

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

John A. Denby :
 :
v. : No. 3:02cv1143(JBA)
 : PRISONER
Commissioner of Correction :

Ruling on Respondent's
Motion to Stay or Dismiss [Doc. #8]

Petitioner John A. Denby is currently confined at the Carl Robinson Correctional Institution in Enfield, Connecticut pursuant to a judgment of conviction of the Connecticut Superior Court for a narcotics offense. He brings this pro se challenge to his conviction pursuant to 28 U.S.C. § 2254, and Respondent has moved to stay or dismiss the petition for failure to exhaust state remedies. As set out below, the Court concludes that Denby has properly presented each claim in the petition to the Connecticut Supreme Court, and thus denies Respondent's motion to dismiss.

I. Background

A. Conviction and § 2254 Petition

In January 1993, a jury convicted Denby of possession of cocaine with the intent to sell or dispense by a person who is not drug-dependent, in violation of Conn. Gen. Stat. § 21a-278(b), and possession of cocaine with the intent to sell

within 1000 feet of a school, in violation of Conn. Gen. Stat. §§ 21a-278 and 21a-278a(b). He was sentenced to a total effective term of imprisonment of nineteen years.

As the title of the offense indicates, one element of the prosecution's case was proof that at the time of the crime, Denby was not a drug dependent person. In this § 2254 petition, Denby attacks his trial counsel's handling of this key aspect of his defense - that is, Denby's status as a drug dependent person. Based on trial counsel's admission during a state habeas proceeding that counsel "did not pursue the drug dependency issue because of his erroneous belie[f] that the maximum penalty under Connecticut General Statutes § 21-277 and § 21a-278 were the same, namely twenty years," Denby v. Commissioner, No. 374567 (Conn. Super. Nov. 4, 1996) ("Denby I") [attached in Ex. C to Doc. #8] at 2-3, and counsel's admission that he believed Denby was drug dependent and would have pursued a different defense strategy had he correctly understood law, id. at 3, Denby asserts that trial counsel was constitutionally ineffective:

Attorney Dakers did not know the penalty of law The only evidence of drug dependency Attorney Dakers put on was the testimony of John Denby and his witness William Garvin, a layperson. Attorney Dakers was of the impression that [the crime charged] carried the same penalty as the lesser included offense [which did not include the element of non-drug dependency.] Attorney Dakers did not

fully prepare for the presentation of evidence on the issue of drug dependency. Specifically, although made aware that helpful medical and prison records drug treatment program in prison existed on this issue, he did not obtain them * * * Attorney Dakers did not have John Denby examined by any scientific expert * * * Attorney Dakers testif[ied that] had he known the law he would [have gotten] records and would [have] had John Denby examine[d] by [an] expert.

Brief in Support of Petition [Doc. #7] at 2. The Petition also alleges Denby's actual innocence of the charge (based on his claim of verifiable drug dependency), and ineffective assistance of Denby's state court habeas counsel.¹

B. State Court Post-Conviction Proceedings

Following his conviction by the jury, Denby appealed and his conviction was affirmed by the Connecticut Appellate Court. See State v. Denby, 35 Conn. App. 609 (1994). The Connecticut Supreme Court granted certification limited to the question of whether Denby had to have had the specific intent to sell within 1000 feet of a school in order to be properly convicted, see State v. Denby, 231 Conn. 941 (1994) (granting

¹At the end of his brief in support of the petition, Denby makes a passing reference to equal protection, although equal protection is never listed as a claim in the petition itself. While Respondent interprets this as the presentation of a new ground in support of the petition, the Court reads this as further argument in support of the grounds explicitly set forth in the petition. See also infra note 2.

certification in part), and affirmed the conviction on December 5, 1995, see State v. Denby, 235 Conn. 477 (1995). The issues of ineffective assistance and actual innocence based on drug dependence were not raised in either of Denby's direct appeals. Following his direct appeals, Denby commenced a series of state habeas proceedings in the Connecticut Superior Court, the third (and final) of which remains pending.

The first state habeas proceeding was commenced on May 26, 1995, while his appeal before the Connecticut Supreme Court was still pending. Denby filed a petition for writ of habeas corpus in the Connecticut Superior Court alleging ineffective assistance of his trial counsel. The central issue in that habeas proceeding was his trial counsel's mishandling of the drug dependancy element of the offense and whether his trial strategy would have changed. The Superior Court opinion denying the petition characterized the testimony from the hearing held on the petition as: (1) Denby's testimony that he was drug dependent and that objective supporting evidence of that fact, including medical records, existed; and (2) trial counsel's testimony that he did not pursue the drug dependency issue because he failed to comprehend that a jury finding of no drug dependence would

expose Denby to a higher maximum penalty, and that "he might have pursued a different trial strategy on behalf of the Petitioner" had he correctly understood the law. Denby I at 2-3. The Superior Court concluded that Denby had proved neither cause nor prejudice under Strickland v. Washington, 466 U.S. 668 (1984), and thus was not entitled to relief on the ineffective assistance claim. Denby I at 5.

Denby appealed this denial, and the Connecticut Appellate Court affirmed in a one line memorandum opinion. Denby v. Commissioner, 47 Conn. App. 931 (1998). Denby petitioned the Connecticut Supreme Court for certification, raising his claim that trial counsel was constitutionally ineffective because counsel did not understand that a finding of no drug dependency would result in a higher maximum penalty and had failed to adjust his trial strategy accordingly to challenge the state's proof on this issue. Denby's brief in support of certification lists the "question presented" as:

Under circumstances where trial counsel admitted that he would have considered a plea agreement rather than a jury trial if he had known the maximum penalty for the crime for which the petitioner was convicted by the jury, was the appellate court correct in affirming the habeas court's conclusions that trial counsel was not deficient in performance and the petitioner was not prejudiced by said performance?

Appellant's Br. [attached as Ex. E to Doc. #8] at 1. The next

page of the brief specifically identifies the failure to produce records of Denby's past drug use and failure to obtain and present expert testimony. Id. at 2 (recounting trial counsel's testimony at the habeas hearing that had counsel known the differing maximum penalties, he would have produced records and expert opinion as to Denby's drug dependency). The Connecticut Supreme Court denied certification without opinion on March 17, 1998. Denby v. Commissioner, 244 Conn. 909 (1998).

Denby filed his second state habeas petition on May 4, 1998, alleging ineffective assistance of habeas counsel and actual innocence of the charge (based on his claim that he was, in fact, drug dependent). The second petition was denied by the Superior Court and on appeal, Denby v. Commissioner of Correction, 66 Conn. App. 809 (2001), and Denby petitioned the Connecticut Supreme Court for certification, expressly raising ineffective assistance of habeas counsel and actual innocence by virtue of drug dependency. Petition for Certification [attached as Ex. I to Doc. #8] at 1. Certification was denied on January 3, 2002 without opinion. Denby v. Commissioner, 259 Conn. 908 (2002).

On July 10, 2000, Denby filed a third state habeas petition, which is still pending, alleging newly discovered

evidence related to a search and seizure issue that is not a subject of the § 2254 petition sub judice.

II. Discussion

Respondent has moved to stay or dismiss Denby's § 2254 petition, arguing that it is a "mixed petition" containing both exhausted and unexhausted claims, and thus must be either dismissed or stayed. See Rose v. Lundy, 455 U.S. 509 (1982); Zarvela v. Artuz, 254 F.3d 374 (2d Cir. 2001). While Respondent concedes that the ineffective assistance of habeas counsel and actual innocence claims have been properly exhausted, he argues that Denby's ineffective assistance of trial counsel claim was never presented to the Connecticut Supreme Court in the petition for certification following denial of the first state habeas petition.

A. Exhaustion Requirement

"Federal habeas relief is available to state prisoners only after they have exhausted their claims in state court." O'Sullivan v. Boerckel, 526 U.S. 838, 839 (1999) (citing 28 U.S.C. § 2254(b)(1), (c)). "Principles of exhaustion are premised upon recognition by Congress and the [Supreme] Court that state judiciaries have the duty and competence to

vindicate rights secured by the Constitution in state criminal proceedings." Williams v. Taylor, 529 U.S. 420, 436-437 (2000). Thus, "state prisoners must give the 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 845.

"To fulfill the exhaustion requirement, a petitioner must have presented the substance of his federal claims to the highest court of the pertinent state," Bossett v. Walker, 41 F.3d 825, 828 (2d Cir. 1994) (citations and quotations omitted), either on direct appeal or after one full round of state post-conviction proceedings, 2 Hertz & Liebman: Federal Habeas Corpus Practice & Procedure § 23.3b at 961; cf. Duncan v. Walker, 533 U.S. 167, 180 (2001). Presentation of the "substance" of a claim to the highest court of a state entails providing that court "with an opportunity to apply controlling legal principles to the facts bearing upon [the] constitutional claim." Picard v. Connor, 404 U.S. 270, 277 (1971) (internal quotation omitted). Exhaustion requires seeking discretionary review in the state supreme court of a judgment of the state intermediate appellate court. O'Sullivan, 526 U.S. at 845.

B. Analysis

Respondent arrives at the conclusion that the ineffective assistance of trial counsel claim presented in this § 2254 petition has not been exhausted by distinguishing between the ineffective assistance of trial counsel claim presented to the Connecticut Supreme Court and the ineffective assistance of trial counsel claim presented here. The former, by Respondent's reading, was a claim that trial counsel was ineffective for failing to understand the differing maximum penalties and failing to pursue a plea agreement, while the claim presented here is a claim that trial counsel was ineffective for failing to present more evidence on drug dependency at trial.

The Court concludes that the claims are actually the same. The first line of the petition addressing the factual basis of the claim reads "Trial counsel failure to know the law." [Doc. #1] at 5. Denby's brief in support of the petition includes seven explicit assertions that trial counsel did not understand the law, and it is sufficiently clear from the structure of the petition that the remaining points about trial counsel's failure to secure Denby's drug treatment records and an expert witness are part and parcel of Denby's claim: had trial counsel understood that a finding of non-drug

dependence would increase his maximum possible penalty, trial counsel would have challenged the prosecution's claim of non-drug-dependency; since trial counsel did not understand that there was a difference, little if any evidence was presented on this critical element of the state's case.

This same argument was squarely presented to the Connecticut Supreme Court in the petition for certification following the first habeas proceeding. Denby pointed to trial counsel's admission that he did not understand the law and argued that had counsel understood, the trial strategy would have changed. Explicit reference was made to the decision to go to trial rather than plead, and to counsel's failure to produce records and expert opinion, all of which were alleged to have resulted from his misunderstanding of the effect of a jury finding of non-drug dependence on the maximum possible sentence. With the issue having been timely presented to the Connecticut Supreme Court for its consideration, Denby has done all that he is required to do before commencing this § 2254 petition, and Respondent's motion is without merit.²

²If Denby does wish to pursue a separate equal protection claim, see supra note 1, he may move to amend his petition to include such a claim. Denby is cautioned, however, that this new claim would appear to have not been properly exhausted before the Connecticut courts, and amendment of his petition to include it would mandate dismissal of the petition without prejudice while Denby made attempts to exhaust the new ground.

III. Conclusion

Respondent's motion to stay or dismiss [Doc. #8] is DENIED, and Respondent's answer to the petition shall be filed within twenty days of the date of this ruling.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 6th day of May, 2003.