

FARNAN, District Judge.

Presently before the Court is a Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus By A Person In State Custody (D.I. 2) filed by Petitioner, William T. Johnson, Jr. In seeking federal habeas relief, Petitioner raises eight claims: (1) a violation of double jeopardy clause because the trial court changed the verdicts; (2) the indictment was forged; (3) the trial court committed plain error in not suppressing his statements; (4) a discovery violation under Delaware Superior Court Criminal Rule 16 because the State did not disclose the arresting officer's handwritten notes until presentation of its rebuttal case; (5) a Fourth Amendment violation because the surveillance and arrest were illegal; (6) the acquittal on certain of the robbery charges precluded convictions on related charges; (7) trial counsel was ineffective for not challenging prior conviction evidence and seeking appropriate limiting instruction; and (8) the prosecutor improperly referred to Petitioner's prior convictions in closing argument. For the reasons set forth below, the Petition will be dismissed without prejudice.

BACKGROUND

In October 1998, a jury in the Delaware Superior Court convicted Petitioner of first degree robbery, second degree

conspiracy and possession of a deadly weapon during the commission of a felony. On appeal, the Delaware Supreme Court affirmed the conviction. Johnson v. State, No. 12, 1999 (Del. Nov. 2, 1999). Petitioner filed a motion in the Superior Court seeking relief under Criminal Rule 35. The Superior Court denied the motion under Rule 35. The decision was affirmed on appeal. Johnson v. State, No. 122, 2000 (Del. Aug. 11, 2000).

DISCUSSION

As a threshold matter, before turning to the merits of Petitioner's claims, the Court must determine whether Petitioner may seek federal habeas review. In order for a state petitioner to avail himself or herself of federal habeas review, he or she must have exhausted all available state remedies. 28 U.S.C.

§ 2254 (b). Exhaustion is satisfied if a petitioner shows that he or she presented each of his or her claims to the Delaware Supreme Court. Bailey v. Snyder, 855 F. Supp. 1392, 1399 (D. Del. 1993), aff'd, 68 F.3d 736 (3d Cir. 1995). If a petitioner has failed to exhaust state remedies, but state remedies are no longer available, the exhaustion requirement is excused. Teague v. Lane, 489 U.S. 288, 298 (1989). However, if state remedies are still available for a

petitioner to pursue, and the petition contains both exhausted and unexhausted claims, the court must dismiss the petition without prejudice. Rose v. Lundy, 455 U.S. 509, 522 (1982) (“[B]ecause a total exhaustion rule promotes comity and does not unreasonably impair the prisoner’s right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims.”).

In this case, Petitioner has not exhausted his ineffective assistance of counsel claim because he did not raise it on direct appeal, and has not filed any post-conviction motions regarding this claim in the state court. Petitioner did file a motion pursuant to Delaware Criminal Rule 35. Rule 35, however, serves a function distinct from Rule 61. See Brittingham v. State, 705 A.2d 577, 578 (Del. 1998) (“The ‘narrow function of Rule 35 is to permit correction of an illegal *sentence*, not to reexamine errors occurring at trial or other proceedings prior to the imposition of sentence.’”). Thus, a motion under Rule 35 does not reach a claim of ineffective assistance of counsel. Moreover, Petitioner did not even make that claim in the Rule 35 motion he did file. Accordingly, the Court concludes that the exhaustion requirement is not excused in this case, because Petitioner has available state remedies.

Under Delaware law, an ineffective assistance of counsel claim is appropriately presented by a motion for post-conviction relief. See e.g. Wright v. State, 513 A.2d 1310, 1315 (Del. 1986). Although Petitioner was convicted by a jury in October 1998, the Delaware Supreme Court did not affirm the conviction until November 2, 1999. For purposes of applying Delaware Superior Court Criminal Rule 61(i), a conviction becomes final after the state supreme court issues its decision and mandate in the case. See e.g. Jackson v. State, 654, A.2d 829 (Del. 1995). Accordingly, Petitioner's conviction became final in November 1999, after his conviction was affirmed on direct appeal and the state supreme court issued the mandate in the case.

Because Petitioner's conviction became final in 1999, a motion for post-conviction relief in the state courts would not be barred by the three year limitations period set forth in Delaware Superior Court Rule 61(i)(1). Because Petitioner has not filed a previous post-conviction motion under Rule 61, his claim would not be barred by the prohibition against repetitive motions in Rule 61(i)(2). Compare, e.g. Younger v. state, 580 A.2d 552, 555 (Del. 1990) (dismissing ineffective assistance claim raised in second post-conviction relief motion, but not in first post-conviction relief motion).

Lastly, because ineffective assistance of counsel claims are appropriately raised in post-conviction proceedings, Petitioner's claim is not procedurally defaulted under Rule 61(i)(3). See e.g. Flamer v. State, 585 A.2d 736, 753 (Del. Supr. 1990) (holding that claims of ineffective assistance of counsel at trial and on direct appeal are appropriate in motions for post-conviction relief).

In sum, the Court concludes that Petitioner has not exhausted his state remedies, and that these remedies are still available to Petitioner.¹ Accordingly, the Petition will be dismissed without prejudice. Id. at 522.

CONCLUSION

For the reasons discussed, the Petition Under 28 U.S.C. § 2254 For Writ Of Habeas Corpus By A Person In State Custody (D.I. 2) filed by Petitioner, William T. Johnson, Jr. will be dismissed without prejudice.

An appropriate Order will be entered.

¹ If Petitioner wishes to pursue his federal habeas Petition, rather than file a state post-conviction motion, he may refile his Petition by a motion to the Court, provided that he voluntarily dismiss his ineffective assistance of counsel claim. Petitioner is cautioned, however, that a petitioner "who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." Rose, 455 U.S. at 521.

right" under 28 U.S.C. § 2253(c)(2), a certificate of appealability is **DENIED**.

3. Petitioner's Motion For Special Hearing and Sanction

Order (D.I. 22) is **DENIED** as moot.

UNITED STATES DISTRICT JUDGE