

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ALPHONSO NICKERSON,)
)
 Petitioner,)
)
 v.) Civil Action No. 00-571-SLR
)
 ROBERT SNYDER, Warden, and)
 M. JANE BRADY, Attorney General)
 of the State of Delaware,)
)
 Respondents.)

MEMORANDUM ORDER

I. INTRODUCTION

Petitioner Alphonso Nickerson is an inmate at Delaware Correctional Center in Smyrna, Delaware. Currently before the court is petitioner's application for habeas relief pursuant to 28 U.S.C. § 2254. (D.I. 2) Because petitioner's application contains exhausted and unexhausted claims, the court shall dismiss the petition without prejudice to renew upon exhaustion or voluntary dismissal of petitioner's ineffective assistance claim.

II. BACKGROUND

On October 2, 1997, petitioner was found guilty by a Delaware Superior Court jury of aggravated menacing, possession of a deadly weapon during the commission of a felony, assault in the third degree and criminal trespass in the first degree. (D.I. 8) The Superior Court sentenced

petitioner to 27 years imprisonment. (Id.) On direct appeal, petitioner argued that because he was not convicted of the predicate felony, his conviction on the possession charge should be reversed. The Delaware Supreme Court rejected petitioner's claim and affirmed the judgment of the Superior Court. See Nickerson v. State, 734 A.2d 159 (Del. Mar. 11, 1999). On December 29, 1999, petitioner filed a petition for a writ of habeas corpus in Superior Court, alleging, inter alia, that: (1) the grand jury's reindictment of petitioner constituted double jeopardy; (2) petitioner's trial counsel was ineffective for failing to object to the reindictment; (3) the trial court abused its discretion by not allowing plaintiff to dismiss his court-appointed counsel; and (4) the prosecutor committed misconduct by reindicting petitioner. Because the commitment was regular on its face, the Superior Court summarily dismissed the petition. (D.I. 8) The Supreme Court affirmed the lower court's decision, and noted that petitioner's claims were not properly before the court because "[i]n Delaware, the writ of habeas corpus provides relief on a very limited basis." Nickerson v. State, 750 A.2d 530 (Del. Mar. 27, 2000). The Supreme Court also stated, however, that if it were able to address petitioner's "double jeopardy" claim, it would be dismissed for lack of merit. See id.

In his application for federal habeas relief dated May 25, 2000, petitioner raises four grounds for relief: (1) the grand jury's reindictment of petitioner in July 1997 constituted double jeopardy because the original indictment had not yet been dismissed; (2) petitioner's trial counsel was ineffective in not objecting to the reindictment; (3) the trial court abused its discretion by failing to grant petitioner's motion to dismiss his court-appointed counsel for failing to object to the reindictment; and (4) the prosecutor committed misconduct by reindicting petitioner. (D.I. 2)

III. DISCUSSION

A prisoner must fully exhaust all remedies in state court before a district court may entertain his claims in a federal habeas corpus appeal. See 28 U.S.C. § 2254(b), (c); Rose v. Lundy, 455 U.S. 509, 515-20 (1982). To exhaust state remedies, a petitioner must have raised the factual and legal premises behind his claims for relief to each level of the state courts before proceeding to federal court. See Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996). A federal habeas claim must have been "fairly presented" to the state courts, that is, it must be the substantial equivalent of that presented to the state courts and the state court must have available to it the same method of legal analysis as that to

be employed in federal court. See Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000). If a petitioner has the right under state law to raise, by any available procedure, the claim presented, then he will not be deemed to have exhausted his available state court remedies. See 28 U.S.C. § 2254(c). This exhaustion requirement ensures that state courts have the first opportunity to review federal constitutional challenges to state court convictions and preserves the role of state courts in protecting federal rights. See Caswell v. Ryan, 953 F.2d 853, 857 (3d Cir. 1992).

In the case at bar, the court finds that petitioner has failed to exhaust his claim of ineffective assistance of trial counsel. Although petitioner presented this claim to the state courts, the courts declined to address the merits of the claim because it was improperly raised in a petition for a writ of habeas corpus. See 10 Del. C. § 6902; Parker v. State, 755 A.2d 390 (Del. 2000); Hall v. Carr, 692 A.2d 888, 891 (1997). A petitioner does not exhaust state remedies by presenting a claim to state courts in an improper procedural fashion. See Castille v. Peoples, 489 U.S. 346, 351 (1989). Because petitioner may properly present his ineffective assistance claim to the state courts in a motion for state post-conviction relief pursuant to Delaware Superior Court

Criminal Rule 61(i)(1)¹, the court shall deny petitioner's application for federal habeas relief without prejudice to renew upon exhaustion or voluntary dismissal of his ineffective assistance claim. See Rose, 455 U.S. at 510 (holding that federal courts may not consider habeas petitions containing both exhausted and unexhausted claims).

IV. CONCLUSION

Therefore, at Wilmington this 1st day of February, 2002;

IT IS ORDERED that petitioner's application for federal habeas relief filed pursuant to 28 U.S.C. § 2254 (D.I. 2) is dismissed without prejudice to renew upon exhaustion or voluntary dismissal of petitioner's ineffective assistance claim, provided that petitioner complies with the applicable statutes of limitations.

United States District Judge

¹Rule 61(i)(1) allows a petitioner to file a motion for state post-conviction relief within three years after the judgment of conviction is final. Because petitioner's conviction became final on March 29, 1999 (the date on which the Delaware Supreme Court issued the mandate affirming his conviction), petitioner has until March 29, 2002 to file a motion for state post-conviction relief.