UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ANTHONY J. KEMPER,	:	**CIVIL ACTION No. 3:02-1369**
Petitioner	:	
v.	:	**(MANNION, M.J.)**
BEN VARNER, Warden, and THE PENNSYLVANIA ATTORNEY GENERAL,	:	
Respondents	:	

MEMORANDUM AND ORDER

On August 7, 2002, the petitioner, an inmate incarcerated at the Pennsylvania State Correctional Institution at Smithfield ("SCI-Smithfield"), Huntingdon, Pennsylvania, filed this pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1). The petitioner challenges his criminal conviction and sentencing in the Luzerne County Court of Common Pleas. He claims ineffective assistance of counsel, and seeks to have his guilty plea set aside.

The petitioner applied to proceed in forma pauperis, which was granted, and a show cause order was issued on August 28, 2002. (Doc. Nos. 2, 3). A response to the petition and supporting documentation were filed on January 24, 2003, and February 11, 2003, respectively. (Doc. Nos. 9, 11). The respondent filed a supplemental response on May 4, 2004. (Doc. No. 16). The petition will now be given preliminary consideration pursuant to Rule 4 of the Rules Governing Section 2254 cases, 28 U.S.C. foll. § 2254.

I. BACKGROUND

On May 2, 1995, the petitioner pled guilty to 3 counts of criminal homicide, 1 count of burglary, and 2 counts of theft by unlawful taking. Subsequent to the plea colloquy, he was sentenced on the same date to 3 consecutive life imprisonment terms on the homicide counts; 10 to 20 years imprisonment on the burglary charge, to run consecutively to the 3 life terms, and 2 terms of 3 ½ to 7 years imprisonment on the theft by unlawful taking charges, also to run consecutively to the other terms.

On May 9, 1995, the petitioner wrote to his court appointed attorney, and advised him that he wished to file a Post Conviction Relief Act ("PCRA") petition, and a direct appeal, and that he wished to withdraw his guilty plea. Counsel replied that he would not take any further action on the matter because the petitioner had waived his right to withdraw his guilty plea as part of the plea bargain.[1] (Doc. No. 1, attachments).

On June 24, 1996, the petitioner filed a *pro se* PCRA motion with the trial court in which he alleged ineffective assistance of counsel, and that the guilty plea was unlawfully induced. The trial judge appointed new counsel to represent the petitioner. On February 14, 1997, the trial court granted the petitioner's motion to withdraw the PCRA petition. (Doc. No. 11, Luzerne

[1]A review of the guilty plea colloquy does not reveal that the petitioner "waived" his rights to appeal; however, as noted hereinafter, that fact is of no consequence as the petition must be dismissed.

County Court of Common Pleas Record, case number 1995-CR-0000816).

On July 20, 2001, the petitioner filed an application for an appeal *nunc pro tunc* with the trial court in which he alleged that his direct appeal rights had expired due to ineffective assistance of counsel. The trial court denied the application on August 1, 2001. On or about September 20, 2001, the petitioner filed an appeal *nunc pro tunc* with the Pennsylvania Superior Court wherein he sought reinstatement of his appeal rights. The petitioner again argued that his direct appeal rights expired as a result of ineffective assistance of counsel. By Opinion and Order dated July 8, 2002, the Superior Court denied the appeal. The Court concluded that the only avenue available to the petitioner to challenge his conviction and sentence, including the claims of ineffective assistance of counsel and a guilty plea unlawfully induced, was to have filed a timely PCRA petition, which the petitioner did not do. (Doc. No. 11, Memorandum and Order of the Pennsylvania Superior Court dated July 8, 2002). The petitioner did not file an appeal of the Superior Court's decision. This federal habeas corpus petition was filed on August 7, 2002.

In the original response, the respondent argued that the petition should be dismissed for failure to exhaust state court remedies. Based upon inaccurate representations made by the petitioner regarding the procedural

history of this case,[2] the court erroneously concluded that the petitioner had exhausted state court remedies, and so directed the respondent on March 30, 2004, to fully brief the legal issues raised by the petitioner. On May 4, 2004, the respondent filed a supplemental response which maintains that the petitioner cannot state an ineffective assistance of counsel claim pursuant to Strickland v. Washington, 466 U.S. 668 (1984). Specifically, the respondent argues that the petitioner cannot show that any prejudice to him resulted from an alleged failure by counsel to file a direct appeal because the petitioner has not stated, nor can he state, any cognizable claim. (Doc. No. 16).

II. DISCUSSION

The petitioner filed this habeas corpus petition pursuant to 28 U.S.C. § 2254. Section 2254(b)(1) requires that before bringing a petition under that section, the state prisoner must first exhaust available state remedies. In determining whether a state prisoner has preserved an issue for consideration in a federal habeas corpus petition, the court must determine not only whether the prisoner has exhausted his state remedies, but also whether he has "fairly presented" his claims to the state court. Wenger v. Frank, 266 F.3d 218, 223 (3d Cir. 2001)(citing O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999). As a

[2]As detailed in the "Discussion" portion of this Memorandum, the petitioner represented to this court that his PCRA petition was dismissed, when in fact it was withdrawn.

result, with only limited exceptions, federal courts will refrain from addressing the merits of any claim raised by a habeas petitioner that was not properly exhausted in state court. Coleman v. Thompson, 501 U.S. 722, 750 (1991). "The exhaustion requirement ensures that state courts have the first opportunity to review convictions and preserves the role of state courts in protecting federally guaranteed rights." Caswell v. Ryan, 953 F.2d 853, 856 (3d Cir. 1997). The burden rests with the petitioner to establish that his claims have been exhausted in the state courts. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997).

Where state procedural rules bar a petitioner from seeking further relief in the state courts, "the exhaustion requirement is satisfied because there is an absence of available State corrective process, 28 U.S.C. § 2254(b)." McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999). This does not mean, however, that the federal courts can, without more, determine the merits of the petition. Instead, where claims are deemed exhausted because of a state procedural bar, they are considered procedurally defaulted, and federal courts may not consider their merits unless the petitioner "establishes 'cause and prejudice' or a 'fundamental miscarriage of justice' to excuse the default." Id. To the extent that the petitioner may now be procedurally barred from doing so, he must establish "cause and prejudice" or a "fundamental miscarriage of justice" to excuse the default.

In order to establish "cause", the Supreme Court has stated that a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rules." Murray v. Carrier, 477 U.S. 478 (1986). For instance, the Court noted that where a factual or legal basis for a claim was not reasonably available to counsel or where interference by government officials made compliance impracticable, "cause" for the procedural default would be established. Id.

The petitioner has represented to this court that he filed a PCRA petition in the trial court in which he raised the issues of "[D]enial of post-sentence motions due to ineffective assistance of counsel" and "unknowing and involuntary plea bargain" and that the petition was "denied."(Doc. No. 1, ¶¶ 11 (a)(3) and (5)). Our review of the submitted record and Luzerne County Docket Report on the petitioner's case indicates that the PCRA petition was not denied, but that the trial court granted a motion to withdraw the petition on February 14, 1997. (Doc. No. 11).

Furthermore, the record reflects that in his brief in support of his appeal of the trial court's denial of his application for *nunc pro tunc* appeal, the petitioner represented to the Pennsylvania Superior Court that:

> ...[PCRA] counsel did not amend the Appellant's [pro se] PCRA which was subsequently dismissed by the court below. Counsel further failed to file an appeal from the dismissal of the PCRA...
>
> ...[A]ppellant filed a PCRA petition claiming counsel was

> ineffective in failing to file post sentence motions. Counsel was appointed, who never filed an amended PCRA petition to reflect that claim of the Appellant not making a knowing and intelligent waiver of his appellate rights...The Appellant's PCRA was subsequently dismissed by the court below. No appeal from the judgment of the PCRA court was taken...

(Doc. No. 11, Brief For The Appellant, pp. 6, 9).

As indicated above, the burden rests with the petitioner to establish that his claims have been exhausted in the state courts. The petitioner has not produced a record of the alleged dismissal of the PCRA petition. The Luzerne County Docket Report, however, does plainly indicate that the PCRA petition was withdrawn. Therefore, based on the record before the court, the petitioner has not established that his claims have been exhausted in the state courts. As a result, the claims of ineffective assistance of counsel and unlawfully induced guilty plea should not be reviewed on the merits by this court.

However, even assuming, *arguendo,* that the petitioner had successfully established that he had fairly presented his claims in state court, the petitioner still would not be entitled to relief. This is because he has not set forth any facts which could establish either ineffective assistance of counsel or an unlawfully induced guilty plea.

In Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984), the United States Supreme Court held that in order to establish ineffective assistance of counsel a defendant must show that counsel's

conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. The Court set forth a two-prong test requiring a defendant to show, first, that counsel's performance was deficient, and second, the deficient performance prejudiced the defendant.

In order to establish ineffective assistance of counsel under Strickland, a habeas petitioner must "show that his attorney's representation fell below an objective standard of reasonableness" and that "any prejudice which appears prejudiced the defense." Deputy v. Taylor, 19 F.3d 1485, 1493 (3d Cir.), cert. denied, 512 U.S. 1230 (1994). No reasonable person could find that the petitioner's counsel were ineffective under the facts of this case. The petitioner was advised by counsel to accept the plea agreement wherein the petitioner would plead guilty to the charges as detailed above in exchange for the District Attorney's agreement not to seek the death penalty at trial.

The plea colloquy which took place between the court and the petitioner on May 2, 1995, demonstrates that the petitioner was fully aware of the terms of the plea agreement, and that it was in his best interests to accept the agreement and to plead guilty. The following exchanges took place between the court and the petitioner:

> THE COURT: [Do you understand that] [y]ou can appeal to a higher court official that your plea is not voluntarily?
>
> THE DEFENDANT: Yes.

THE COURT: Or that your attorney was ineffective in representing you and advising you to enter a plea?

THE DEFENDANT: Yes.

THE COURT: However, at the end of this colloquy and I accept your plea, my acceptance means that I have determined that the plea is proper and is unlikely that a higher court will overturn that finding. Furthermore because I will not accept your plea until I am convinced of my questioning of you that your attorneys have represented you effectively and there is little likelihood that a higher court will determine that your attorney was ineffective in advising you to plea?

THE DEFENDANT: Yes.

*** *** *** *** *** *** *** *** ***

THE COURT: Do you understand that the District Attorney can only recommend a sentence to me, that the actual sentence is in my discretion?

THE DEFENDANT: Yes, Your Honor.

THE COURT: In the event that I've decided not to go along with the District Attorney's recommendation, you have an absolute right to withdraw your plea and go to trial before another judge who will not know that you've entered a plea to these charges?

THE DEFENDANT: Yes, Your Honor.

*** *** *** *** *** *** *** *** ***

THE COURT: And why did you decide to plead guilty?

THE DEFENDANT: On my behalf, Your Honor, I felt it best to do rather than the death penalty.

THE COURT: Are you admitting that you did these acts?

THE DEFENDANT: Yes, Your Honor.

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THE COURT: Are you totally satisfied with advice of counsel up to this point?

THE DEFENDANT: Yes, Your Honor.

MR. FLORA[3] : Final thing for clarification. I don't think Mr. Olszewski [Assistant District Attorney] brought this up but I understand where they're coming from. That if in the event Mr. Kemper files any type of motions challenging the entry of this plea for whatever basis, that will render the plea agreement null and void, the Commonwealth will then be able to proceed with the filing of a notice of aggravating circumstances.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And they will seek the death penalty?

THE DEFENDANT: Yes.

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[3]Mr. Flora was the petitioner's court appointed counsel for the plea colloquy.

(Doc. No. 11, Transcript of Proceedings, May 2, 1995, pp. 22-23; 26-27; 35; 40-41. It is apparent from the foregoing that the petitioner cannot state an ineffective assistance of counsel claim. As a result, this claim should be dismissed.

For the same reasons, the petitioner cannot state a claim of unlawful inducement of guilty plea. The Third Circuit court of Appeals applies three factors to be considered in evaluating a motion to withdraw a guilty plea: (1) whether the defendant asserts his innocence; (2) whether the government would be prejudiced by the withdrawal, and (3) the strength of the defendant's reasons for withdrawing the plea. United States of America v. Erskine Smith II, 818 F. Supp. 123, 126 (W.D. Pa. 1993)(citing United States v. Huff, 873 F.2d 709, 712 (3d Cir. 1989). The petitioner has not asserted that he is innocent. He appears merely to wish to proceed to trial for reasons he has not seen fit to provide to this court. The record reveals that the evidence against the petitioner was strong, and that his conviction was likely. Thus, the petitioner has offered nothing to suggest that he is not guilty.

The court also concludes that the government would be prejudiced if this court were to conclude that the guilty plea was invalid. The petitioner was sentenced in May 1995. There is no indication that the prosecution has kept in touch with the witnesses, or the investigators who put the case together. Thus, even if the case against the petitioner could be reassembled, it would

only be at great cost and inconvenience to the government. See United States v. Allen, 668 F. Supp.969, 979 (W.D. Pa. 1987).

Finally, and most importantly, the petitioner has set forth no reasons for claiming that the plea agreement was unlawful. Furthermore, based on the record on the whole, this court has every reason to believe that when the petitioner chose to plead guilty there was adequate factual basis to do so. The evidence against the petitioner was substantial, and his conviction on all of the charges was likely.

Other than his bald assertions, and conclusory citations to what he believes is relevant case law, there is no substance to the petitioner's claims of unlawfully induced guilty plea, or ineffective assistance of counsel. As a result, the petition should be denied.

Therefore, **IT IS HEREBY ORDERED THAT** the Petition for Habeas Corpus is **DENIED**.

s/Malachy E. Mannion

MALACHY E. MANNION
United State Magistrate Judge

Dated: September 7, 2004

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