

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

THOMAS W. REIMANN,

Petitioner,

ORDER

v.

00-C-441-C

PHIL KINGSTON, Warden,
Jackson Correctional Institution

Respondents.

Petitioner Thomas W. Reimann has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in which he challenges a 1990 judgment of the Circuit Court for Dane County convicting him of drug and firearm charges. He has paid the five dollar filing fee.

Petitioner alleges that his trial lawyer coerced him into pleading no contest to the charges and failed to file a motion to suppress incriminating statements made by petitioner. Petitioner also alleges that one of the officers who arrested him falsely testified that he did not strip search petitioner, but petitioner does not specify the nature of the proceeding in which the officer testified nor explain why the officer's alleged testimony amounts to a constitutional violation cognizable under § 2254. See United States v. Brack, 188 F.3d 748, 758-59 (7th Cir.

1999)(the fact of a strip search does not, by itself, violate the Fourth Amendment, even if it is conducted in violation of state statute).

On August 10, 2000, this court directed petitioner to supplement his petition by reporting whether he had sought review by the Wisconsin Supreme Court of the appellate court's denial of petitioner's motion for postconviction relief. *See* Dkt. 2. This was important both for exhaustion purposes and for computing when the statute of limitations began to run.

On August 23, 2000, petitioner responded that he had filed a petition for review with the Wisconsin Supreme Court, but “never received a response from them.” *See* Dkt. 3. Petitioner suspects that the mail room at his institution is “losing” his mail, perhaps on purpose; petitioner observes that “if the Wisconsin Supreme Court said they never received anything from me it doesn't surprise me. But I did file a Petition for Review.” *Id.*

This court has no independent means to determine whether the Wisconsin Supreme Court ever received petitioner's petition for review. The only way to proceed is to take petitioner at his word and require a response from the state. If the state asserts, and can establish, that the supreme court never received a petition for review from petitioner, then petitioner is essentially out of luck: this court will dismiss his petition for having missed the statute of limitations. Even if petitioner could prove that his institution's mail room mishandled his letter to the supreme court, he would have to present his evidence to that court and seek

leave to file a late petition for review. Absent such relief, this court would make its decisions from the record as it currently exists and dismiss the petition as untimely.

If, on the other hand, the state discovers that the supreme court did in fact receive petitioner's petition for review, then this court will toll additional time as necessary.

Because petitioner has paid the filing fee, it is his obligation to serve the state by mailing a copy of his petition via certified mail to Warden Kingston and to the Wisconsin Attorney General.

ORDER

It is ORDERED that petitioner's claim for relief on the ground that the officer who strip searched him denied performing such a search is DISMISSED for failure to state a claim.

FURTHER, IT IS ORDERED that petitioner may proceed on his two claims of ineffective assistance of trial counsel. The state shall file a response to this petition not later than twenty days from the date of service of the petition, showing cause, if any, why this writ should not issue. The state shall advise the court whether it concedes state court exhaustion of the claims raised in the petition, and if not, whether the state is willing to waive exhaustion in order to obtain a decision on the merits.

If the state claims that petitioner has not exhausted his state court remedies and it is not willing to waive the exhaustion requirement, or if the state claims that petitioner has procedurally defaulted by missing the statute of limitations or for some other reason, then the

state should file a motion to dismiss (along with a brief and any necessary supporting documents) within its twenty day deadline. If the state chooses this course, then no formal response or answer to the petition is necessary until the motion to dismiss is resolved.

Petitioner shall have 20 days following service of any such motion within which to file and serve his responsive brief and any supporting documents. The state shall have ten days following service of the response within which to file a reply.

If the state wishes to respond on the merits, then within the twenty day deadline the state must file and serve not only its substantive legal response to petitioner's claims, but also all documents, records and transcripts that commemorate the findings of fact or legal conclusions reached by the state courts at any level relevant to petitioner's claims. The state must also file and serve any additional portions of the record that are material to deciding whether the legal conclusions reached by state courts on the claim were unreasonable in light of the facts presented. *See* 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within the twenty day period allowed for the filing of the response, respondent must advise the court when such papers will be filed.

Petitioner may have 20 days thereafter within which to file and serve a substantive reply to the state's response.

Entered this 24th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge