

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RICHARD THORNTON, Sr. and)
NANCY FORD,)
)
Petitioners,)
)
v.) Civil Action No. 98-414-SLR
)
STANLEY TAYLOR, Commissioner,)
Delaware Department of)
Correction and M. JANE BRADY,)
Attorney General of)
the State of Delaware,)
)
Respondents.)

Darryl K. Fountain, Esquire of Wilmington Delaware. Counsel
for Petitioners. Angelina Louise Gadher, Esquire of Trainer,
Pennsylvania. Of counsel for Petitioners.

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

MEMORANDUM OPINION

Dated: May 9, 2001
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On July 15, 1998, Richard Thornton and Nancy Ford (collectively, "petitioners") filed this application for habeas corpus relief pursuant to 28 U.S.C. § 2254. Thornton is currently incarcerated at the Sussex Correctional Institution, and Ford is currently serving six years of probation. Stanley Taylor and M. Jane Brady (collectively, "respondents") are the Commissioner of the Department of Correction and the Attorney General of the State of Delaware, respectively. In their application, petitioners allege several constitutional violations including: (1) suppression of evidence by the state; (2) ineffective assistance of counsel; and (3) discrimination in jury selection. The court has jurisdiction by virtue of 28 U.S.C. § 1331. For the following reasons, the court shall deny petitioners' application.

II. BACKGROUND

As a preliminary matter, the court shall review the events that prompted petitioners to seek habeas corpus relief. The court gleans the following facts (which the court must accept as correct, see 28 U.S.C. § 2254(e)(1)) from the Supreme Court of Delaware's opinions affirming petitioners'

convictions. See Thornton v. State, No. 529, 1996, 1998 WL 309837 (Del. June 3, 1998); Ford v. State No. 507, 1996, 1998 WL 780349 (Del. Oct. 9, 1998). In October of 1995, a Delaware grand jury indicted Thornton on three counts of felony theft, one count of attempted tax evasion, and one count of making a false statement. The grand jury indicted Ford as an accomplice on the three theft counts and on a separate count of official misconduct. A Superior Court jury convicted both individuals of all charges in May of 1996. Petitioners' indictments and convictions stemmed from their involvement in the Delaware Summer Food Service Program ("the Program"). The State of Delaware operates this federally funded program designed to deliver midday meals to underprivileged children during the summer months. With the approval of Ford, the Administrator of the Program, Thornton signed a contract to become an "outreach coordinator" at a Program center. Pursuant to the contract, Thornton procured from the State more than \$65,000 in reimbursements purportedly for start-up costs, employment income, and travel expenses.

At trial, the evidence demonstrated that Thornton deposited the state funds into his personal bank account and later used the money as a down payment for a home that he shared with Ford. The State also presented evidence that

Thornton did not perform any duties as an "outreach coordinator" and did not incur any reimbursable expenses in that capacity. The prosecution argued that the petitioners defrauded the State. The State also prosecuted Thornton for failing to report much of the ill-gotten \$65,000 on his state income tax returns.

After Thornton's conviction, the Superior Court sentenced him to six years incarceration, followed by two and one-half years of probation and 500 hours of community service. The court also ordered Thornton to pay \$76,805 in restitution. On December 20, 1996, Thornton filed a notice of appeal with the Delaware Supreme Court, which affirmed the conviction and sentence on June 3, 1998. Prior to the Delaware Supreme Court's decision, Thornton filed a petition under 28 U.S.C. § 2254 in this court alleging that a delay in the preparation of the trial transcripts deprived petitioner of a constitutional right to a speedy appeal, equal protection of the laws, and effective assistance of counsel. This court denied that petition on July 22, 1999. Thornton v. Kearney, Civ. Act. No. 97-585-SLR, 1999 U.S. Dist. LEXIS 12115 (D. Del. 1999).

The Superior Court sentenced Ford cumulatively to, inter alia, seven years at Level V, suspended after six months at Level V and six months at Level IV for six years of Level II

probation. Ford appealed to the Delaware Supreme Court on only one ground, arguing that the language of the jury charge on her affirmative defense impermissibly shifted to Ford the burden of proving her innocence. The Delaware Supreme Court affirmed Ford's conviction and sentence on October 9, 1998.

The original 1998 petition filed under this civil action number named only Thornton and was filed pro se. (D.I. 1) Thornton subsequently retained counsel, added Ford as a petitioner, and amended the petition. (D.I. 12) Since the amended petition, filed on March 31, 2000, makes no reference to the original 1998 petition, the court will only consider the allegations in the more recent petition.

III. STANDARD OF REVIEW

As of April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) amended the standards for reviewing state court judgments in § 2254 proceedings. Since petitioners' convictions followed the enactment of the AEDPA, the court will apply the amended standards set forth in the AEDPA to petitioners' claims for federal habeas corpus relief. See Lindh v. Murphy, 521 U.S. 320, 336 (1997).

Section 2254 provides that a district court will consider

a petition for a writ of habeas corpus presented by an individual "in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A district court need not consider a petition unless the petitioner has fulfilled certain procedural requirements, such as having "exhausted the remedies available in the courts of the State." Id. § 2254(b)(1)(A). State remedies are unexhausted if the petitioner "has the right under the law of the State to raise, by any available procedure, the question presented." Id. § 2254(c). Thus, a petitioner must raise before the state court of last resort the factual and legal premises of the claims for relief asserted in the § 2254 petition. See Chaussard v. Fulcomer, 816 F.2d 925, 928 (3d Cir. 1987); Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986). The principle of comity underlies this exhaustion requirement, which allows state courts the first opportunity to pass on alleged defects in the criminal proceedings. As an alternative to dismissal, the court may deny the petition on the merits despite petitioner's failure to exhaust state remedies. See 28 U.S.C. § 2254(b)(2).

A district court may not entertain a second or successive

habeas corpus application without an order from the court of appeals authorizing such a filing. See 28 U.S.C. § 2244(b). Section 2244(b) "is an allocation of subject-matter jurisdiction to the court of appeals. A district court must dismiss a second or consecutive petition without awaiting a response from the government." Núñez v. United States, 96 F.3d 990, 991 (7th Cir. 1996).

The AEDPA also increases the deference a federal court must pay to the factual findings and legal determinations made by state courts. See Dickerson v. Vaughn, 90 F.3d 87, 90 (3d Cir. 1996) (finding amended § 2254 to be a "more deferential test" with respect to state courts' legal and factual findings). Like the prior § 2254(d), amended § 2254(e)(1) provides that factual determinations made by a state court are presumed correct. See 28 U.S.C. § 2254(e)(1). The amended § 2254(e) goes further, however, by placing on the petitioner the burden of rebutting the presumption by clear and convincing evidence. See id. With these precepts in mind, the court now turns to an analysis of petitioners' claims.

IV. DISCUSSION

Although the petitioners were tried together, they appealed their respective convictions on different grounds. Thus, the court will review the petitions separately.

A. Ford's Claims are Unexhausted

1. Suppression of Evidence

Ford alleges that the State violated her constitutional rights by suppressing evidence, presumably in violation of Brady v. Maryland, 373 U.S. 83 (1963). Specifically, she alleges that "the State suppressed evidence supporting the Auditor of Account Audit Report, in violation of the Fifth, Eighth, and Fourteenth Amendments." (D.I. 12 at 14)

Ford did not present this claim on her direct appeal. The only issue Ford raised on appeal was an alleged defect in the charge to the jury. Ford, therefore, has failed to exhaust her state remedies with respect to this first ground for relief. To exhaust her state remedies, petitioner must present the factual and legal premises of her claim to the Delaware Supreme Court. See Doctor v. Walters, 96 F.3d 675, 678 (3d Cir. 1996) (holding that "[t]he petitioner must afford each level of the state courts a fair opportunity to address the claims").

Rule 61(i)(3) of the Delaware Superior Court Criminal Rules bars the postconviction hearing of any ground for relief that was not asserted in the proceedings leading to the judgment of conviction. Since Ford is procedurally barred from raising the suppression issue in State court, she is

excused from the exhaustion requirement. Claims deemed exhausted due to a state procedural bar, however, are deemed procedurally defaulted. See Lines v. Larkins, 208 F.3d 153, 160 (3d Cir. 2000). Federal courts may not consider procedurally defaulted claims unless the petitioner establishes cause and prejudice or a fundamental miscarriage of justice to excuse the default. See id.

In her response to the State's answer, Ford couches this claim in terms of "newly discovered" evidence "which the State knew should have been made available during the trial, in order to have given petitioners the opportunity to have a fair trial." (D.I. 21, ¶ 1) When a § 2254 petitioner seeks review of a conviction based on new evidence, she must comply with the federal rules of criminal and appellate procedure. See United States v. Miller, 197 F.3d 644, 648 (3d Cir. 1999). Five requirements must be met before a court may order a new trial due to newly discovered evidence: (1) evidence must be in fact newly discovered, i.e., discovered since trial; (2) facts must be alleged from which the court may infer diligence on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) it must be such, and of such a nature, as that, on a new trial, newly discovered evidence

would probably produce an acquittal. Government of the Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir. 1985).

The "new evidence" relied on by petitioner apparently is a United States Department of Agriculture ("USDA") Final Audit Report. Ford alleges that the State's case was based upon an incomplete audit of the Program. Ford's counsel, in the petition for habeas relief, blames Ford's conviction on

the State's haste to prosecute and convict the petitioners without waiting for the USDA final audit review, especially after the USDA responded to the State's Audit by stating in ter [sic] alia, "The audit was conducted in a very short timeframe [sic] by a limited number of auditors and the reports were already issued at the time of our review." This would have constituted effective notice to the State to wait for The USDA Final Audit Report. Evidence existed then and now to expose these fabrications (along with evidence to expose other vulnerabilities in the prosecution's case), but was never presented to the jury, either because of the trial court's improper rulings, the State's suppression of evidence, or the ineffectiveness of counsel.

(D.I. 12 at 10) Although counsel refers to a USDA report, the report has not been made part of the record. Mere allegations of new evidence possessed by a petitioner, without showing the actual content of the evidence, are not sufficient to warrant the granting of a habeas petition.¹

¹ The record does include a letter to the court from Ford dated July 28, 1999, referencing two sheets of paper that she described as follows:

The USDA Food and Consumer Service (FCS) 3/03/97 Letter of Determination and Review of Audit Report 50020-0023-Hy, State of Del. For the year ended June 30, 1994. . . . This audit was kept concealed by the Department of Public Instruction (DPI), now the Dept. of Educ., the State Auditor of Accounts, and the Dept. of Justice. DPI conducted my termination hearing in Sept. 1995, removing me from my position of 18 years. The Dept. of Justice followed with my indictment and criminal prosecution in August 1996. The audit was not completed until March 3, 1997. It contains findings that support our innocence of all charges.

(D.I. 6 at 4, 10-11) The first sheet of paper appears to be a letter on USDA letterhead from Robert J. Freiler, regional director of special nutrition programs, to Dr. Jack G. Nichols of the Delaware Department of Public Instruction ("DPI"). The letter is a supplement to a February 18, 1997 Letter of Determination concerning Audit Report # 50020-0023-Hy, State of Delaware, for the year ending June 30, 1994. In the letter, the USDA informs the DPI that \$26,000 will be deducted from the accounts payable to the DPI for a disallowed reimbursement for the Program. (D.I. 6 at 10)

The second sheet of paper is not identified, although it appears to be part of a letter. The excerpt of the letter provides:

The remaining costs questioned in the finding were incurred with a valid contract in place. The services delineated in the contract were allowable expenses of the [Program]. Therefore, we have determined that recovery of the remaining questioned costs is not indicated. The issue of the consultant's performance with respect to the contract is a matter of ethics. Ethics requirements were satisfactorily addressed by DPI under #26. In addition, remedy for ethical violations was successfully pursued in Delaware criminal court.

(D.I. 6 at 10)

Even if this were the new evidence counsel is referring to in the petition, the court holds that such evidence would not "probably produce acquittal" in a new trial. Ford was

2. Ineffective Assistance of Counsel

Ford also has failed to exhaust state remedies with respect to her second claim of ineffective assistance of counsel. In her response to the State's answer, Ford acknowledges her failure to exhaust state remedies, but asks the court to take judicial notice that in June 2000, the Delaware Supreme Court found Samuel L. Guy to have violated the Delaware Rules of Professional Conduct on several occasions between 1996 and 1998. Guy served as trial and appellate counsel for Thornton. Ford was represented at trial by Christopher Amalfitano. Amalfitano was permitted to withdraw on appeal, and the Office of Public Defender was subsequently appointed to represent Ford on appeal.

A finding of professional responsibility violations by her co-defendant's counsel does not relieve Ford from her obligation to exhaust all state remedies before coming to this court. As noted, a habeas petitioner must present her claims in a procedural context in which the merits of the claims will be considered by the State Supreme Court. See Castille, 489 U.S. at 351. Ford has failed to bring her claim of

convicted of theft of property valued over \$500.00. Although the USDA and State audits might differ in the amounts of money deemed misappropriated, there is no indication of record that absolves petitioner of the charges.

ineffective assistance of trial counsel to the attention of the Delaware Supreme Court; accordingly, she has not exhausted her state remedy. Rule 61(i)(1) permits motions for postconviction relief up to three years following a final judgment. Since three years has not passed since Ford's conviction became final, she may still petition the Superior Court for relief. See e.g., Righter v. State 704 A.2d 262 (Del. 1997); Grattis v. State, 697 A.2d 1174, 1178-79 (Del. 1997). The court, therefore, will not address the unexhausted claim of ineffective assistance of counsel. Toulson v. Beyer, 987 F.2d 984, 987-89 (3d Cir. 1993).

3. Discrimination in Voir Dire

Ford's final claim accuses the State of "purposeful discrimination in its voir dire of the jury." Ford complains that the trial court erroneously denied counsel's request to ascertain the previous occupations of two retired jurors. Ford contends that evidence has surfaced that these jurors were law enforcement officers. Furthermore, the entire jury was white with the exception of one African-American alternate, who petitioners later learned was an employee of a school which participated in the Program.

Ford acknowledges that this claim has not been exhausted in the state courts. Ford did not raise this issue on her

direct appeal. Again, she is now procedurally barred under Rule 61 from raising the issue in State court, and this court may not consider the procedurally defaulted claim absent cause and prejudice or a fundamental miscarriage of justice to excuse the default. Ford alleges as the cause of the default the ineffective assistance provided by her attorneys. Because her claim of ineffective assistance of appellate counsel has not been - but can be - presented to the State court, the petition shall be dismissed.

Ford petitions this court to stay any decision regarding this issue until the State has provided the court with the voir dire transcripts. To date, no transcript has been prepared of the voir dire. The court will not order the production of the transcripts because the court cannot entertain the merits of the issue for the procedural reasons above.

B. Thornton's Petition is Successive

This court decided Thornton's previous petition on the merits. See Thornton v. Kearney, Civ. Act. No. 97-585-SLR, 1999 U.S. Dist. LEXIS 12115 (D. Del. 1999). Although the court gave Thornton the opportunity to amend his 1997 petition to incorporate the claims he now presents, Thornton failed to do so.

Since Thornton previously filed a § 2254 petition attacking the same conviction, this court must dismiss the second petition absent an order from the Third Circuit Court of Appeals. See 28 U.S.C. § 2244(b).

V. CONCLUSION

For the aforementioned reasons, petitioners' application for a writ of habeas corpus is denied. An appropriate order shall issue.