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

DOMINIQUE LEE MOFFATT, Petitioner, v. MICHAEL OVERMYER, et al., Respondents.	)))))))	Civil Action No. 16-292 Erie Magistrate Judge Susan Paradise Baxter

OPINION[1]

Dominique Lee Moffatt (the "Petitioner") is a state prisoner. He has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1). The Respondents have filed a motion in which they contend that this case should be dismissed because the Petitioner is exhausting his remedies in state court. (ECF No. 6). For the reasons set forth below, the Respondents' motion to dismiss is granted, the petition is dismissed without prejudice, and a certificate of appealability is denied. Additionally, the Petitioner's motion for appointment of counsel (ECF No. 11) is denied.

A. Relevant Background

On November 12, 2014, in the Court of Common Pleas of Erie County (the "trial court") at Criminal Docket 46 of 2014, a jury found the Petitioner guilty of numerous crimes, including robbery, conspiracy to commit robbery, and terroristic threats. Garrett A. Taylor, Esquire, represented him. On January 27, 2015, the trial court sentenced the Petitioner to an aggregate term of imprisonment of 10-20 years. The Petitioner did not file a direct appeal with the Superior Court of Pennsylvania.

On or around October 29, 2015, the Petitioner filed with his trial court a *pro se* collateral motion for relief from his judgments of sentence pursuant to Pennsylvania's Post Conviction Relief Act

[1] In accordance with the provisions of 28 U.S.C. § 636(c)(1), the parties have voluntarily consented to have a U.S. Magistrate Judge conduct proceedings in this case, including entry of a final judgment.

("PCRA"), 42 Pa.C.S. § 9541 *et seq.* in which he alleged, *inter alia*, that Attorney Taylor provided him with ineffective assistance for failing to file a direct appeal. The trial court appointed new counsel, William J. Hathaway, Esquire, to represent the Petitioner. On April 28, 2016, it granted the PCRA petition and reinstated the Petitioner's right to file post-sentence motions and a direct appeal with the Superior Court. (See Criminal Docket Sheet, ECF No. 6-1 at 10-11).

The trial court subsequently denied the Petitioner's post-sentence motion and the Petitioner, through Attorney Hathaway, filed a direct appeal with the Superior Court. (Id. at 12-13). That appeal is pending before the Superior Court at docket number 997 WDA 2016. (Id. at 13-14).

On or around December 1, 2016, the Petitioner filed with this Court his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). On February 10, 2017, the Respondents filed their motion to dismiss (ECF No. 6), and on or around March 27, 2017, the Petitioner filed his reply (ECF No. 10) and a motion for appointment of counsel (ECF No. 11).

B. Discussion

When a state prisoner seeking federal habeas relief is at the same time exhausting his remedies in state court, the general rule is that the federal court should dismiss the case before it without prejudice. See, e.g., Rose v. Lundy, 455 U.S. 509 (1982). That rule applies in this case, since the trial court reinstated the Petitioner's direct appeal rights *nunc pro tunc* and he is currently exhausting his remedies in the Superior Court.

The issue of staying and abeying federal habeas cases is a fairly recent development necessitated by the interaction of the one-year statute of limitations enacted by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d)(2) and the pre-AEDPA rule set forth in Rose v.

Lundy that required that federal courts dismiss without prejudice habeas petitions that contain unexhausted claims. Rhines v. Weber, 544 U.S. 269, 275 (2005) ("As a result of the interplay between AEDPA's 1-year statute of limitations and Lundy's dismissal requirement, petitioners who come to federal court with 'mixed' petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims."); see also Heleva v. Brooks, 581 F.3d 187, 189-90 (3d Cir. 2009). In Rhines v. Weber, the Supreme Court held that in order to avoid predicaments that may arise in attempting to comply with AEDPA's statute of limitations while at the same time exhausting claims in state court, a state prisoner may file a "protective" habeas petition in federal court and ask the district court to stay and abey the federal habeas proceeding until state remedies are exhausted. 544 U.S. at 276-78; see also Pace v. DiGuglielmo, 544 U.S. 408, 416-17 (2005); Ellison v. Rogers, 484 F.3d 658, 662-63 (3d Cir. 2007); Crews v. Horn, 360 F.3d 146 (3d Cir. 2004).

There is no reason for this Court to stay this case instead of dismissing it without prejudice. Because the trial court reinstated the Petitioner's direct appeal rights *nunc pro tunc*, AEDPA's limitations period has not started to run. Jimenez v. Quarterman, 555 U.S. 113, 121 (2009) ("We hold that, where a state court grants a criminal defendant the right to file an out-of-time direct appeal during state collateral review, but before the defendant has first sought federal habeas relief, his judgment is not yet 'final' for purposes of § 2244(d)(1)(A). In such a case, 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review' must reflect the conclusion of the out-of-time direct appeal, or the expiration of the time for seeking review of that appeal.") Therefore, although the Court has the discretion to issue a stay and abeyance in the appropriate habeas case, the Petitioner has failed to demonstrate why his case is one of those in which the Court should exercise that discretion.

As for the Petitioner's motion to appoint counsel (ECF No. 11), he has no constitutional right to counsel in this habeas proceeding, Pennsylvania v. Finley, 481 U.S. 551, 555 (1987), and, because this is a non-capital case, he has no statutory right to counsel either. See 18 U.S.C. § 3599(a)(2). Whether to appoint counsel in this action lies within the discretion of the Court (unless there is an order for an evidentiary hearing, see Rule 8 of the Rules Governing Section 2254 Cases), and there is no reason for the Court to exercise that discretion at this time.

Finally, jurists of reason would not find it debatable whether this case should be dismissed without prejudice. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Accordingly, a certificate of appealability is denied.

An appropriate Order follows.

/s/ Susan Paradise Baxter
Dated: April 5, 2017 SUSAN PARADISE BAXTER
United States Magistrate Judge