IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TITUS FUGAH	:	CIVIL ACTION
	:	
v.	:	
	:	
J.F. MAZURKIEWICZ, et al.	:	NO. 96-7272

MEMORANDUM AND ORDER

YOHN, J. December , 1997

Titus Fugah, the petitioner, filed a Petition for a Writ of Habeas Corpus in this court pursuant to 28 U.S.C. § 2254. This petition arose from his conviction in the Philadelphia Court of Common Pleas for robbery, criminal conspiracy, and recklessly endangering another person. After his conviction, the trial judge sentenced the petitioner to twelve to twenty-four years in prison. Commonwealth v. Fugah, Nos. 3951-3955 (C.P. Phila. Sept. 22, 1994). Fugah then appealed to the Superior Court of Pennsylvania which affirmed the judgment of sentence. Commonwealth v. Fugah, No. 00388 PHL 94, slip op. at 2 (Pa. Super. filed July 3, 1995). The Supreme Court of Pennsylvania denied Fugah's request for review on December 4, 1995.[1] (Pa. Ct. Docket.) After Fugah filed the instant petition on November 29, 1996, Magistrate Judge Diane Welsh recommended dismissing the petition without prejudice due to his failure to exhaust state remedies.[2] (See Report and Recommendation.) For the reasons set forth below, I adopt this

[1] The District Attorney's Response to the Petition for Habeas Corpus states that the supreme court denied allocatur on April 12, 1995. The state record forwarded to this court from the Philadelphia Court of Common Pleas, however, reflected the abovementioned date.

[2] Magistrate Judge Welsh also recommended that the petitioner's motions for appointment of counsel and discovery be denied. The decision to appoint counsel lies within the sound discretion of the trial court. Parham v. Johnson, No. CIV.A.95-3623, 1997 WL 573185, at *3 (3d Cir. Sept. 17, 1997); Tabron v. Grace, 6 F.3d 147, 153 (3d Cir. 1993). Nevertheless, the Third Circuit has noted that "it would be desirable for the district court to explain the reasons for

recommendation.

BACKGROUND

After his conviction and the denial of his post-verdict motions in the state trial court, the petitioner raised the following issues, in relevant part, on appeal to the Superior Court of Pennsylvania:

> (1) The trial court erred in denying the petitioner's motion to suppress statements attributed to him where the taking of the statement violated his right to counsel and his right not to incriminate himself because he was not properly apprised of his right to remain silent, his right to cease questioning at anytime, or the crime about which he was being questioned;

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its decision" to deny an indigent plaintiff counsel. Tabron, 6 F.3d at 158.

Before appointing counsel, the court must find that the petitioner's claim is "arguably meritorious in fact and law." Parham, 1997 WL 573185, at *4; Tabron, 6 F.3d at 157. If the issue has merit, the court may then evaluate how the other factors listed in Tabron bear on the decision. Parham, 1997 WL 573185, at *4.

This court will dismiss this petition for failure to exhaust state remedies. As such, petitioner's claims are not yet ripe for consideration, thereby rendering them meritless at this stage of the proceedings. See Wooten v. Lewis, No. CIV.A.94-3605, 1995 WL 526535, at *2 (D.N.J. Sept. 5, 1997).

Moreover, although the court need not proceed with the analysis because the petitioner has not presented a meritorious claim, I would note that an examination of Tabron's other factors also suggests that counsel should not be appointed. For example, Fugah can effectively present the bulk of his claims in the federal forum without the assistance of counsel because he has already had them briefed by state court attorneys. Furthermore, in his pleadings before this court, Fugah has proven himself quite competent at legal representation. Finally, it is not the facts surrounding Fugah's claims that are in dispute but the application of the law. Thus, none of Fugah's asserted claims are likely to (1) require intense factual investigation, (2) turn on credibility determinations necessitating adept direct and cross examination, or (3) benefit from an expert witness, which are other relevant factors under Tabron. In light of this evaluation, this court is constrained to dismiss Fugah's motion to appoint counsel. If circumstances arise justifying an appointment, the court can do so then.

I will also deny Fugah's motion for discovery. Rule 6(a) of the Rules Governing § 2254 Cases states that discovery in habeas corpus cases is allowed only for good cause shown. This court finds that there is sufficient information presently available to dismiss the petition and, therefore, I deny the motion. See Riley v. Scheidemantel, No. CIV.A.88-2364, 1988 WL 100013, at *4 (D.N.J. Aug. 12, 1988).

(2) The trial court erred in denying appellant's motion to suppress the in-court and out-of-court identifications on the ground that the original photographic array was unduly suggestive;

(3) The trial court erred in refusing to instruct the jury that the identification evidence was to be received with caution pursuant to Commonwealth v. Kloiber, 106 A.2d 820 (Pa. 1954);

(4) The trial court erred by allowing the prosecution to introduce evidence that the petitioner was previously arrested in a stolen car;

(5) The trial court erred by allowing the prosecutor, during the summation, to offer his own opinion as to the defendant's guilt; to refer to matters outside the evidence; and to refer to the evidence of petitioner's "other crimes" in a manner that was inconsistent with the trial court's ruling on that evidence;

(6) The trial court erred by refusing to allow the petitioner to introduce evidence that another individual committed a crime similar to the instant robbery while the petitioner was in custody;

(7) The sentencing court improperly issued the petitioner an excessive and disproportionate sentence.

(See Pa. Ct. Docket.) Finding the claims meritless, the superior court affirmed the trial court's judgment. Commonwealth v. Fugah, No. 00388 PHL 94 (Pa. Super. filed July 3, 1995).

In his subsequent Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, the petitioner alleged the following grounds for relief:

(1) The trial court denied the petitioner his rights to due process by admitting prejudicial evidence regarding his possession of a stolen car as well as his statement about that car where the evidence had no probative value and where the statement was taken during a police interrogation in violation of Miranda v. Arizona, 384 U.S. 436 (1966);

(2) The trial court denied the petitioner his rights to due process and effective assistance of counsel by refusing to allow the petitioner to introduce exculpatory evidence that another individual committed a crime similar to the instant robbery while the petitioner was in custody;

(3) The trial court erred when it refused to instruct the jury to receive the

identification evidence with caution pursuant to Commonwealth v. Kloiber, 106 A.2d 820 (Pa. 1954), where the photographic array was unduly suggestive;

(4) The trial court denied the petitioner his right to due process by allowing the prosecutor to refer to the "other crimes" evidence in a manner inconsistent with the trial court's instructions.

(See Pa. Ct. Docket.) The supreme court denied the petitioner's request for review of these claims. (See id.)

The petitioner filed the instant petition on November 29, 1996. In it, he raises the following claims:

(1) The petitioner did not knowingly and intelligently waive his right to silence when the police interrogated him regarding an unrelated robbery without warning him that he had a right to stop the questioning when the interrogation moved to the instant crime;

(2) The photo array was unduly suggestive and should have been suppressed;

(3) The trial court erred in denying petitioner's request for a jury instruction on identification;

(4) The trial court erred in allowing the Commonwealth to introduce evidence of petitioner's subsequent bad acts and his statement admitting to them where those acts were irrelevant and prejudicial;

(5) The trial court erred in denying the petitioner's motion for a mistrial based on the prosecutor's summation where the district attorney (a) referred to the petitioner's possession of a stolen vehicle in violation of the court's ruling on that evidence and; (b) attempted to bolster the credibility of a witness by appealing to the jury to place themselves in the position of the victim;

(6) The trial court erred in denying the petitioner's motion to introduce evidence that an individual resembling the petitioner committed a separate crime with a similar modus operandi;

(7) The petitioner is entitled to a new sentence because the trial court unreasonably and excessively departed from the sentencing guidelines, improperly applied factors already accounted for in the guidelines, and enhanced the petitioner's sentence based on his assertion of innocence and lack of remorse.

(See Hab. Pet. ¶ 12(A)-(G).)

Urging the court to deny the instant petition without a hearing, the Commonwealth argues that the petitioner's first, second and seventh grounds are procedurally barred from federal review; his third and seventh grounds are state law claims not cognizable in a federal habeas action; and the remaining grounds are meritless. (See Resp. to Hab. Pet.) The magistrate judge recommends dismissing Fugah's petition without prejudice for failure to exhaust state remedies. The petitioner filed objections to this recommendation, claiming that his third and seventh claims constitute properly exhausted federal issues and that he can show "cause" and "prejudice" for his failure to exhaust his unexhausted claims. (See Petitioner's Objections to Report and Recommendation.) After reviewing the matters raised in these objections de novo, see 28 U.S.C. § 636(b)(1)(C), I adopt the magistrate judge's recommendation.

DISCUSSION

(A) Exhaustion of State Remedies

A federal court will ordinarily dismiss a petition for a writ of habeas corpus if the petitioner has not "fairly presented" each claim raised therein to the highest state court empowered to consider it. Castille v. Peoples, 489 U.S. 346, 349 (1989). Furthermore, 28 U.S.C. § 2254(c) expressly provides that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the state within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented." The burden of proving exhaustion rests on the petitioner. Gonce v. Redman, 780 F.2d 333, 336 (3d Cir. 1985). In the event that the prisoner has not met this burden and the federal court determines that there exists the possibility of state court review, the petition should be dismissed without

prejudice. See Chaussard v. Fulcomer, 816 F.2d 925, 927 (3d Cir.), cert. denied, 484 U.S. 845 (1987).

Here, the respondents argue that the petitioner presented his first, second, and seventh claims to Pennsylvania's Superior Court but then abandoned them in his appeal to the supreme court. (See Resp. To Hab. Pet. at 3.) Actually, Fugah consolidated his first and second habeas claims, respectively alleging (1) that he did not knowingly waive his rights during his interrogation about this crime and (2) that the identifications were unduly suggestive, into the first and third questions presented in his Petition for Allowance of Appeal to the Pennsylvania Supreme Court. (See Pet. for Allowance of Appeal at 7, 18.) Therefore, Fugah satisfied the exhaustion requirement with respect to his first and second habeas claims because he presented them to Pennsylvania's highest court. See Evans v. Court of Common Pleas of Delaware County, 959 F.2d 1227, 1230 (3d Cir. 1992).

To ascertain whether an issue has been fairly presented to the state courts, habeas courts must consider the state court briefs as a whole, even where the question presented in the briefs fails to include the habeas ground at issue. See Brown v. Cuyler, 669 F.2d 155 (3d Cir. 1982). While the specific language of the third question presented in Fugah's brief to the state supreme court challenges only the trial court's failure to instruct the jury pursuant to Commonwealth v. Kloiber, the brief's analysis of this issue questions the validity of the identification itself. (See id. at 18-20.) Fugah begins his argument to the state supreme court by claiming that "[t]he trial court's refusal to give a cautionary instruction on the issue of identification evidence pursuant to Commonwealth v. Kloiber, 106 A.2d 820 (Pa. 1954), compounded by the suggestive circumstances surrounding the photo array conflicts with the prior rulings . . . of this Court." (Id.

at 18.) Further along in his brief, he argues that the procedures used to secure his identification were similar to identification procedures that both state and federal courts had found to be impermissibly suggestive. (Id.); compare Brown, 669 F.2d at 159-160 (legal theories underlying cases cited in state court briefs bear upon whether the issue was fairly presented). Thus, Fugah not only challenged the identification process indirectly, by arguing that it so undermined the accuracy of the identification that he was entitled to a Kloiber charge, but also directly, by claiming that the process led to the making of an impermissibly suggestive identification under federal and state law. A thorough reading of Fugah's state court briefs, therefore, reveals that his second habeas ground has been fairly presented to the state courts.

On the other hand, the petitioner has not presented to any state tribunal an issue asserted in his seventh ground, that the trial judge impermissibly enhanced his sentence for exercising his right to maintain his innocence and for his lack of remorse.[3] See, e.g., U.S. v. Heubel, 864 F.2d 1104 (3d Cir. 1989) (increasing sentence due to defendant's refusal to incriminate himself violates Fifth Amendment). Thus, Fugah has failed to exhaust this claim. See Castille, 489 U.S. at 349.

The fifth ground for relief has the same problem. Here, the petitioner asserts that the prosecutor attempted to bolster the credibility of a witness by asking the jury to place themselves in the victim's position. As with the foregoing sentencing claim, the petitioner's failure to give any state forum an opportunity to consider this issue renders it unexhausted. See Castille, 489

[3] The petitioner raises other issues in this ground which will be discussed infra.

U.S. at 349.[4]

(B) Procedurally Barred Claims

The respondent argues that the statute of limitations in the Post Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. §§ 9541-46 (West Supp. 1996), bars the petitioner from seeking further state court review of his unexhausted claims. See § 9545(b) (imposes one year time limit for filing of petitions for state collateral review). Assuming the petitioner no longer has any available remedy in the state tribunals, the Commonwealth further contends that the issues are procedurally defaulted and, therefore, barred from federal review as well. (See Resp. To Hab. Pet. at 4.)

In the interests of comity and federalism, state courts must be given every opportunity to address federal claims arising in state proceedings. Doctor v. Walters, 96 F.3d 675, 681 (3d Cir. 1996). To protect that opportunity, federal courts will not consider a claim that a state court previously refused to review pursuant to a state law "that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). This is known as the doctrine of procedural default. Id.

A prisoner has procedurally defaulted his claim only if state law "clearly forecloses" further state consideration of an unexhausted claim. In those circumstances, forcing the prisoner to return to state court would be futile and the court, instead, should dismiss that particular claim from the petition. Id.; Toulson v. Beyer, 987 F.2d 984, 987 (3d Cir. 1993). Nevertheless, to

[4] As the Commonwealth concedes in its response to the instant petition, the petitioner's fourth and sixth habeas grounds, respectively alleging that the trial court erred in admitting "other crimes" evidence and that the trial court erred in refusing to allow petitioner to introduce evidence that another individual committed another crime, are exhausted.

ensure that state courts are given every opportunity to address claims arising from state proceedings, the Third Circuit has cautioned that a court should not find an issue procedurally defaulted "*even if it is unlikely that the state court would consider the merits* [of the claim] . . . ." Doctor, 96 F.3d at 681 (3d Cir. 1996) (emphasis added); accord Belle v. Stepanik, No. CIV.A.95-2547, 1996 WL 663872, at *8 (E.D. Pa. Nov. 14, 1996).

With respect to requests for collateral review in Pennsylvania, the Pennsylvania courts have consistently read into the PCRA an exception that allows for judicial review of a claim in order to avoid a "miscarriage of justice." Belle, 1996 WL 663872, at *8 (E.D. Pa. Nov. 14, 1996); see generally Commonwealth v. Lawson, 548 A.2d 107, 111-112 (Pa. 1988). When a prisoner can make this showing, a state court will forgive the applicant's failure to comply with the procedural provisions of the PCRA and consider the allegation. Lawson, 548 A.2d at 111-12. Addressing whether Pennsylvania would apply this exception to the PCRA's recent amendments, Branca v. Pennsylvania Parole Bd. of Probate. and Parole, No. CIV.A.95-4114, 1996 WL 745532, at *3 (E.D. Pa. Dec. 23, 1996), reasoned that Pennsylvania's demonstrated willingness to read exceptions into the statute prohibited the court from finding that the petitioner's habeas claims were procedurally barred by § 9545(b)'s one year statute of limitations.[5] Id.; see also Belle v. Stepanik, 1996 WL 663872 (E.D. Pa. Nov. 14, 1996).

Similarly, in the present case, the court cannot conclude that there is "no chance" that the Pennsylvania courts would find an exception to override the eligibility requirements of the PCRA

[5] Pennsylvania's PCRA was amended on November 17, 1995, with the amendments to take effect January 16, 1996. See Postconviction Relief, Capital Unitary Act, Pa. Act No. 1995-32, § 3 (1995). So far, there are no Pennsylvania cases examining whether the "miscarriage of justice" doctrine applies to the amendments.

and consider the issues raised in his unexhausted fifth and seventh habeas grounds. See Doctor, 96 F.3d at 683. The fact that no state court decision clearly forecloses review of the petitioner's prosecutorial misconduct issue and that Pennsylvania courts have held that claims challenging the legality of a sentence can never be waived, Commonwealth v. Shannon, 608 A.2d 1020 (Pa. 1992); Commonwealth v. Yount, 615 A.2d 1316, 1318 (Pa. Super. 1992), further counsels in favor of dismissing the present petition for failure to exhaust state court remedies. See Doctor, 96 F.3d at 681. Therefore, raising these issues in state court should not be considered futile. See id. at 683.

In his objections to the magistrate judge's recommendations, Fugah argues that appellate counsel's failure to pursue the fifth and seventh grounds on appeal to the state supreme court amounted to ineffective assistance of counsel. (See Petitioner's Objections to Report and Recommendation at 4.) He then asserts that because he can show "cause" and "prejudice" for the waiver of these issues, the court should excuse his failure to exhaust them. See e.g., Coleman, 501 U.S. 722 (1991). The "cause" and "prejudice" exceptions, however, only apply to procedurally barred claims. Id. As has been shown, these claims are not procedurally defaulted, making the petitioner's argument irrelevant.

(C) Fair Presentation of State Law Issues

The magistrate judge found that the third habeas ground, alleging that the trial court erred in denying petitioner's request for a jury instruction on identification pursuant to Commonwealth v. Kloiber, 106 A.2d 820, cert. denied, 348 U.S. 875 (1954), and that the remaining components in his seventh allegation, challenging the sentence imposed by the trial judge under Pennsylvania law, amounted to state law issues not cognizable in a federal habeas action. (See Report and

Recommendation at 6-7.) In his objections, the petitioner responds that his third and seventh grounds are "sufficiently equivalent" to properly exhausted federal claims. (See Petitioner's Objections to Report and Recommendation.) He thus argues that federal review of these claims is warranted.

"Both the legal theory and the facts on which a federal claim rests must have been presented to the state courts" in order to be properly exhausted. Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986). A federal issue must be more than merely similar to a state claim in order to have been fairly presented to the state tribunals. Paulett v. Howard, 634 F.2d 117, 119-20 (3d Cir. 1980). Rather, the substance of the claimant's state court matters must be "virtually indistinguishable" from the habeas grounds at issue. Santana v. Fenton, 685 F.2d 71, 74 (3d Cir. 1982).

On direct review of Fugah's conviction, the Superior Court of Pennsylvania affirmed without comment the trial court's opinion. The trial judge analyzed the Kloiber issue, Fugah's third allegation, by examining whether the decision not to issue the instruction complied with the Supreme Court of Pennsylvania's mandates in that case, not whether the instruction's absence deprived the defendant of his constitutional rights. (See Pa. Ct. Docket.) Relying only on state law, Kloiber held that a defendant is entitled to a cautionary instruction where the identification is subject to specific infirmities, such as a limited observation of the defendant. 106 A.2d at 826-28. Because a defendant's right to a Kloiber instruction is solely a creation of state law and the lower courts analyzed the issue in light of the state law standards developed in that case, this court may not address the merits of Fugah's third claim. See id.

Fugah's seventh ground asserts that the trial judge impermissibly sentenced him by (1)

accounting for factors already considered in the guidelines and (2) relying on factors outside of the record. (See Hab. Pet. ¶ 12 G.) A state court's sentencing decision and claims arising from it are not generally reviewable in a federal habeas action. See Twyman v. Carr, No. CIV.A.96-365, 1997 WL 309456, at *3 (D. Del. Apr. 7, 1997); Pollio v. Lanzaro, No. CIV.A.88-2310, 1989 WL 85066, at *9 (D.N.J. July 18, 1989). Furthermore, the trial judge evaluated this claim by analyzing whether the upward departure from the guidelines amounted to an abuse of discretion under applicable Pennsylvania law. See Commonwealth v. Fugah, Nos. 3951-3955, slip op. at 17-18 (C.P. Phila. Sept. 22, 1994). The judge did not examine whether the sentence was so excessive or improperly administered as to violate the petitioner's federal constitutional rights. Thus, in both claims, the petitioner confined his arguments to violations of state law and failed to invoke any legal theory entitling him to relief on federal grounds. See Duncan v. Henry, 513 U.S. 364, 366 (1995) (per curiam) (noting that state evidentiary issue not sufficiently similar to federal claim when state court does not employ same legal standards).

Although an examination of a state court's opinion to discern what issues were presented is not determinative of the exhaustion issue, the burden to establish exhaustion lies on the petitioner. Brown v. Cuyler, 669 F.2d 155, 158 (3d Cir. 1982). Thus, the petitioner's failure to make his state court appellate brief part of the record forces this court to conclude that, to the extent the third and seventh grounds constitute federal issues, the petitioner has failed to present them as such to the state tribunals. See id. at 158-59; Branca v. Pa. Bd. of Probation and Parole, No. CIV.A.95-4114, 1996 WL 745532, at *2 (E.D. Pa. Dec. 23, 1996) (failure to provide appellate briefs forces court to rely on state court opinions). As such, his third and seventh grounds are not "sufficiently equivalent" to any properly exhausted federal issues.

Issues presented to the federal habeas court involving only state law matters do not entitle the petitioner to federal habeas relief. Engle v. Isaac, 456 F.2d 107, 119 (1982). Petitioner's third and seventh grounds, as presented to the state courts, raised only questions of state law. Thus, this court may not address the merits of these claims.

(D) Conclusion

Fugah has filed a petition with both exhausted and unexhausted claims, known as a "mixed petition." Rose v. Lundy, 455 U.S. 509, 510 (1982). When a mixed petition is presented to the court, the entire petition - including the exhausted grounds - must be dismissed, "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims . . . ." Id. at 518. In light of Rose, the petitioner may withdraw his unexhausted claims by filing with this court a motion to reconsider his exhausted issues within ten days of the entry of this order. If the petitioner chooses this route, the court will then address the exhausted claims on the merits. The court cautions, however, that "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." Miller v. O'Connell, No. 96-7564, 1997 WL 83747, at *1 (E.D. Pa. Feb. 21, 1997) (quoting Rose, 455 U.S. at 521).

Based on the foregoing reasons, the court will overrule the petitioner's objections, approve the Report and Recommendation of U.S. Magistrate Judge Welsh and dismiss the instant petition without prejudice for failure to exhaust state remedies.

An appropriate order follows.

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TITUS FUGAH	:	CIVIL ACTION
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ORDER

AND NOW, this day of December, 1997, upon consideration of the Petition for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254, the Response to the habeas petition, Petitioner's Traverse, Petitioner's Motion for Appointment of Counsel (Doc. No. 10), Petitioner's Motion for Discovery (Doc. No. 11), Petitioner's Objections to the Magistrate Judge's Report and Recommendation and the Defendant's Response to the Petitioner's Objections, and after review of the Report and Recommendation of United States Magistrate Judge Diane M. Welsh, it is hereby ORDERED that:

1. The Petitioner's Objections to the Report and Recommendation are OVERRULED;

2. The Report and Recommendation is APPROVED and ADOPTED;

3. The Petition for Writ of Habeas Corpus is DISMISSED without prejudice for failure to exhaust state remedies;

4. Petitioner's Motions for Discovery and Appointment of Counsel are DENIED;

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William H. Yohn, Jr., J.