

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

EUGENE RUSSELL

:

:

v.

:

No. 3:00cv1116 (SRU)

:

JOHN ARMSTRONG

:

RULING ON MOTION TO DISMISS

Eugene Russell brought a federal habeas petition, pursuant to 28 U.S.C. § 2254, challenging his 1989 state court conviction on the ground that he was denied effective assistance of counsel. On August 9, 2002, the respondent moved to dismiss the petition for writ of habeas corpus on the grounds that Russell had failed to exhaust available state court remedies.

For the reasons set forth below, the motion to dismiss is denied as moot.

BACKGROUND

On June 30, 1989, after a jury trial, Russell was found guilty of assault in the first degree in violation of Connecticut General Statutes § 53a-59 and two counts of risk of injury to a minor in violation of Connecticut General Statutes § 53-21. State v. Russell, Docket No. CR8-83588 (Conn. Super. June 30, 1989). On the same day, in a consolidated case, Russell also was found guilty, by jury trial, of sexual assault in the first degree in violation of § 53a-70, sexual assault in the second degree in violation of § 53a-71 and risk of injury to a minor in violation of § 53-21. State v. Russell, Docket No.

CR8-87222 (Conn. Super. June 30, 1989). On August 2, 1989, Russell was sentenced to fifty years' incarceration.

Russell subsequently appealed his conviction to the Connecticut Appellate Court, claiming that: (1) his convictions for the crimes of sexual assault in the first degree and sexual assault in the second degree violated his right against being placed in double jeopardy; (2) his conviction of three counts of risk of injury to a minor violated his rights against being placed in double jeopardy; and (3) that the prosecutor's remarks during closing argument violated his right to a fair trial. The Connecticut Appellate Court affirmed Russell's convictions. State v. Russell, 25 Conn. App. 243, cert. denied, 220 Conn. 911 (1991).

On October 28, 1991, Russell filed a petition for writ of habeas corpus in state court. After an evidentiary hearing, the state habeas court dismissed the petition on August 29, 1996. Russell v. Warden, State Prison, 1996 WL 512620 (Conn. Super. Aug. 29, 1996). Russell appealed the decision of the state habeas court to the Connecticut Appellate Court. That appeal was dismissed. Russell v. Commissioner of Corrections, 49 Conn. App. 52, cert. denied, 247 Conn. 916 (1998). A petition to the United States Supreme Court for a writ of certiorari was denied on February 22, 1999. Russell v. Armstrong, 525 U.S. 1161 (1999).

On April 25, 2000, Russell filed a pro se petition for a writ of habeas corpus in federal district court, pursuant to 28 U.S.C. § 2254. On January 5, 2001, the respondent moved to dismiss the pro se petition on the grounds that it was untimely filed and that Russell failed to exhaust state remedies with respect to all of his claims. An evidentiary hearing was held on October 10, 2001, to determine whether the one-year statute of limitations set forth in 28 U.S.C. § 2244(d) should be equitably tolled.

Russell, then represented by court-appointed counsel, indicated to the court that he intended to file an amended petition, withdrawing any unexhausted claims. Hearing Trans., Oct. 10, 2001, p. 49-50.

On November 16, 2001, Russell, pursuant to 28 U.S.C. § 2254, filed an Amended Petition, eliminating certain of the claims alleged in his pro se petition. On March 1, 2002, this court denied the respondent's motion to dismiss the petition for failure to comply with the statute of limitations prescribed in 28 U.S.C. § 2244(d).

DISCUSSION

Pursuant to 28 U.S.C. § 2254, federal district courts have subject matter jurisdiction to hear “an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court.” 28 U.S.C. § 2254(a). Such relief, however, is available only where “the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A).

In his Amended Petition (Doc. #25), Russell raises a single claim – that his custody is unlawful because his counsel created a conflict of interest by breaching the duty of loyalty. However, in his Memorandum in Support of the Amended Petition for Writ of Habeas Corpus (Doc. #32), he discusses two claims. He first discusses the ineffective assistance of counsel claim raised in the Amended Petition. However, he also contends that the state trial court conducted an inadequate inquiry into the conflict of interest created by trial counsel's breach of the duty of loyalty.

The respondent moves to dismiss the petition for a writ of habeas corpus on the grounds that although it is raised only in a supporting memorandum, the inadequate inquiry claim is, functionally, a second habeas claim. Because Russell did not present this second claim to the state court, the

respondent argues, he has failed to exhaust available state remedies. Russell contends that the inadequate inquiry claim is actually part of his ineffective assistance of counsel claim, upon which all state court remedies have been exhausted. As such, Russell contends, the inadequate inquiry claim does not amend the petition to add an unexhausted claim, but rather, simply presents another argument to support of his ineffective assistance of counsel claim.

Russell's arguments are unpersuasive. A claim alleging ineffective assistance of counsel is fundamentally distinct from a claim that the state trial court failed to conduct an adequate inquiry into the issue of trial counsel's conduct and the ensuing conflict of interest. A claim of ineffective assistance of counsel is focused on the conduct of the attorney, whereas a claim alleging that a trial court failed to make an adequate inquiry of counsel's conduct is focused on the conduct of the court itself. Although they are related to the same conduct or actions -- trial counsel's breach of the duty of loyalty -- both claims are distinct and separable. Because Russell's claim regarding the trial court's inquiry is distinct from his ineffective assistance of counsel claim, the exhaustion requirements must be satisfied in order for this court to review that claim.

The exhaustion requirement "springs primarily from considerations of comity" between the federal and state judicial systems. Daye v. Att'y Gen. of New York, 696 F.2d 186, 191 (2d Cir. 1982) (en banc). By requiring exhaustion, federal courts recognize that state courts, "no less than federal courts, are bound to safeguard the federal rights of state criminal defendants." Id. Exhaustion requires a petitioner to present fairly the federal claim in state court. See Strogov v. Att'y Gen. of New York, 191 F.3d 188, 191 (2d Cir. 1999). "A petitioner has 'fairly presented' his claim only if he has 'informed the state court of both the factual and the legal premises of the claim he asserts in federal

court.” Dorsey v. Kelly, 112 F.3d 50, 52 (2d Cir. 1997) (quoting Daye, 696 F.2d at 191).

In this case, only Russell’s ineffective assistance of counsel claim has been exhausted at the state level. His claim regarding the trial court’s inquiry was not presented at the state level, and thus, is not eligible for federal habeas review.

The Second Circuit has held that “mixed” habeas petitions – that is, those containing both exhausted and unexhausted claims – may be treated in a variety of ways by federal habeas courts. Zarvela v. Artuz, 254 F. 3d 374, 380 (2d Cir. 2001). The court may either stay the proceedings on the exhausted claims pending state court disposition of the unexhausted claims, or dismiss the petition entirely. Id. A federal court, however, may not dismantle the petition by dismissing unexhausted claims, while keeping exhausted claims. Rose v. Lundy, 455 U.S. 509, 522 (1982) (“a district court must dismiss habeas petitions containing both exhausted and unexhausted claims.”). Alternatively, a federal habeas court could “send [the petitioner] back to state court or afford him the opportunity to abandon his unexhausted claims and proceed only with his exhausted claims.” Zarvela, 254 F. 3d at 378 (quoting Rose v. Lundy, 455 U.S. 509, 519-20 (1982)).

The court would choose this final option, but for the clear indication at page 10 of Russell’s Memorandum in Opposition to Respondent’s Motion to Dismiss (Doc. # 35) that he would rather omit the claimed error by the trial court than be required to exhaust that claim. “Petitioner does not wish to pursue any additional relief in the Connecticut courts and does not wish to stay these proceedings before the District Court.” Memo. at 10. Based on this statement and the court’s conclusion that Russell’s Memorandum in Support of the Amended Petition (Doc. # 32) seeks to raise an unexhausted claim of error by the trial court, that unexhausted claim is hereby dismissed as withdrawn. Accordingly,

the motion to dismiss (Doc. # 33) is denied as moot.

CONCLUSION

For the reasons stated above, the petition for writ of habeas corpus is DISMISSED as withdrawn to the extent that it raises a claim of error by the trial court. The respondent shall file his brief on the merits of the petition within thirty days of entry of this ruling.

It is so ordered.

SO ORDERED this _____ day of June 2003 at Bridgeport, Connecticut.

Stefan R. Underhill
United States District Judge