

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KENNETH T. DEPUTY,)
)
 Petitioner,)
)
 v.) Civil Action No. 00-539-SLR
)
 DAVE GARRAGHTY, Warden,)
 ROBERT SNYDER, Warden, and)
 ATTORNEY GENERAL OF THE)
 STATE OF DELAWARE,)
)
 Respondents.)

Kenneth T. Deputy, Delaware Correctional Center, Smyrna,
Delaware. Petitioner, pro se.

Loren C. Meyers, Esquire and Thomas E. Brown, Esquire, Delaware
Department of Justice, Wilmington, Delaware. Attorneys for
Respondents.

MEMORANDUM OPINION

Dated: June 4, 2001
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner Kenneth T. Deputy is an inmate at Delaware Correctional Center in Smyrna, Delaware. (D.I. 19) Currently before the court are petitioner's motion for habeas corpus relief pursuant to 28 U.S.C. § 2254 (D.I. 2), motions for default judgment (D.I. 11, 18), motion for sanctions (D.I. 12), motions to strike the State's answer (D.I. 12, 18), and motion for appointment of counsel (D.I. 26). Because petitioner is procedurally barred from raising his claims for relief, the court shall dismiss his petition without reaching its merits, and deny all other pending motions as moot.

II. BACKGROUND

On September 18, 1997, petitioner was convicted by a Delaware Superior Court jury of attempted robbery in the first degree, first degree assault and possession of a deadly weapon during the commission of a felony. (D.I. 21) On December 19, 1997, the Delaware Superior Court sentenced petitioner to 27 years imprisonment suspended after 22 years for probation. (Id.) Petitioner's counsel filed a timely notice of appeal with the Delaware Supreme Court, as well as a motion to withdraw as counsel pursuant to Supreme Court Rule 26(c).¹ (Id.) Petitioner

¹Rule 26(c) provides, in pertinent part:

If the trial attorney, after a conscientious examination of the record and the law, concludes that an appeal is wholly without merit, the attorney may file a motion to withdraw.

filed an appellate brief pro se, and the Supreme Court affirmed petitioner's conviction and sentence. See Deputy v. State, 718 A.2d 527 (Del. Aug. 10, 1998). On September 14, 1998, petitioner filed a motion for post-conviction relief in Delaware Superior Court. The Superior Court referred petitioner's motion to a Court Commissioner for proposed findings and recommendations pursuant to 10 Del. C. § 512(b) and Superior Court Criminal Rule 62. In a Report and Recommendation dated August 10, 1999, the Court Commissioner concluded that petitioner's claims were either procedurally barred or lacked merit. By order dated September 17, 1999, the Delaware Superior Court adopted the Court Commissioner's Report and Recommendation and denied petitioner's motion for post-conviction relief. See State v. Deputy, Nos. IK97-01-0018-R1 through 0020-R1, 1999 WL 743921 (Del. Super. Sept. 17, 1999). The Delaware Supreme Court affirmed the

. . .
The client shall have 30 days in which to review the proposed brief and proposed motion to withdraw and to prepare and submit any points for the Court's consideration, prior to the filing by counsel of said brief and motion. The motion and the brief shall be served upon the State; and the State shall file within 20 days of service a response or make any application it deems appropriate.

Upon the expiration of such 20-day period, the Court shall determine, without oral argument, whether the appeal, on its face, is wholly without merit. If the Court so determines, the Court may order that the judgment below be affirmed. If the Court does not so determine, the motion for withdrawal may be granted and the Court may appoint substitute counsel who shall thereafter have 30 days in which to submit an opening brief.

Superior Court's decision. See Deputy v. State, 748 A.2d 913 (Del. Mar. 9, 2000).

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 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.

Petitioner lists several grounds for relief on the model § 2254 form and attachment: (1) his arrest was illegal; (2) the indictment was defective; (3) the trial court lacked jurisdiction because the Court of Common Pleas commitment sheet was invalid; (4) the evidence presented at trial was insufficient for a conviction; (5) there was prosecutorial misconduct based on a manufactured commitment sheet, loss of a photo array and defective eyewitness testimony; (6) there was judicial misconduct because of racial bias, various rulings, and court-sanctioned activation of a stun belt; (7) the photo array was improperly suppressed; (8) the arresting officer committed perjury because he testified that he had obtained the photos in the photo array "from troop #3"; (9) the court's sequestration order was violated when the arresting officer was permitted to exit the courtroom and retrieve a government witness; (10) petitioner's sentence is illegal because the conviction is invalid and he did not receive credit for time served; and (11) numerous claims of ineffective assistance of counsel at trial and sentencing. (D.I. 2)

After a liberal reading of petitioner's filings, it appears that petitioner's claims in his federal habeas application were

sufficiently presented to the Delaware courts in his state post-conviction motion and appeal of its denial. Thus, because petitioner raised the facts and the legal theory on which he now relies to each level of the Delaware courts, his claims have been exhausted.

The court may nevertheless be barred from considering petitioner's application because petitioner has failed to comply with Delaware's procedural requirements. With the exception of his claim for ineffective assistance of counsel, the Delaware Supreme Court rejected petitioner's post-conviction claims as procedurally barred under Delaware Superior Court Criminal Rules 61(i)(3) and 61(i)(4).² The Supreme Court's denial of petitioner's appeal "rests on [state law grounds that are] independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729 (1991). Therefore, the court must deny petitioner's application as

²Rule 61(i)(3) provides:

Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

- (a) Cause for relief from the procedural default and
- (b) Prejudice for violation of the movant's rights.

Rule 61(i)(4) provides:

Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

procedurally barred unless petitioner establishes either: (1) cause for his procedural default and resulting prejudice, or (2) that a miscarriage of justice would result if the court refused to consider his claims. See Coleman at 750.

To show "cause" petitioner must demonstrate that "something external to the petitioner, something that cannot be attributed to him" impeded efforts to comply with the state's procedural rule. Coleman, 501 U.S. at 753. Petitioner alleges ineffective assistance of counsel as cause for procedural default of his claims barred by Rule 61(i)(3), specifically, that his attorney did not raise those claims during his trial or on direct appeal. To prevail on a claim of ineffective assistance of counsel, petitioner must demonstrate that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) there exists a reasonable probability that the proceeding, but for counsel's unprofessional errors, would have concluded with a different result. See id. at 687, 694; Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996) (holding that petitioner must demonstrate "a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different"). Here, petitioner has offered no persuasive evidence demonstrating that his counsel's failure to raise the claims at bar was either unreasonable or prejudicial. At most, petitioner's allegations suggest that counsel exercised his professional judgment in deciding which issues to present at

trial. Such assertions do not rise to ineffective assistance of counsel. See Murray v. Carrier, 477 U.S. 478, 493 (1986) (“[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for procedural default.”). Additionally, petitioner was given the opportunity to raise any issues in the Rule 26(c) brief filed on direct appeal. The law in Delaware is clear that “appellate counsel cannot be held ineffective for failing to raise issues that [the defendant] himself had the opportunity to raise but did not.” Truitt v. State, 682 A.2d 627 (Del. Jul. 2, 1996). Thus, petitioner has failed to establish “cause” for his procedural default.³ Petitioner having failed to establish cause, the court need not reach the question of whether he has shown 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

³The Strickland test also applies to petitioner’s other general claims of ineffective assistance of counsel, which the Delaware Supreme Court considered and rejected on their merits. To the extent the court must address those claims on their merits, the court agrees that “there is no evidence in the record suggesting errors on the part of counsel either at trial or on appeal or that any conduct on the part of counsel negatively influenced the outcome of [petitioner’s] case. . . .” Deputy v. State, 748 A.2d 913 (Del. Mar. 9, 2000).

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). Review of the record reveals no new evidence that would preclude a reasonable fact finder from reaching a conviction in petitioner's case, 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 corpus relief is denied. An appropriate order shall issue.

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O R D E R

At Wilmington, this 4th day of June, 2001, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Petitioner Kenneth T. Deputy's application for habeas corpus relief pursuant to 28 U.S.C. § 2254 (D.I. 2) is dismissed and the writ denied.

2. All other pending motions filed by petitioner are denied as moot.

3. 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