

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

BILLY G. JOHNSON,)
)
 Petitioner,)
)
 v.) Civil Action No. 00-870-SLR
)
 RICK KEARNEY, Warden, and)
 ATTORNEY GENERAL OF THE)
 STATE OF DELAWARE)
)
 Respondents.)

Billy G. Johnson, Sussex Correctional Institution, Georgetown, Delaware. Petitioner, pro se.

Loren C. Meyers, Chief of Appeals Division, Delaware Department of Justice, Wilmington, Delaware. Counsel for Respondents.

MEMORANDUM OPINION

Dated: February 19, 2002
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner Billy G. Johnson is an inmate at Sussex Correctional Institution in Georgetown, Delaware. Currently before the court is petitioner's application for habeas relief pursuant to 28 U.S.C. § 2254. (D.I. 1) Because petitioner is procedurally barred from raising his claim for relief, the court shall dismiss petitioner's application without reaching its merits.

II. BACKGROUND

In August 1996, the State of Delaware filed an information in Delaware Superior Court (New Castle County), charging petitioner with escape after conviction. (D.I. 13) On April 16, 1997, petitioner pled guilty to the lesser included offense of second degree escape, and was sentenced to two years imprisonment suspended for two years probation. (Id.) After a hearing on June 21, 2000, the Superior Court found petitioner to have violated his probation. Consequently, the Superior Court revoked petitioner's probation and sentenced him to 23 months imprisonment. (Id.) Petitioner filed a notice of appeal on August 21, 2000, but the Delaware Supreme Court dismissed his appeal as untimely

pursuant to Delaware Supreme Court Rule 6(a)(iii).¹ See Johnson v. State, 760 A.2d 163 (Del. Sept. 14, 2000).

Petitioner's instant federal habeas application challenging the sentence imposed after revocation of his probation is dated September 25, 2000. (D.I. 1)

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). 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). Even if a petitioner fully presents

¹Rule 6(a)(iii) provides:

A notice of appeal shall be filed in the office of the Clerk of this Court as follows:

. . .
(iii) Post-conviction Appeals. Within 30 days after entry upon the docket of a judgment or order in any proceeding for post-conviction relief.

his claims in state court, however, if the state court refuses to consider them because the petitioner has not observed state procedural rules, a federal habeas court is barred from considering the claims. See id. This procedural bar rule prevents habeas petitioners from avoiding the exhaustion requirement "by defaulting their federal claims in state court" and making an end-run around state court review of those claims. See Coleman v. Thompson, 501 U.S. 722, 732 (1991). Accordingly,

[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750. In the case at bar, although petitioner challenged the revocation of his probation and subsequent incarceration on direct appeal, the Delaware Supreme Court dismissed the appeal as untimely. Thus, petitioner's claim is procedurally defaulted unless he can demonstrate cause for the default and resulting prejudice, or that the court's failure to consider his claim will result in a "fundamental miscarriage of justice." Id.

To show cause, petitioner must demonstrate that "something external to the petitioner, something that cannot fairly be attributed to him," impeded his efforts to comply with state procedural rules. Id. at 753. Such factors include interference by government officials, constitutionally ineffective assistance of counsel, or the unavailability of the factual or legal basis for a claim. See, e.g., McCleskey v. Zant, 499 U.S. 467, 494 (1991). Petitioner's application is devoid of any showing of cause for his failure to timely file an appeal to the Delaware Supreme Court. Petitioner's having failed to establish cause, the court need not reach the question of whether he has suffered actual prejudice. See Coleman, 501 U.S. at 750-51.

Alternatively, the court may consider an otherwise procedurally barred claim if petitioner demonstrates that failure to do so would constitute a "miscarriage of justice." See Schlup v. Delo, 513 U.S. 298, 314-15 (1995). This exception applies only in "extraordinary cases." Id. at 321. To establish a miscarriage of justice, the petitioner must demonstrate "by clear and convincing evidence that, but for [the asserted] constitutional error, no reasonable juror would have found the petitioner eligible for the . . . penalty under the applicable state law." Sawyer v. Whitley, 505 U.S. 333,

336 (1992). Petitioner has failed to present any evidence that would preclude a reasonable fact finder from determining that petitioner violated his probation, nor has petitioner demonstrated how the court's failure to consider his claims will otherwise result in a fundamental miscarriage of justice. Therefore, the court is procedurally barred from considering petitioner's claims for habeas relief.

IV. CONCLUSION

For the reasons stated, petitioner's application for habeas relief pursuant to 28 U.S.C. § 2254 is denied. An appropriate order shall issue.

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O R D E R

At Wilmington, this 19th day of February, 2002,
consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Petitioner Billy G. Johnson's application for habeas relief pursuant to 28 U.S.C. § 2254 (D.I. 1) is dismissed and the writ denied.

2. For the reasons stated above, petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and a certificate of appealability is not warranted. See United States v. Eyer, 113 F.3d 470 (3d Cir. 1997); 3d Cir. Local Appellate Rule 22.2 (1998).

United States District Judge