

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

RAPHUS ELEY,)
)
 Petitioner,)
)
 v.) Civ. No. 03-1141-SLR
)
 RICK KEARNEY,)
 Warden, and M. JANE)
 BRADY, Attorney General)
 of the State of)
 Delaware,)
)
 Respondents.)

Raphus Eley. Pro se petitioner.

Gregory E. Smith, Deputy Attorney General, Delaware Department of
Justice, Wilmington, Delaware. Counsel for respondents.

MEMORANDUM OPINION

Dated: April 18, 2005
Wilmington, Delaware


ROBINSON, Chief Judge

I. INTRODUCTION

Currently before the court is petitioner Raphus Eley's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I. 1; D.I. 8.) Petitioner was in custody at the Sussex Correctional Institution in Georgetown, Delaware when he filed his petition. For the reasons that follow, the court will deny his petition.

II. FACTUAL AND PROCEDURAL BACKGROUND

On October 27, 1999, a Sussex County Superior Court jury convicted petitioner of two counts of third degree burglary, one count of third degree assault, and two counts of misdemeanor theft. These convictions stemmed from crimes petitioner committed at the Route 13 Market in Laurel, Delaware. On December 10, 1999, the Superior Court sentenced petitioner to a total of nine years at Level V, with credit for time served. Upon successful completion of the Key Program, the balance was suspended for Level IV Residential Substance Abuse Treatment Program, and upon successful completion of the Treatment Program, the balance was to be served at Level III. The sentencing order also stated that the Department of Correction had the discretion to move petitioner between supervision Levels I, II, and III. (D.I. 16, State's Resp. to Rule 26(C) Br. in Eley v. State, No.137,2000 at ¶1; D.I. 16, Ex. A-7 & A-8 in App. to Appellant's

Br. in Eley v. State, No.137,2000)

Petitioner's trial counsel did not file a timely appeal. The Delaware Supreme Court directed the Superior Court to re-sentence petitioner and appoint new counsel to represent him. The Superior Court held a new sentencing hearing on March 24, 2000, and imposed the same sentences as it had in December 1999. (D.I. 16, Ex. A-4 in App. to Appellant's Br. in Eley v. State, No.137,2000). Petitioner appealed, and the Delaware Supreme Court affirmed his convictions and sentences.

On June 22, 2002, petitioner was released to Level III probation. On November 15, 2002, petitioner was found guilty of violating his probation and his probation was revoked. Petitioner was re-sentenced, as modified on November 18, 2002, to a total of six years at Level V, suspended after serving one year at Level V for one year at Level IV Home Confinement, followed by three years and six months at Level III. Petitioner filed a pro se motion for sentence reduction, which the Superior Court denied on December 11, 2002. (D.I. 16, State's Motion to Affirm in Eley v. State, No.576,2003, at ¶2 & Exhs. F, H, I, J)

On November 12, 2003, petitioner filed a letter motion to modify his sentence from Level IV to Level III. On November 17, he filed a motion for correction of an illegal sentence, claiming that he had served his Level V sentence and was now being illegally detained at Level V because he did not have a host for

Level IV confinement. He asked the Superior Court to "flow him down" to Level III. (D.I. 16, State's Motion to Affirm in Eley v. State, No.576,2003, at Exhs. K,L)

The Superior Court sent a letter to petitioner dated November 18, 2003 informing him that, due to a clerical error, his sentence did not include language stating what level he should be held at while awaiting Level IV placement. The court also stated that petitioner's Level IV sentence would be transferred to another Level IV program, such as the VOP center or Work Release, if he was unable to establish a host. The court then issued a corrected VOP sentence to state that petitioner would be held at Level V awaiting placement into Level IV Home Confinement, and denied petitioner's prior two motions. (D.I. 16, State's Motion to Affirm in Eley v. State, No.576,2003, at Exhs. M,N)

Petitioner appealed this order, and the Delaware Supreme Court affirmed the Superior Court's decision.

In December 2003, petitioner filed in this court an application and an amended application for habeas corpus relief. The state filed an answer arguing that the amended application challenges the conditions of petitioner's confinement and therefore does not assert a proper basis for federal habeas relief.

Petitioner's application is ready for review.

III. GOVERNING LEGAL PRINCIPLES

A. The Antiterrorism And Effective Death Penalty Act Of 1996

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "to reduce delays in the execution of state and federal criminal sentences . . . and to further the principles of comity, finality, and federalism." Woodford v. Garceau, 538 U.S. 202, 206 (2003) (internal citations and quotation marks omitted). Pursuant to the AEDPA, a federal court may consider a habeas petition filed by a state prisoner 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). The AEDPA increases the deference federal courts must give to state court decisions, primarily by imposing procedural requirements and standards for analyzing the merits of a habeas petition. See Woodford, 538 U.S. at 206. Generally, the AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." Bell v. Cone, 535 U.S. 685, 693 (2002).

B. Exhaustion

Absent exceptional circumstances, a federal court cannot grant federal habeas relief unless the petitioner has exhausted

all means of available relief under state law. 28 U.S.C. § 2254(b); O'Sullivan v. Boerckel, 526 U.S. 838, 842-44 (1999); Picard v. Connor, 404 U.S. 270, 275 (1971). The AEDPA states, in pertinent part:

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).

The exhaustion requirement is based on principles of comity, requiring a petitioner to give "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, 526 U.S. at 844-45; Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000); 28 U.S.C. § 2254(c) (A petitioner "shall not be deemed to have exhausted remedies available . . . if he has the right under the law of the state to raise, by any available procedure, the question presented"). A petitioner must demonstrate that he "fairly presented" the habeas claim to the state's highest court, either on direct appeal or in a post-conviction proceeding. See Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citations omitted); Coverdale v. Snyder, 2000

WL 1897290, at *2 (D. Del. Dec. 22, 2000). “‘Fair presentation’ of a claim means that the petitioner ‘must present a federal claim’s factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted.’” Holloway v. Horn, 355 F.3d 707, 714 (3d Cir. 2004) (citing McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999)).

A petitioner’s failure to exhaust state remedies will be excused if state procedural rules prevent him from seeking further relief in state courts. Lines v. Larkin, 208 F.3d 153, 160 (3d Cir. 2000); Wenger v. Frank, 266 F.3d 218, 223 (3d Cir. 2001); see Teague v. Lane, 489 U.S. 288, 297-98 (1989). Although deemed exhausted, such claims are nonetheless procedurally defaulted. Coleman v. Thompson, 501 U.S. 722, 749 (1991); Lines, 208 F.3d at 160. A federal habeas court cannot review the merits of a procedurally defaulted claim unless the petitioner demonstrates either cause for the procedural default and actual prejudice resulting therefrom, or that a fundamental miscarriage of justice will result if the court does not review the claims. McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999); Coleman, 501 U.S. at 750-51 (1999); Caswell v. Ryan, 953 F.2d 853, 861-62 (3d Cir. 1992).

IV. DISCUSSION

A. Claim One

Petitioner's first claim asserts that his continued detention at Level V is illegal because he should have been transferred to Level IV when the Level V portion of his sentence expired on November 7, 2003. He also argues that home confinement at Level IV does not constitute incarceration, thus, the state is illegally keeping him at Level V. (D.I. 14)

Petitioner exhausted state remedies by presenting this claim to the Delaware Supreme Court in his appeal of the Superior Court's corrected sentencing order. However, the state contends that this claim is not cognizable on federal habeas review and asks the court to dismiss it.

The United States Supreme Court has described two broad categories of prisoner petitions: (1) § 2254 petitions that challenge the fact or duration of the prisoner's confinement; and (2) § 1983 actions that challenge the conditions of confinement. Preiser v. Rodriguez, 411 U.S. 475, (1973). Although it is not always easy to distinguish between these two types of actions, the Third Circuit has explained that

whenever the challenge ultimately attacks the 'core of habeas' - - the validity of the continued conviction or the fact or length of the sentence - - a challenge, however denominated and regardless of the relief sought, must be brought by way of a habeas corpus petition. Conversely, when the challenge is to a condition of confinement such that a finding in plaintiff's favor would not alter his sentence or undo his conviction, an action under § 1983 is

appropriate.

Leamer v. Fauver, 288 F.3d 532, 542 (3d Cir. 2002).

Here, petitioner does not challenge the VOP proceeding, nor does he contend that the VOP sentence exceeds the time remaining on his previously suspended sentence. If petitioner's claim were to succeed, he would only be entitled to serve his sentence in a different location rather than immediate or speedier release. Petitioner is actually challenging a condition of his custody, not the fact or length of his custody. Thus, petitioner's claim does not assert a basis for federal habeas relief.¹ See, e.g., Beckley v. Minor, 2005 WL 256047 (3d Cir. Feb. 3, 2005) ("where the relief sought 'would not alter [petitioner's] sentence or undue his conviction,'" district court does not have habeas jurisdiction) (not precedential); Urrutia v. Harrisburg County

¹To the extent petitioner's claim can be construed as challenging the execution of his sentence, it does present a claim cognizable on federal habeas review. See Lovett v. Carroll, 2002 WL 1461730 (D. Del. June 27, 2002) (habeas petition challenging petitioner's continued detention at Level V custody, when sentencing order required him to be transferred to the boot camp program, construed as claim challenging the execution of his sentence); Coady v. Vaughn, 251 F.3d 480 (3d Cir. 2001) (claim challenging execution of sentence properly presented under 28 U.S.C. § 2254). However, the record reveals that petitioner was transferred to Level IV custody in January 2004. (D.I. 7) Thus, even if this claim does present a cognizable challenge to the execution of petitioner's sentence, the court would dismiss it as moot because the alleged unlawful execution of petitioner's sentence has ceased. See, e.g., Lovett, 2002 WL 1461730, at *2 (once unlawful execution of sentence ceased, petitioner lacked standing to maintain the habeas action and the court dismissed his petition as moot).

Police Dept., 91 F.3d 451, 462 (3d Cir. 1996); Oberly v. Kearney, 2000 WL 1876439, *2 (D. Del. Dec. 15, 2000) (finding that a claim alleging petitioner is entitled to work release or home furlough is properly characterized as a § 1983 claim and not a § 2254 claim). Accordingly, the court will dismiss this claim.

B. Claim Two

Petitioner's second claim appears to assert that the Superior Court violated his due process rights in modifying the November 18, 2002 VOP sentencing order. Specifically, petitioner contends that he should have been present when the Superior Court inserted the language that he was to be held at Level V until space became available at Level IV. He argues that the change was substantive, not merely a correction of a clerical error.

Petitioner never presented this federal due process claim to the state courts, thus, he has failed to exhaust state remedies for this claim. When petitioner appealed the Superior Court's modification of his November 18, 2002 VOP sentencing order, he argued that the Superior Court improperly and in bad faith modified his VOP sentence to require him to be held at Level V while awaiting space at Level IV. He further contended that the modification was an intentional deviation from the court's oral pronouncement and not the result of a clerical or technical error. Yet, because petitioner did not assert that he should have been present during the court's modification of his VOP

sentence, he never put the state courts on notice that he was presenting a federal or constitutional claim. Thus, petitioner did not exhaust state remedies.

Petitioner's failure to exhaust state remedies is excused, however, because state procedural rules would prevent him from pursuing further state court relief. See Teague v. Lane, 489 U.S. 288, 298 (1989); Coleman, 501 U.S. at 750; Lines, 208 F.3d at 160. Petitioner filed his November 2003 motion to modify his sentence pursuant to Delaware Superior Court Criminal Rule 35(a), which permits the correction of an illegal sentence at any time. (D.I. 16, Exh. L in State's Motion to Affirm, No.576,2003, Eley v. State). The Superior Court, however, denied this motion because petitioner's sentence was not illegal, and the Delaware Supreme Court affirmed. Thus, any attempt to file another Rule 35(a) motion or a new Rule 61 motion for post-conviction relief on this ground would be barred as formerly adjudicated. See Delaware Superior Court Criminal Rule 61(i)(4).

Additionally, petitioner cannot now file a motion to modify/reduce his sentence pursuant to Rule 35(b) because more than 90 days have passed since his sentencing and there are no extraordinary circumstances justifying relief from the 90 day time bar.² See Del. Super. Ct. Crim. R. 35(b); Webster v. State,

²Further, a Rule 35(b) motion asserting the same challenge would also be barred by Rule 61(i)(4) as formerly adjudicated.

795 A.2d 668 (table), 2002 WL 487177 (Del. Mar. 26, 2002).

Although petitioner's failure to exhaust is excused, his claim is still procedurally defaulted. Petitioner has not demonstrated cause for, and prejudice resulting from, his procedural default, nor has he demonstrated that a miscarriage of justice will result if the court does not reach the merits of this claim. Moreover, to the extent petitioner's argument can be interpreted as a challenge to the application of Delaware Superior Court Criminal Rule 36, this claim is not subject to federal habeas review. Estelle v. McGuire, 502 U.S. 62, 67-8 (1991) (it is not the province of a federal court to re-examine a state court's determination of state law); Johnson v. Rosemeyer, 117 F.3d 104, 109 (1997) ("it is well established that a state court's misapplication of its own law does not generally raise a constitutional claim").

In short, federal habeas review of petitioner's second claim is unavailable.

C. Claim Three

Petitioner's final claim contends that the Superior Court erred in failing to treat his motion to correct clerical mistakes as a motion to vacate, set aside or correct his sentence. This claim challenges the Superior Court's application of state procedural rules in a state court collateral proceeding. The court will dismiss the claim for failing to present an issue

cognizable on federal habeas review. See Lambert v. Blackwell, 387 F.3d 210, 247 (3d Cir. 2004) (“alleged errors in [state] collateral proceedings . . . are not a proper basis for habeas relief”); Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998).

V. CERTIFICATE OF APPEALABILITY

When a district court issues a final order denying a § 2254 petition, the court must also decide whether to issue a certificate of appealability. See Third Circuit Local Appellate Rule 22.2. A certificate of appealability is appropriate when a petitioner makes a “substantial showing of the denial of a constitutional right” by demonstrating “that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The court concludes that petitioner’s § 2254 application does not warrant federal habeas relief. Reasonable jurists would not find this conclusion to be unreasonable. Consequently, the court declines to issue a certificate of appealability.

VI. CONCLUSION

For the reasons stated, petitioner’s request for habeas relief filed pursuant to 28 U.S.C. § 2254 is denied. An appropriate order will issue.

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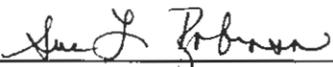
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ORDER

At Wilmington this ~~18th~~ day of April, 2005, consistent with the memorandum opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner Raphus Eley's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED, and the relief requested therein is DENIED. (D.I. 1; D.I. 8)
2. 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).


UNITED STATES DISTRICT JUDGE