA one year statute of limitations to bar petitions that do not fall under any of the three express exceptions.² Holman v. Gillis, 1999 WL 517105 at *7-*8 (E.D. Pa. July 21, 1999) (citing Commonwealth v. Peterkin, 554 Pa. 547 (1998), Commonwealth v. Cross, 555 Pa. 603 (1999), Commonwealth v. Banks, 726 A.2d 374 (Pa. 1999), Commonwealth v. Yarris, 731 A.2d 581 (Pa. 1999)). These recent Pennsylvania Supreme Court cases applying the one year statute of limitations were capital cases. The Pennsylvania Supreme Court is now "consistently and regularly" applying the PCRA statute of limitations in all cases, regardless of the penalty involved. Holman, 1999 WL 517105 at *8.

In Commonwealth v. Fahy, 1999 WL 625079 (Pa. August 27, 1999), the Pennsylvania Supreme Court dismissed a petition from a death sentence prisoner as untimely because it was not filed within one year of the date the judgment became final, and it did not fall under any of the three statutory

²The three exceptions to the one year PCRA time limit are:

- (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;
 - (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
 - (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.
- 42 Pa. Cons. Stat. Ann. § 9545 (b)(1) (West 1998).

exceptions. Id. at *2-*3. The Fahy court, rejecting several arguments that it should consider the merits of the petition despite its untimeliness, held that the time limitations of the PCRA are jurisdictional and refused to apply principles of equitable tolling to cure the petition of its untimeliness. Id. at *6-*7. For the same reason, the court refused to consider the merits of the petition on finding a "miscarriage of justice." Id. at *8. The court also rejected an ineffective assistance of counsel argument, and refused to exercise the court's King's Bench powers. Id. at *8-*9.

As respondent points out, petitioner's state post-conviction remedies are now time barred under the PCRA because more than one year has passed since the judgment of conviction became final. See 42 Pa. Cons. Stat. Ann. § 9545(b)(1). Neither the state nor the federal court record shows any evidence that any of the three exceptions to this time limit apply. Petitioner, in his objections to Judge Smith's Report and Recommendation, for the first time asserts "deteriorating health problems" excuse his failure to exhaust state remedies, but this does not relate to any exception to the PCRA one-year limitation.

It is clear that petitioner's unexhausted state court claims are now procedurally barred in state court. If petitioner has demonstrated cause and prejudice, the unexhausted claims should be considered on the merits; if

not, they must be dismissed unless that would cause a fundamental miscarriage of justice. The exhausted claim should be considered on the merits.

Conclusion

This habeas petition contains both exhausted and unexhausted claims, but the unexhausted claims are procedurally defaulted; the petitioner has no available state remedies. The unexhausted but procedurally defaulted claims can be considered on the merits only if there is cause for the procedural default and prejudice from lack of consideration, or a "fundamental miscarriage of justice" with regard to petitioner's conviction. See Holman, 1999 WL 517105 at *12 (citing O'Sullivan v. Boerckel, ___ U.S. ___, 119 S.Ct. 1728 (1999) (Stevens, J., dissenting); Coleman v. Thompson, 501 U.S. 722 (1991)). The exhausted claim must be considered on the merits. The petition will be remanded to the Magistrate Judge for a Report and Recommendation in accordance with this opinion.

An appropriate Order follows.

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ORDER

AND NOW, this 5th day of October, 1999, upon consideration of the petition for writ of habeas corpus, respondent's reply thereto, the Report and Recommendation of Magistrate Judge Charles B. Smith, petitioner's objections, respondent's response thereto, respondent's objections, petitioner's motion for judgement on the pleadings, and respondent's reply thereto, it is hereby ordered that:

1. The Report and Recommendation is **NOT APPROVED**.
2. The petitioner's motion for judgment on the pleadings is **DENIED**.
3. The matter is **REMANDED** to the United States Magistrate Judge for consideration on the merits of the exhausted claim and claims procedurally defaulted where cause and prejudice or a fundamental miscarriage of justice has been established.

