

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NATHAN McCLURE,)	
)	
<i>Petitioner</i>)	
)	
v.)	Civil No. 97-239-P-H
)	
SUPERINTENDENT, MAINE)	
CORRECTIONAL CENTER,)	
)	
<i>Respondent</i>)	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The *pro se* petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with his conviction, based upon a guilty plea, in the Maine Superior Court (Cumberland County) for being a habitual motor vehicle offender and operating a motor vehicle under the influence of alcohol. The judgment of conviction on these charges was entered on September 13, 1996. Petition (Docket No. 1) at 2. The petitioner, who is in custody, asserts that he was deprived of the effective assistance of counsel and that his plea was unlawfully induced or not made voluntarily. I recommend that the court dismiss the petition.

I. Background

The petitioner pleaded guilty to two charges in the Maine Superior Court (Cumberland County) on July 12, 1996: operating a motor vehicle after habitual offender revocation of his driver's license, a violation of 29-A M.R.S.A. §2557; and operating a motor vehicle under the influence of

alcohol, a violation of 29-A M.R.S.A. § 2411. Judgment and Commitment, *State v. McClure*, Docket No. CR 96-518, Superior Court (Cumberland County), at 1. He was sentenced on the first count to a term of 30 months imprisonment, with all but 150 days suspended, followed by a 3-year term of probation; on the second count, he was sentenced to a concurrent term of 360 days, with all but 90 days suspended, followed by a 2-year term of probation, a \$1,000 fine and an 18-month suspension of the right to apply for or obtain a license to operate a motor vehicle. *Id.* at 1-2. The sentence on the first count was modified on September 13, 1996 by suspending all but 120 days of the petitioner's prison term. Amended Judgment and Commitment, *State v. McClure*, Docket No. CR 96-518, Superior Court (Cumberland County), at 1.

McClure did not appeal. His probation was revoked on December 11, 1996. Revocation of Probation, *State v. McClure*, Docket No. CR 96-518, Superior Court (Cumberland County). On March 5, 1997 McClure filed a motion to correct or reduce his sentences pursuant to M.R.Crim.P. 35, which was denied. Motion to Correct or Reduce Sentences Pursuant to Rule 35, *State v. McClure*, Docket No. CR 96-518, Superior Court (Cumberland County) at [1], [4]. McClure did not appeal. On March 28, 1997 McClure filed a petition for post-conviction review in state court, in which he stated as grounds that (1) "I feel I was discriminated against by Judge Roland Cole [who] refused to release me after a 72 hour period against the wishes of my atty;" (2) "I feel I was punished to [sic] severely for this crime. . . . I was sentenced again on additional charges of the same nature and received 4 months jail time;" and (3) "I also feel that being heard on domestic violence issues along with H.O. charges by a female judge may have swayed the amount of time given me." Petition for Post-Conviction Review, *McClure v. State*, Docket No. CR-97-558, Superior Court (Cumberland County), at 1, 3-4. This petition was dismissed. Post-Conviction Summary Dismissal Order,

McClure v. State, Docket No. CR-97-558, Superior Court (Cumberland County) at 2. McClure did not seek to appeal from this disposition.

McClure filed this action on July 16, 1997.

II. Analysis

McClure asserts two grounds for relief in his petition to this court. The first, under the heading “Denial of Effective Assistance of Counsel,” states, in its entirety, “My attorney . . . was inexperienced and somewhat incompetent. He allowed illegal testimony to be presented without objection. I was confused and did not understand the proceedings and he seemed unable to enlighten me.” Petition at 5. The second ground, under the heading “Conviction obtained by plea of guilty unlawfully induced or not made voluntarily with understanding,” states, in its entirety, “I plead guilty based on a plea bargain. The judge refused to enter the plea bargain. I feel that I was coerced while under duress and did not understand the consequences.” *Id.* These statements provide little guidance for the State in responding to the merits of the petition or for the court, were it to rule on the merits of the petition.

The State argues that these claims are procedurally barred due to McClure’s failure to exhaust remedies available to him in state court. Section 2254(b)(1) provides that an application for a writ of habeas corpus shall not be granted unless it appears that “the applicant has exhausted the remedies available in the courts of the State.” An applicant shall not be deemed to have exhausted the remedies available in state court if he has the right under state law to raise, “by any available procedure,” the question presented in the petition. 28 U.S.C. § 2254(c). A claim of ineffective assistance of counsel must be addressed in a state post-conviction review proceeding. *State v.*

Nichols, 1997 ME 178, 1997 WL 437235, slip op. at 3 (Aug. 5, 1997). To the extent that McClure's second stated ground for relief is based on an alleged violation of a plea bargain, such a claim is also properly raised by way of a post-conviction review proceeding. *See, e.g., State v. Dalot*, 615 A.2d 1161, 1161 (Me. 1992). The same is true of a claim that a guilty plea was involuntary. *Wellman v. State*, 588 A.2d 1178, 1179 (Me. 1991).

McClure's prior state-court post-conviction review petition does not appear to raise either of the issues raised in his petition to this court. He is not barred from bringing another post-conviction review petition in state court. 15 M.R.S.A. §§ 2121-32. Therefore, this court may not consider his petition for a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S. 477, 481 (1994).

III. Conclusion

For the foregoing reasons, I recommend that the petition for a writ of habeas corpus be **DISMISSED** without a hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 1st day of October, 1997.

David M. Cohen
United States Magistrate Judge