ALD-145 March 28, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-3416**

GERALD S. LEPRE, JR., Appellant

v.

COMMONWEALTH OF PENNSYLVANIA; ET AL.

(W.D. Pa. Civ. No. 2-16-cv-01169)

Present: MCKEE, SHWARTZ and BIBAS, Circuit Judges

Submitted is Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)

in the above-captioned case.

Respectfully,

Clerk

ORDER

Lepre's application for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). Jurists of reason would agree without debate that Lepre was not in custody at the time he filed his petition under 28 U.S.C. § 2254 and that the District Court therefore lacked jurisdiction over his petition. See Piasecki v. Court of Common Pleas, 917 F.3d 161 (3d Cir. 2019) ("A federal court has jurisdiction to entertain a petition for a writ of habeas corpus under § 2254 only if the petitioner was 'in custody pursuant to the judgment of a State court' when the petition was filed." (quoting § 2254(a)); United States ex rel. Dessus v. Pennsylvania, 452 F.2d 557, 560 (3d Cir. 1971) (ruling that a suspended sentence, without more, does not satisfy the custody requirement).

By the Court,

s/Patty Shwartz
Circuit Judge

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

GERALD S. LEPRE, JR.,	)	
	)	
Petitioner,	)	Civil Action No. 16-1169
	)	
v.	)	Judge Cathy Bissoon
	)	Magistrate Judge Robert C. Mitchell
COMMONWEALTH OF	)	
PENNSYLVANIA, and	)	
THE ATTORNEY GENERAL OF THE	)	
STATE OF PENNSYLVANIA,	)	
	)	
Respondents.	)	

JUDGMENT ORDER

FINAL JUDGMENT hereby is entered pursuant to Rule 58 of the Federal Rules of Civil Procedure. This case has been marked closed.

IT IS SO ORDERED.

October 18, 2018

s\Cathy Bissoon
Cathy Bissoon
United States District Judge

cc (via First-Class U.S. Mail
and Electronic Filing):

Gerald S. Lepre, Jr.
130 Clara Street
Millvale, PA 15209

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

GERALD S. LEPRE, JR.,	)	
	)	
Petitioner,	)	Civil Action No. 16-1169
	)	
v.	)	Judge Cathy Bissoon
	)	Magistrate Judge Robert C. Mitchell
COMMONWEALTH OF	)	
PENNSYLVANIA, and	)	
THE ATTORNEY GENERAL OF THE	)	
STATE OF PENNSYLVANIA,	)	
	)	
Respondents.	)	

MEMORANDUM ORDER

This case has been referred to United States Magistrate Judge Robert C. Mitchell for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §§ 636(b)(l)(A) and (B), and Local Rule of Civil Procedure 72.

On August 10, 2018, the Magistrate Judge issued a Report (Doc. 40) recommending that Gerald S. Lepre, Jr.'s petition for a writ of habeas corpus under 28 U.S.C. § 2254 (Doc. 1) be dismissed, and that a certificate of appealability be denied. Service of the Report and Recommendation was made, and Petitioner filed Objections on August 10 and August 12, 2018. *See* Docs. 41 and 42.

After a *de novo* review of the pleadings and documents in the case, together with the Report and Recommendation and the Objections thereto, it hereby is **ORDERED** that Gerald S. Lepre, Jr.'s habeas petition is **DISMISSED**; a certificate of appealability is **DENIED**; and the Report and Recommendation is **ADOPTED** as the Opinion of the District Court.

IT IS SO ORDERED.

October 18, 2018

s\Cathy Bissoon
Cathy Bissoon
United States District Judge

cc (via First-Class U.S. Mail
and Electronic Filing):

Gerald S. Lepre, Jr.
130 Clara Street
Millvale, PA 15209

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

GERALD S. LEPRE, JR., Petitioner,	)	
V.	)	2:16-CV-1169
COMM. OF PENNSYLVANIA, et al., Respondents.	)	

SECOND AMENDED REPORT and RECOMMENDATION

I. Recommendation:

It is respectfully recommended that the petition of Gerald S. Lepre, Jr. for a writ of habeas corpus (ECF. No.1) be dismissed, and because reasonable jurists could not conclude that a basis for appeal exists, that a certificate of appealability to be denied.

II. Report:

Gerald S. Lepre, Jr. has submitted a petition for a writ of habeas corpus which was filed in this Court on August 3, 2016 (ECF. No. 1). At petitioner's request the case was stayed pending exhaustion of state court remedies (ECF No. 4), and at his request the case was reopened on October 17, 2017 (ECF Nos. 6 and 7).

Lepre seeks to challenge his sentence of 90 days' imprisonment with a consecutive 6 month suspended sentence imposed on December 16, 2015 following his conviction of two counts of criminal contempt at No. FD-15-000354 in the Court of Common Pleas of Allegheny County, Pennsylvania.[1]

Petitioner filed a notice of appeal on February 24, 2016 which was docketed at 272 WDA 2016 in which he raised the following issues:

> I. Did the Commonwealth present sufficient evidence to prove Mr. Lepre violated the terms of the protection from abuse order?

[1] See: Petition at ¶¶ 1-6.

II. Were the verdicts of guilty for indirect criminal contempt against the weight of the evidence presented?[2]

On December 16, 2016, the Superior Court, citing the trial court, wrote:

> Family Division Plaintiff Erica Milton sought and obtained a temporary PFA Order against her ex-boyfriend, [Appellant] on March 11, 2015. A final hearing was held, and a final PFA Order [was] entered on May 20, 2015. [Appellant] was subsequently charged with three (3) counts of Indirect Criminal Contempt on May 11, 2015, June 3, 2015 and October 1, 2015, respectively. An ICC Hearing was held before [the Court of Common Pleas] on December 16, 2015, and following the presentation of evidence, [Appellant] was found guilty of the ICC Complaints dated May 11, 2015 and June 3, 2015, but was found not guilty of the ICC Complaint from October 1, 2015. He was immediately sentenced to a term of imprisonment of 90 days for the May 11, 2015 violation and an additional term of imprisonment of six (6) months at the June 3, 2015 violation, which was suspended. Post – Sentence Motions were filed and were denied on January 25, 2016.

The Superior continued:

> Before addressing the merits of Appellant's claim, we must address the timeliness of this appeal as it implicates our jurisdiction... Appellant's sentencing in open court on December 16, 2015, constitutes the reference point for determining the timeliness of post-sentence motions or a notice of appeal...
>
> Appellant's post-sentence motion was untimely filed [January 13, 2016; Pa.R.Crim.P. 720(A)(1)]. As the motion was late, it did not toll Appellant's direct appeal period...
>
> In order to be timely, Appellant's notice of appeal needed to be filed within thirty days of the imposition of his sentence, or by January 15, 2016. Pa.R.Crim.P. 720(A)(3). Appellant, however, did not file his notice of appeal until February 24, 2016... Thus, Appellant's current appeal is untimely. Consequently, we lack jurisdiction to hear it. (footnotes omitted). (Appx. pp.90-94).

As a result, the appeal was quashed and leave to appeal was denied by the Pennsylvania Supreme Court on September 19, 2017. (Appx. p. 148). Accordingly, under state law, petitioner's conviction became final thirty days after his sentencing, i.e., on January 15, 2017. However, while Lepre was proceeding in the state courts, on August 3, 2016 the instant

[2] Appx. p. 50.

protective federal petition was filed and stayed pending the exhaustion of the state court remedies. In his federal petition Lepre's first argument is that he was denied the effective assistance of trial counsel and his second argument is that the evidence was insufficient to support his convictions.[3]

It is provided in 28 U.S.C. §2254(a) that:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. [4]

It is further provided in 28 U.S.C. §2254(b) that:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

This statute represents a codification of the well-established concept which requires that before a federal court will review any allegations raised by a state prisoner, those allegations must first be presented to that state's highest court for consideration. Preiser v. Rodriguez, 411 U.S. 475 (1973); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973); Doctor v. Walters, 96 F.3d 675 (3d Cir. 1996). An untimely post-conviction petition is not "properly filed". Pace v. DiGulglielmo, 544 U.S. 408 (2005).

In its response, the Commonwealth observes that a procedural default has occurred but that upon a demonstration of cause and prejudice for the default, a petition may nevertheless be considered.[5] Pennsylvania requires that a claim of ineffective assistance be raised in a post-conviction petition rather than on direct appeal. Commonwealth v. Bozic, 997 A.2d 1211 (Pa.Super), leave to appeal denied 608 Pa. 659 (2010), cert. denied 131 S.Ct. 2939 (2011). However, a post-conviction petition can only be filed if the petitioner is "in custody" on the conviction challenged. 42 Pa.C.S.A. § 9542 ("to be eligible for relief ... the petitioner must plead

---

[3] See: Petition at ¶12.

[4] Although the petitioner does not appear to be incarcerated or is there any indication of whether or not his sentence has been served, since the resolution of this question is immaterial to the disposition here we will not address the "custody" requirement of §2254.

[5] Brief pp. 13-14.

and prove by a preponderance of the evidence... that the petitioner has been convicted of a crime under the laws of this Commonwealth and is *at the time relief is granted* currently serving a sentence of imprisonment, probation or parole for the crime...) (emphasis added). In September 2017 his sentence had expired and he could not secure post-conviction relief. McCandless v. Vaughn, 172 F.3d 255, 260 (3d Cir. 1999) ("when a claim is not exhausted because it has not been 'fairly presented' to the state courts, but state procedural rules bar the applicant from seeking further relief in state courts, the exhaustion requirement is satisfied because there is 'an absence of available State corrective process'"). See: 28 U.S.C. § 2254(b)(1)(B)(i) ("there is an absence of available State corrective process").

Thus, Lepre never had an opportunity to present his claim of ineffective assistance of counsel to the courts of the Commonwealth and there is good cause for this default.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court explained that there are two components to demonstrating a violation of the right to the effective assistance of counsel. First, the petitioner must show that counsel's performance was deficient. This requires showing that "counsel's representation fell below an objective standard of reasonableness." Id. at 688; see also Williams v. Taylor, 529 U.S. 362, 390-91 (2000). Second, under Strickland, the defendant must show that he was prejudiced by the deficient performance. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687, 104 S.Ct. 2052. To establish prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. This burden rests on the petitioner. Id.at 693.The Strickland test is conjunctive and a habeas petitioner must establish both the deficiency in performance prong and the prejudice prong. See Strickland, 466 U.S. at 687; Rainey v. Varner, 603 F.3d 189,197 (3d Cir.2010) cert. denied 131 S.Ct. 1673 (2011). As a result, if a petitioner fails on either prong, he loses. Rolan v. Vaughn, 445 F.3d 671 (3d Cir.2006).

Specifically, petitioner alleges:

> Counsel unprepared for trial. Counsel failed to consult with Defendant prior to trial to prepare a defense. Counsel coerced Defendant not to testify at trial despite his request. Counsel failed to

> effectively cross-examine and challenge the credibility of only complaining witness which was only evidence to support convictions and sentence. Counsel failed to object to illegal sentence immediately following convictions. Counsel failed to raise double jeopardy in convictions and sentence. Counsel failed to raise absolute lack of due and fail process as well as the lack of equal protection in Protection from Abuse Act Proceedings/Contempts of Court for alleged violations of Restraining Order. Counsel failed to challenge the lack of Defendant's intent. (Petition at ¶ 12).

While the petitioner seeks to raise a myriad of unsupported allegations, the record demonstrates that on cross-examination, counsel made clear that the victim's allegations were based on presumptions she had made based on the circumstances and not on observed facts (TT.16-18). Nevertheless, from a review of the trial transcript the record clearly demonstrates that there was a sufficient credible basis presented which enabled the court to conclude that on at least two occasions petitioner violated the protection from abuse order and thereby was guilty of the charges. Nevertheless, petitioner concludes in his response that counsel's actions fell below an objective standard of reasonableness. Despite the opportunity to respond to the Commonwealth's argument that his allegations are totally unsupported, the petitioner has failed to do so. That is, petitioner has failed to demonstrate the existence of any actions by counsel that might have undermined confidence in the court's determination. Thus, this claim does not provide a basis for relief.

The remaining issue raised by petitioner is that the evidence was insufficient to sustain the verdict. In order to sustain this claim, a petitioner must demonstrate that based on the evidence presented no rational factfinder could determine guilt beyond a reasonable doubt. Coleman v. Johnson, 566 U.S. 650 (2012); Jackson v. Virginia, 443 U.S. 307, 319 (1979). This issue was raised in the direct appeal but was deemed untimely. In Coleman v. Thompson, 501 U.S. 722,750 (1991), the Court held:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice.

Because no such showing is made here, the petitioner has failed to avail himself of the available state court remedies on this issue and no further consideration is warranted here.

Nevertheless, despite the default, "an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2).

At the indirect criminal contempt hearing held on December 16, 2015, the victim, Erica Milton testified that she was in a relationship with the petitioner for almost six years (TT. p.3); that she filed for a protection from abuse order on March 9, 2015 which was granted and extended for about a three-year period (TT. p. 3); that she filed indirect criminal contempt charges on three occasions, May 11, 2015, June 3, 2015 and October 1, 2015 alleging that the petition had continuously harassed her (TT. pp. 4-13). No other evidence was presented. Following that hearing Judge Donna Jo McDaniel stated on the record:

> I find Mr. Lepre guilty of 5/11. And I find him in contempt of court of the 5/11 and 6/3 ICC violations.
>
> Now, it's my opinion that Mr. Lepre is threatening. The letters and actually going in, taking things from her, walking into her house, going – hiding in her residence when her young daughter was there, I think that these are very egregious things to do.
>
> I found it interesting that the victim testified that she left one of her jobs because of you.
>
> So at the 5/11, I'm going to order you to spend 90 days in the Allegheny County Jail and order a Behavior Clinic evaluation. At the second ICC at 3/15, I'm going to give you six months suspended sentence. You are to have no contact with the victim in this case…
>
> I'll extend the PFA. ((TT. p.21).

Certainly, the evidence supports the finding that any rational factfinder could determine guilt beyond a reasonable doubt, and this claim likewise, does not provide a basis for relief.

Accordingly, for the reasons set forth above, petitioner's conviction was not secured in any manner contrary to federal law as determined by the Supreme Court nor involved an unreasonable application of that law. For this reason, it is recommended that the petition of Gerald Lepre, Jr. for a writ of habeas corpus be dismissed, and because no reasonable jurists could conclude that a basis for appeal exists, that a certificate of appealability be denied.

Litigants who seek to challenge this Report and Recommendation must seek review by the district judge by filing objections within fourteen (14) days of this date and mailing them to

United States District Court, 700 Grant Street, Pittsburgh PA 15219-1957. Failure to file timely objections will waive the right to appeal.

Respectfully submitted,
s/ Robert C. Mitchell
United States Magistrate Judge

Filed: August 10, 2018

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-3416

GERALD S. LEPRE, JR., Appellant

v.

COMMONWEALTH OF PENNSYLVANIA; ET AL.

(W.D. Pa. Civ. No. 2-16-cv-01169)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, and MATEY, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Dated: May 20, 2019
Lmr/cc: Gerald S. Lepre, Jr.
Keaton Carr