

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

FRED ODELL,

Petitioner,

ORDER

v.

02-C-560-C

JON LITSCHER, Secretary, Wisconsin
Department of Corrections,

Respondent.

Fred Odell is presently serving parole in Wisconsin after being released from a three-year sentence for failing to report to jail to serve a 30-day sentence imposed in an earlier case. He has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner is challenging his October 18, 1999 conviction and sentence, which was imposed after a bench trial in the Circuit Court for Dane County on October 18, 1999. He contends that the conviction and sentence violate the due process clause of the United States Constitution because he was convicted on the basis of insufficient evidence. Also, petitioner contends that the original 30-day jail sentence upon which his conviction was based was unconstitutional because the trial court ordered that sentence to begin before a previous sentence had expired.

In a separate order, the magistrate judge has granted petitioner's application for leave to proceed *in forma pauperis*. However, I am dismissing the petition because it plainly appears

from the documents attached to the petition that petitioner has not exhausted his state court remedies as required by 28 U.S.C. § 2254(b)(1)(A). In O’Sullivan v. Boerckel, 526 U.S. 838 (1999), the United States Supreme Court held that in order to comply with the exhaustion requirement, a state prisoner “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.” Id. at 845. This means that state prisoners must seek discretionary review of their claims in the state’s highest court “when that review is part of the ordinary appellate review procedure in the State” Id. at 847.

The documents that petitioner attached to his petition show that he challenged his conviction by means of a postconviction motion pursuant to Wis. Stat. § 974.06. The trial court denied the motion, and the court of appeals affirmed the trial court on December 27, 2001. Petitioner then missed his deadline for filing a petition for review with the Wisconsin Supreme Court. On January 31, 2002, petitioner submitted a petition for review and a letter in which he asked for an extension of time within which to file his petition, explaining that the court of appeals had mailed his copy of its decision to the wrong address. On February 5, 2002, the Wisconsin Supreme Court issued an order denying petitioner’s motion for an extension of time, noting that the statutory 30-day period for filing a petition for review may not be enlarged. However, the court stated that “[t]o the extent defendant-appellant is claiming that a clerical error on the part of the court of appeals caused a delay in his receiving a copy of the court of appeals’ order, defendant-appellant may have a remedy by

means of filing a petition for writ of habeas corpus. See State ex rel. Fuentes v. Court of Appeals, 225 Wis. 2d 446, 593 N.W. 2d 48 (1999).” Pet. for Writ of Habeas Corpus, exh. K.

28 U.S.C. § 2254(c) provides that “[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.” “[T]he pertinent question is not whether the state court would be inclined to rule in the petitioner's favor, but whether there is any available state procedure for determining the merits of petitioner's claim.” White v. Peters, 990 F.2d 338, 342 (7th Cir. 1993). Although petitioner asserts conclusorily that the state’s process is “ineffective” to protect his federal constitutional rights, from the Wisconsin Supreme Court’s February 5, 2002 order, it appears that petitioner does have the right to raise his claims by filing a writ of habeas corpus with the Wisconsin Supreme Court. State ex rel. Fuentes, 225 Wis. 2d 446, 593 N.W.2d 48. Accordingly, I am unable to conclude that petitioner has satisfied the exhaustion requirement. For that reason, I must dismiss the petition.

ORDER

IT IS ORDERED that, pursuant to Rule 4 of the Rules Governing Section 2254 Cases, petitioner Fred Odell's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is dismissed without prejudice for his failure to exhaust his state court remedies.

Entered this 4th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge