

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HUBERT E. PARKER,)
)
 Petitioner,)
)
 v.) Civil Action No. 01-739-SLR
)
 RICK KEARNEY, Warden, and)
 ATTORNEY GENERAL OF THE)
 STATE OF DELAWARE,)
)
 Respondents.)

Hubert E. Parker, Sussex Correctional Institution, Georgetown,
Delaware. Petitioner, pro se.

Thomas E. Brown, Esquire, Delaware Department of Justice,
Wilmington, Delaware. Counsel for Respondents.

MEMORANDUM OPINION

Dated: September 18, 2002
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner Hubert E. Parker is a Delaware inmate in custody at the Sussex Correctional Institution in Georgetown, Delaware. Currently before the court is petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I. 2) Also pending in this matter is petitioner's request for copies of transcripts. (D.I. 15) For the reasons that follow, the court concludes that petitioner's claims do not provide a basis for granting federal habeas relief. Accordingly, the court will deny the petition and the request for transcripts.

II. BACKGROUND

On January 24, 2000, petitioner pleaded guilty in the Delaware Superior Court to conspiracy, third degree burglary, criminal mischief, and two counts of felony theft. He also entered a Robinson plea¹ to one additional count of third degree burglary and one count of possession of cocaine. In addition, petitioner agreed that he was a habitual offender as defined by the Delaware habitual criminal statute.² Pursuant to the plea agreement, the Superior Court sentenced petitioner to five years in prison followed by twelve years of decreasing levels of

¹ Pursuant to Robinson v. State, 291 A.2d 279 (Del. 1972), the Superior Court may accept a guilty plea where the defendant is unwilling to admit his guilt, if the plea is voluntary, knowing, and intelligent, and if a factual basis for the plea exists. Id. at 281.

² See Del. Code Ann., tit. 11, § 4214(a).

supervision. Petitioner did not file a direct appeal with the Delaware Supreme Court.

On March 14, 2000, petitioner filed in the Superior Court a motion to correct his sentence on the ground that the five-year term imposed for third degree burglary exceeded the statutory limit. The Superior Court denied the motion on May 16, 2000, and explained that petitioner could have been sentenced to life in prison under the habitual criminal statute. State v. Parker, I.D. No. 9812020293 (Del. Super. Ct. May 16, 2000). The Delaware Supreme Court affirmed. Parker v. State, No. 244, 2000, 2000 WL 1152406 (Del. July 26, 2000).

On March 14, 2000, petitioner also filed a motion for postconviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure, alleging ineffective assistance of counsel. At the recommendation of a Superior Court commissioner, the Superior Court denied the motion. State v. Parker, I.D. No. 9812020293 (Del. Super. Ct. June 1, 2000). Rather than filing a timely notice of appeal, petitioner filed an untimely motion for reargument, which the Superior Court denied. State v. Parker, I.D. No. 9812020293 (Del. Super. Ct. June 29, 2000). Petitioner then appealed from the June 1, 2000 order denying his motion, but the Delaware Supreme Court dismissed the appeal for lack of jurisdiction because the notice of appeal was not timely. Parker v. State, No. 341, 2000, 2001 WL 213389 (Del. Feb. 26, 2001).

Petitioner continued pursuing state court remedies by filing a motion for writ of plain error, which the Superior Court treated as a second Rule 61 motion, and a motion to correct an illegal sentence. The Delaware Supreme Court affirmed the Superior Court's denial of each. Parker v. State, No. 542, 2000, 2001 WL 292596 (Del. Mar. 14, 2001); Parker v. State, No. 193, 2001, 2001 WL 1751245 (Del. Oct. 15, 2001).

Petitioner has now filed the current application for federal habeas corpus relief. Respondents ask the court to deny the petition because the claims presented therein either lack merit or are procedurally barred from federal habeas review.

III. GOVERNING LEGAL PRINCIPLES

A. Exhaustion and Procedural Default

Pursuant to the federal habeas statute:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b) (1). Grounded on principles of comity, the requirement of exhaustion of state court remedies ensures that state courts have the initial opportunity to review federal constitutional challenges to state convictions. Werts v. Vaughn,

228 F.3d 178, 192 (3d Cir. 2000), cert. denied, 532 U.S. 980 (2001).

To satisfy the exhaustion requirement, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Although a state prisoner need not "invoke extraordinary remedies" to satisfy exhaustion, he must fairly present each of his claims to the state courts. Id. at 844-45. A claim has not been fairly presented unless it was presented "at all levels of state court adjudication." Cristin v. Brennan, 281 F.3d 404, 410 (3d Cir. 2002).

If a claim has not been fairly presented, and further state court review is procedurally barred, the exhaustion requirement is deemed satisfied because further state court review is unavailable. Lines v. Larkins, 208 F.3d 153, 160 (3d Cir. 2000), cert. denied, 531 U.S. 1082 (2001). Although deemed exhausted, such claims are nonetheless procedurally defaulted. Lines, 208 F.3d at 160. In addition, where a state court refuses to consider a petitioner's claims because he failed to comply with an independent and adequate state procedural rule, his claims are deemed exhausted but procedurally defaulted. Harris v. Reed, 489 U.S. 255, 263 (1989); Werts, 228 F.3d at 192. Federal courts may not consider the merits of procedurally defaulted claims unless

the petitioner demonstrates cause for the default and prejudice resulting therefrom, or a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Lines, 208 F.3d at 160.

In order to demonstrate cause for a procedural default, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). A petitioner may establish cause, for example, by showing that the factual or legal basis for a claim was not reasonably available or that government officials interfered in a manner that made compliance impracticable. Werts, 228 F.3d at 193. In addition to cause, a petitioner must establish actual prejudice, which requires him to show "not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Murray, 477 U.S. at 494.

Alternatively, a federal court may excuse a procedural default if the petitioner demonstrates that failure to review the claim will result in a fundamental miscarriage of justice. Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Wenger v. Frank, 266 F.3d 218, 224 (3d Cir. 2001). The miscarriage of justice exception applies only in extraordinary cases "where a

constitutional violation has probably resulted in the conviction of one who is actually innocent.” Murray, 477 U.S. at 496. To establish actual innocence, a petitioner must satisfy the “extremely high burden” of showing that it is more likely than not that no reasonable juror would have convicted him. Sweger v. Chesney, 294 F.3d 506, 522-23 (3d Cir. 2002) (citing Schlup v. Delo, 513 U.S. 298, 329 (1995)).

B. Standards of Review

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) mandates the following standards of review:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A federal court may issue a writ of habeas corpus under § 2254(d)(1) only if it finds that the state court decision on the merits of a claim either (1) was contrary to clearly established federal law, or (2) involved an unreasonable application of clearly established federal law. Williams v. Taylor, 529 U.S. 362, 412 (2000).

Respecting a state court's determinations of fact, a federal habeas court must presume that they are correct. 28 U.S.C. § 2254(e)(1). The petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. Id. The presumption of correctness applies to both explicit and implicit findings of fact. Campbell v. Vaughn, 209 F.3d 280, 286 (3d Cir. 2000), cert. denied, 531 U.S. 1084 (2001).

IV. DISCUSSION

In his application, petitioner articulates the following claims for relief:

- (1) Counsel rendered ineffective assistance due to a conflict of interest.
- (2) His Robinson plea was involuntary because he did not understand that he would be sentenced to five years for second degree burglary rather than a lesser sentence for third degree burglary.
- (3) The state breached the plea agreement and induced him to waive his right to a preliminary hearing and indictment by promising a "Drug Diversion Program," then failed to fulfill that promise.

A. Procedurally Barred Claims One and Three

Before the court can consider the merits of any of petitioner's claims, the court must first determine whether he has exhausted available state court remedies as to each. According to respondents, petitioner has not exhausted claim 1 or claim 3 because the Delaware Supreme Court refused to consider either claim due to a procedural default.

A review of the record confirms that petitioner presented

his claim of ineffective assistance, as well as his claim of an unfulfilled promise, to the Superior Court in his first Rule 61 motion. (D.I. 14, App. to State's Answering Br. in No. 341, 2000 at B15-B35) The record also confirms that petitioner presented these two claims on postconviction appeal. (Id., Appellant's Opening Br.) The Delaware Supreme Court, however, refused to consider the merits of these claims because the notice of appeal was not filed within the thirty-day period prescribed by the rules of that court. Parker, 2001 WL 213389 at **1 & n.2 (citing Del. Sup. Ct. R. 6(a)(iii)). Because the Delaware Supreme Court's refusal to consider the merits of these two claims was based on an independent and adequate state procedural rule, his claims are procedurally barred from federal habeas review unless he demonstrates cause and prejudice or a fundamental miscarriage of justice. Coleman, 501 U.S. at 750; Kirby v. Delaware Via Detainer, Civ. A. No. 99-703-SLR, 2001 WL 641729, *3 (D. Del. May 29, 2001).

The only remaining question as to these two claims is whether petitioner has articulated any reason why his procedural default should be excused. Petitioner specifically acknowledges his obligation to demonstrate either cause and prejudice, or a miscarriage of justice. (D.I. 5 at 4-6) He argues that counsel's conflict of interest and ineffective assistance constitute cause and prejudice, as well as a miscarriage of

justice. (Id. at 8) His procedural default, however, occurred when he failed to file a timely notice of appeal from the denial of postconviction relief. He was not represented by counsel in postconviction proceedings, nor did he have any constitutional right to an attorney in those proceedings. See Coleman, 501 U.S. at 752 (stating that “[t]here is no constitutional right to an attorney in state post-conviction proceedings”). Thus, petitioner’s allegations of ineffective assistance cannot excuse his procedural default. In addition, he offers no evidence suggesting that he is actually innocent for the purpose of demonstrating a miscarriage of justice.

In sum, the court finds that petitioner procedurally defaulted these two claims by failing to file a timely notice of appeal from the order denying his first motion for postconviction relief. The court can find no reason to excuse this procedural default. For these reasons, the court concludes that petitioner’s claims of ineffective assistance and an unfulfilled promise are procedurally barred from federal habeas review.

B. Involuntary Plea

In his second claim, petitioner asserts that his Robinson plea for third degree burglary was uninformed and involuntary. According to petitioner, he did not understand that he would be subject to a five-year term of imprisonment for **second** degree burglary by entering a Robinson plea to **third** degree burglary.

Respondents correctly acknowledge that petitioner exhausted this claim by presenting it to the state courts in his motion to correct an illegal sentence. Because the state courts rejected this claim on the merits, this court's review is limited to determining whether the state courts' decision was contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1); Williams, 529 U.S. at 412.

As the Delaware Supreme Court noted, the record contradicts petitioner's assertion that he was sentenced for second degree burglary. According to that court, "The plea agreement, plea colloquy, docket sheet and sentencing order clearly reflect that the third degree burglary charge . . . was deemed to be a lesser-included offense of second degree burglary." Parker, 2001 WL 1751245 at **1. After reviewing the documents cited by the Delaware Supreme Court, this court has no doubt that petitioner was sentenced for third degree burglary, not second degree burglary.

Moreover, a review of the transcript of the proceedings at which petitioner entered his Robinson plea and was sentenced establishes that petitioner was well informed of the consequences of his plea. The Superior Court cautioned petitioner several times of the "serious consequences" that would result from his plea. (D.I. 14, State's Motion to Affirm in No. 244, 2000, Ex. D at 12) It appears that the trial judge mistakenly referred to

"burglary second" one time. (Id. at 21:15) Before accepting petitioner's plea, however, the court clarified that petitioner was charged "with burglary in the third degree, which is a lesser-included offense of burglary in the second degree." (Id. at 25:1-3) Before accepting the plea, the court also explained that petitioner was agreeing to a five-year term of incarceration as a habitual offender for burglary in the third degree. (Id. at 4:13-16) The court questioned petitioner at length as to his understanding, extended him several opportunities to speak and ask questions, and advised him of the rights he was relinquishing and the consequences of his actions. In other words, the record contradicts petitioner's assertion that he was uninformed as to the consequences of entering a Robinson plea to third degree burglary.

For these reasons, the court finds that petitioner's claim lacks merit. It follows that the Delaware Supreme Court's rejection of this claim is neither contrary to, nor did it involve an unreasonable application of, clearly established federal law. Accordingly, the court will deny petitioner's request for federal habeas relief as to this claim.

C. Request for Transcripts

In his response, petitioner asks the court to order respondents to provide copies of transcripts of various state court proceedings. (D.I. 15) He argues that the transcripts are

necessary to establish counsel's conflict of interest, and to demonstrate cause and prejudice for excusing his procedural default. (Id. at 3, 6)

Certainly this court possesses the authority to order the production of such transcripts. See Rule 5 of the Rules Governing Section 2254 Cases. Here, however, the court cannot perceive how the requested transcripts will further petitioner's claims in any way. Because petitioner's claim of ineffective assistance is procedurally barred, the court is precluded from considering the merits of this claim. Moreover, petitioner's contention that counsel's ineffective assistance should excuse his procedural default plainly lacks merit, for the reasons described previously. In short, the requested transcripts would have no bearing on the court's analyses or conclusions.

Accordingly, the court will deny petitioner's request for copies of transcripts.

V. CERTIFICATE OF APPEALABILITY

Finally, the court must determine whether a certificate of appealability should issue. See Third Circuit Local Appellate Rule 22.2. The court may issue a certificate of appealability only if petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires the petitioner to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional

claims debatable or wrong.” Slack v. McDaniel, 529 U.S. 473, 484 (2000).

As explained above, the court has concluded that the claims presented in the current petition do not provide a basis for granting federal habeas relief. The court is persuaded that reasonable jurists would not debate the correctness of its assessments. Petitioner, therefore, has failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability is not warranted.

VI. CONCLUSION

For the reasons stated, the court will deny petitioner’s application for a writ of habeas corpus and his request for copies of transcripts. The court will not issue a certificate of appealability. An appropriate order shall issue.

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 ATTORNEY GENERAL OF THE)
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O R D E R

At Wilmington, this 18th day of September, 2002, consistent with the memorandum opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner Hubert E. Parker's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is dismissed, and the relief requested therein is denied.

2. Petitioner's response (D.I. 15) is treated as a request for copies of transcripts, and so treated, is denied.

3. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c) (2).

Sue L. Robinson
United States District Judge