

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

JACKIE THOMAS,

Petitioner,

ORDER

v.

00-C-438-C

JEFFREY ENDICOTT, Warden, Columbia
Correctional Institution,

Respondent.

Petitioner Jackie Thomas, currently incarcerated at the Columbia Correctional Institution, is serving a forty year sentence imposed by the Circuit Court for Milwaukee County, Wisconsin, after pleading guilty to charges of first degree reckless homicide and possession of a short-barreled shotgun. Petitioner has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, raising numerous challenges to his conviction. He has paid the filing fee.

Petitioner raises the following claims in this court: 1) he did not understand most of the questions asked of him at his sentencing hearing but went along because his attorney told him to agree with everything so that the court might be more inclined to go easy on him; 2) police beat him at the time of his arrest; 3) his post-arrest statements should have been suppressed because the police never provided a Miranda advisal and because the police threatened him

with a more serious charge of murder if they thought he was lying; 4) his plea was not knowing and voluntary; and 5) police seized the short-barreled shotgun illegally from the house in which they arrested petitioner.

Although petitioner's second claim is serious, it is not one susceptible to habeas relief under § 2254 because it does not challenge the fact or duration of petitioner's custody. See Moran v. Sondalle, ___ F.3d ___, 2000 WL 804551, Case No. 00-1190 (7th Cir. 2000), slip op. At 5-6. Accordingly, he may not proceed on it in this § 2254 petition.

A more general concern is petitioner's failure to appeal his conviction to the Wisconsin Supreme Court, which he is required to do under § 2254(b)(1). Before petitioner may proceed with a § 2254 petition in this court, he must exhaust his state court remedies. 28 U.S.C. § 2254(b)(1)(A); see Moleterno v. Nelson, 114 F.3d 629, 633 (7th Cir. 1997) (citing cases). Principles of comity require that a habeas petitioner present his federal constitutional claims initially to the state courts in order to give the state the “opportunity to pass upon and correct alleged violations of its prisoners' federal rights.” Duncan v. Henry, 513 U.S. 364, 365 (1995) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971) (internal quotation marks omitted)). Claims are exhausted when they have been presented to the highest state court for a ruling on the merits of the claims or when state remedies no longer remain available to the petitioner. O'Sullivan v. Boerckel, ___ U.S. ___, 119 S. Ct. 1728, 1732-33 (1999); Engle v. Isaac, 456 U.S. 107, 125 n. 28, 1570 n. 28 (1982).

A petitioner is excused from the exhaustion requirement if there is an absence of state corrective processes or if circumstances render state processes ineffective to protect a petitioner's rights. See § 2254(b)(1)(B)(i) and (ii). Put another way, “an 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.” 28 U.S.C. § 2254(c).

Petitioner asserts that he filed a direct appeal of his conviction with the Wisconsin court of appeals, which accepted his appellate lawyer’s no-merit report and affirmed the conviction. Petitioner admits that he did not file a petition for review with the Wisconsin Supreme Court, but he asserts that this was because he was unaware that he had a right to petition for such review and his lawyer never informed him that he had this right. Petitioner proffers that his lawyer’s failure to inform him of his right to petition for review violated state law. See Wis. Stat. § 809.32(3) (“In the event the court of appeals finds that further appellate proceedings would be frivolous and without any arguable merit, the court of appeals shall affirm the judgment of conviction and the denial of any postconviction motion and relieve the attorney of further responsibility in the case. The attorney shall advise the defendant of the right to file a petition for review to the supreme court under s. 809.62.”).

Petitioner asserts that he has now missed the deadline for filing a petition for review.

In light of petitioner’s explanation for his default and the mandatory language of § 809.32(3), there may be an avenue of relief available to him in the state courts. Defendants

in Wisconsin who claim that they received ineffective assistance of counsel on appeal may file a petition for habeas corpus in the court of appeals pursuant to State v. Knight, 168 Wis. 2d 509, 484 N.W. 2d 540 (1992) (claims of ineffective assistance of appellate counsel may be brought in court of appeals by petition for writ of habeas corpus). The language of Wis. Stat. § 809.32(3) suggests that appellate lawyers who file no merit reports have one final duty before they are relieved of their responsibility as counsel: to advise the defendant of his right to petition the supreme court for review. Petitioner's claim that his appellate attorney abdicated this statutory duty appears to be a claim that could be considered by the court of appeals in a Knight petition.

Alternatively, because the remedy for counsel's alleged omission would be to allow the petitioner to file an untimely petition for review in the supreme court, petitioner may instead have to file a petition for a writ of habeas corpus in the Wisconsin Supreme Court pursuant to State ex rel. Schmelzer v. Murphy, 201 Wis. 2d 246, 255-56, 548 N.W. 2d 45 (1996). In that case, the Wisconsin Supreme Court held that a defendant's prejudicial deprivation of adequate representation on appeal—specifically, his lawyer's failure to file a petition for review within the 30-day deadline prescribed by Wis. Stat. § 809.62—was properly remedied by filing a petition for habeas corpus in the state supreme court, which could allow the late filing of a petition for review. In determining that it had the power to grant the relief sought by the defendant, the court first concluded that Wis. Stat. §§ 809.32(4) and 977.05(4)(j) together created a statutory right to counsel in petitions for review, provided that counsel does not determine the

appeal to be without merit. Id. at 253; 548 N.W. 2d at 48. Observing that “[w]here a statutory right to counsel exists . . . the right includes the right to effective counsel,” the court next concluded that Schmelzer’s counsel had performed deficiently in failing to file a petition for review within the 30-day deadline, and that habeas corpus was the proper vehicle by which to relieve the defendant of any prejudice resulting from counsel’s deficient performance. Id. at 253-255, 548 N.W. 2d at 48. The court suggested that in many cases prejudice could be presumed from counsel’s failure to file a petition for review on time; however, the court found it unnecessary to decide that question because it was able to review the untimely petition that had been filed by Schmelzer’s counsel and to conclude that it would not have granted the petition even if it had been filed on time. Id.

Although it is unclear whether the Wisconsin courts would treat petitioner’s claim that his lawyer failed to inform him that he could file a petition for review in the same way that they treated Schmelzer’s claim that his lawyer missed the deadline for filing a petition, it appears that petitioner could at least *raise* his claim via a Schmelzer petition, or alternatively, a Knight petition. Accordingly, I conclude that petitioner has not shown that he has exhausted his state court remedies. See 28 U.S.C. § 2254(c). If, as petitioner alleges, an error was committed that led to the erroneous deprivation of petitioner’s appellate rights under Wisconsin law, the Wisconsin courts are better able to make that determination and to fashion an appropriate remedy, if necessary.

Because there appear to be state court remedies that are available to petitioner, I am dismissing his claims without prejudice to allow him to seek redress in the state courts. This has implications for the limitations period in the event petitioner returns to this court after exhausting his state court remedies, making necessary a few comments regarding timing. As of now, assuming the dates set forth in his petition are correct, petitioner's one-year period in which to file a habeas petition under § 2244(d)(1) began running on April 6, 2000, the day after his direct review concluded with the expiration of his 30-day time period for filing a petition for review with the State Supreme Court. If petitioner succeeds in convincing the state courts that he should have a new opportunity to file a petition for review with the Wisconsin Supreme Court, any part of the one-year statute of limitations under § 2244(d)(1) that has run will effectively be restored, meaning that petitioner would have one full year from whenever he concludes the direct review process in which to file a federal habeas petition. In other words, petitioner would get a "do over."

If, on the other hand, petitioner does not succeed in getting his direct review reinstated, then the habeas clock will not start over. However, any petition that he files in the state courts pursuant to Knight or Schmelzer relating to his appellate lawyer's alleged failure to inform him of his right to file a petition for review shall be deemed to be a "properly filed application for State post-conviction or other collateral review" for tolling purposes under § 2244(d)(2).

ORDER

It is ORDERED that claim 2 of petitioner Jackie Thomas's petition for a writ of habeas corpus is DISMISSED WITH PREJUDICE because it does not raise a claim that would entitle petitioner to habeas corpus relief. The remaining claims in the petition are DISMISSED WITHOUT PREJUDICE for petitioner's failure to exhaust his state court remedies. The Clerk of Court is directed to enter judgment closing this case.

Entered this 18th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge