

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TERRILLE D. ELLIS,

Petitioner,

v.

WARDEN, ROSS
CORRECTIONAL INSTITUTION,

Respondent.

Case No. 2:17-cv-415

CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Norah McCann King

ORDER

This is an action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On August 16, 2017, the Magistrate Judge recommended that Respondent's *Motion to Dismiss* (Doc. 5) be granted, that Petitioner's *Motion to Stay* (Doc. 6) be denied, and that this action be dismissed without prejudice as unexhausted unless Petitioner notifies the Court, within 14 days, that he wishes to delete his unexhausted claim and proceed only on his remaining, exhausted, claim. *Report and Recommendation* (Doc. 8). Petitioner objects to that recommendation. *Objection* (Doc. 14). Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review.

Petitioner challenges his conviction, pursuant to his guilty plea in the Franklin County Court of Common Pleas, on a charge of aggravated murder with a firearm specification. The *Petition* alleges that the trial court violated Ohio Criminal Rule 11 and due process when the trial court accepted his guilty plea (claim one), and that his guilty plea was not knowing, intelligent or voluntary because his counsel was ineffective in advising Petitioner that he would eligible for early release after 13 years (claim two). The Magistrate Judge reasoned that claim two was unexhausted because Petitioner had not filed an appeal from the trial court's June 27, 2017, denial of Petitioner's fourth motion to withdraw his guilty plea. *See Rose v. Lundy*, 455 U.S. 509

(1982) (Federal courts may not entertain “mixed petitions,” *i.e.*, petitions that present both exhausted and unexhausted claims). The Magistrate Judge also recommended the denial of Petitioner’s request to stay this action pending exhaustion of his claim two, reasoning that Petitioner cannot establish good cause for having failed to pursue a delayed appeal from the denial of his fourth motion to withdraw his guilty plea and because any such appeal would likely fail. *Report and Recommendation* (Doc. 8). The Magistrate Judge therefore recommended that the action be dismissed, without prejudice, unless Petitioner expressed his intention to proceed on only his first, exhausted, claim. *Id.*

Petitioner objects to that recommendation and represents that he has now filed an appeal from the trial court’s June 27, 2017, denial of his fourth motion to withdraw his guilty plea. *Objection* (Doc. 14, PageID# 257). Petitioner therefore again requests a stay of proceedings pending exhaustion of claim two in the Ohio courts. However, the docket of the Franklin County Court of Appeals indicates that, on October 6, 2017, the appellate court *sua sponte* dismissed Petitioner’s appeal for failure to file a brief within the time required by Rule 18(C) of the Ohio Rules of Appellate Procedure, and for failure to respond to a notification from the appellate court that the time for filing the brief had expired. *State v. Ellis*, Case No. 17AP-527 (Ct. App. 10th Dist., Oct. 6, 2017), *Journal Entry of Dismissal*. Thus, Petitioner’s claim two may no longer be unexhausted, although it may be procedurally defaulted. Moreover, and for the same reason, the Court is not persuaded that a stay of proceedings is warranted under *Rhines v. Weber*, 544 U.S. 269 (2005).

Under these circumstances, and in light of the new information provided by Petitioner, Petitioner’s *Objection* (Doc. 14) is **GRANTED**. The Court **DECLINES** to adopt the *Report and Recommendation* (Doc. 8).

Respondent's *Motion to Dismiss for Failure to Exhaust* (Doc. 5) is **DENIED**;
Petitioner's *Motion to Stay* (Doc. 6) is **DENIED**.

Respondent is **DIRECTED** to file a response to the *Petition* in accordance with the Rules Governing Section 2254 Cases in the United States District Courts within 45 days. Petitioner may have 14 days thereafter to file a traverse.

IT IS SO ORDERED.

10-17-2018
DATE


EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE