

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

RITCHIE DUMER,

Petitioner,

ORDER

v.

03-C-0212-C

DARREN SWENSON, Warden, Prairie
Correctional Facility,

Respondent.

Ritchie Dumer, a Wisconsin inmate incarcerated at the Prairie Correctional Facility in Appleton, Minnesota, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is in custody pursuant to an August 6, 1985 judgment and conviction in the Circuit Court for Dane County for two counts of attempted second-degree sexual assault, two counts of false imprisonment, one count of battery and one count of aggravated battery, all as a habitual criminal. Petitioner contends that he is in custody in violation of the laws or Constitution of the United States. Specifically, he contends that his rights to due process were denied when the court sentenced him as a repeat offender in the absence of an admission by him or proof from the state that the repeater statute applied.

Because the petition and its attachments show plainly that petitioner is not entitled to relief, I am dismissing the petition summarily pursuant to Rule 4 of the Rules Governing Section 2254 Cases. The following facts are drawn from the petition and its attachments.

PROCEDURAL HISTORY

On February 7, 1985, petitioner was charged with multiple felony counts and as a habitual criminal pursuant to Wis. Stat. § 939.62 (1985-86). Petitioner and the State of Wisconsin subsequently entered into an agreement in which petitioner agreed to enter a plea of no contest. Under the agreement, petitioner was required to stipulate that he was a “repeater” within the meaning of Wis. Stat. § 93.62. The court accepted petitioner’s no contest plea and on August 6, 1985, entered judgment of conviction against him. Petitioner was convicted of two counts of attempted second-degree sexual assault, two counts of false imprisonment, one count of battery and one count of aggravated battery, all as a habitual criminal.

Petitioner did not file a direct appeal of his conviction under Wis. Stat. § 809.30. However, on August 23, 1993, petitioner filed a *pro se* post-conviction motion in the state circuit court. Petitioner sought to withdraw his guilty pleas on the ground that 1) his trial counsel was ineffective when he withheld exculpatory evidence from petitioner and when he failed to undertake an adequate investigation prior to the plea hearing; and 2) petitioner’s pleas were not knowingly and voluntarily entered. The trial court construed the motion as a motion for post-conviction relief under Wis. Stat. § 974.06. After an evidentiary hearing, it denied the motion.

Petitioner appealed. In addition to the claims he raised in the trial court, petitioner alleged that his appellate counsel was ineffective for failing to file a direct appeal of his

conviction or a “no merit” brief. In an order issued August 10, 1995, the court of appeals affirmed the trial court’s denial of petitioner’s post-conviction motion. It also rejected petitioner’s claim of ineffective assistance of counsel, finding that even if petitioner’s appointed attorney had acted improperly by not filing an appeal or a no merit report, petitioner had not been prejudiced because he had already had the equivalent of a direct appeal insofar as the court had fully addressed his arguments in favor of plea withdrawal. The Wisconsin Supreme Court denied petitioner’s petition for review on October 17, 1995.

On or about February 18, 1997, before the grace period for filing a federal habeas petition expired, petitioner filed an application for a writ of habeas corpus in the federal district court in the Eastern District of Milwaukee. See Newell v. Hanks, 283 F.3d 827, 833 (7th Cir. 2002) (prisoners whose convictions became final before April 24, 1996, the effective date of the Anti-Terrorism and Effective Death Penalty Act, had until April 24, 1997, to file § 2254 petition in federal court). Petitioner challenged his 1985 conviction on the ground that his plea of no contest was not knowingly and voluntarily made; his trial lawyer was ineffective for failing to adequately investigate the case and for entering into a plea agreement without petitioner’s knowledge; and his appellate lawyer was ineffective. In a decision dated August 25, 1997, the district court denied petitioner’s first two claims on the merits, finding that petitioner failed to establish that the state courts’ adjudication of those claims was unreasonable under 28 U.S.C. § 2254(d). Dumer v. Berge, 975 F. Supp. 1165, 1168-71 (E.D. Wis. 1997). However, it found that the manner in which the state

court of appeals had resolved petitioner's ineffective assistance of appellate counsel claim violated Supreme Court precedent. Id., at 1172. Specifically, the court found that in requiring petitioner to have shown that he was prejudiced by his appellate lawyer's alleged failure to file an appeal or no merit report, the court of appeals had disregarded Penson v. Ohio, 488 U.S. 75 (1988), which held that prejudice is presumed in such circumstances. Id. Accordingly, the court granted the writ conditionally, directing the state to release petitioner unless it provided him with a fresh appeal within 60 days. Id., at 1173.

On November 17, 1997, the Wisconsin Court of Appeals issued an order reinstating petitioner's rights to a direct appeal. A lawyer was appointed to represent petitioner. Counsel filed a no merit report pursuant to Wis. Stat. § 809.32 and *Anders v. California*, 386 U.S. 738 (1967), in which he identified only ineffective assistance of trial counsel as a potential issue for appeal. Petitioner was served with a copy of the report but elected not to respond. On November 9, 1998, the court of appeals issued an opinion disposing of the case summarily. The court rejected the ineffective assistance of trial counsel claim on grounds of claim preclusion, noting that the federal district court had addressed the claim on its merits in the federal habeas action and that that ruling stood as the "law of the case." From its independent review of the record, the court concluded there were no other issues of arguable merit. Accordingly, it discharged appointed counsel and affirmed the conviction. See State v. Dumer, 98-0955-CR-NM, (Ct. App. Nov. 9, 1998) (unpublished opinion) (copy attached to Petition).

It appears that petitioner did not petition the Wisconsin Supreme Court for review of the court of appeals' decision. On January 21, 2001, petitioner filed a new postconviction motion in the Circuit Court for Dane County in which he contended for the first time that his conviction as a repeater was invalid because of defects in the plea colloquy. In an order entered February 14, 2001, the circuit court denied the motion. As an initial matter, it found that although petitioner's motion was successive, his claim that his repeater sentence was faulty fell within an exception to the statutory bar against successive postconviction motions. Addressing the merits, the court reviewed the record and found that it showed conclusively that, contrary to petitioner's assertions in his motion, he understood the nature of the repeater charge against him and admitted to the prior conviction that formed the basis for that charge at his plea hearing. On November 13, 2001, the Wisconsin Court of Appeals entered an order affirming the trial court's denial of the motion; the Wisconsin Supreme Court denied petitioner's petition for review on January 29, 2002.

Petitioner filed an application for federal habeas corpus in the Eastern District of Wisconsin on December 27, 2002. On April 22, 2003, that court entered an order transferring the case to this court because the judgment that petitioner is challenging was entered by a circuit court located in this district and petitioner is not in custody in the Eastern District.

DISCUSSION

The petition must be dismissed because it is untimely. Under 28 U.S.C. § 2244(d)(1)(A), a person in custody pursuant to the judgment of a State court has one year from “the date on which the judgment became final by the conclusion of direct review or the time for seeking such review” in which to file an application for a writ of habeas corpus, unless one of the statutory tolling provisions apply. See § 2244(d)(1)(B)-(D) and (2). As a result of the Eastern District’s restoration of his direct state appeal, petitioner’s conviction did not become final until he exhausted that restored appeal. That occurred on December 10, 1998, or 30 days after the Wisconsin Court of Appeals rejected the “new” appeal it had granted to petitioner pursuant to the Eastern District’s order. (Under Wis. Stat. § , petitioner had 30 days in which to file a petition for review with the state supreme court. He did not file such a petition; therefore, his “time for seeking direct review” expired on the date his petition was due.) Petitioner had one year from that date, or until December 10, 1999, within which to file a new federal habeas petition challenging his conviction. Petitioner did not file his application until December 27, 2002, well after his deadline expired.

Furthermore, although § 2244(d)(2) provides that “time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending” is not counted towards the statute of limitations, that provision does not help petitioner. According to the petition, petitioner filed his

postconviction motion contesting the validity of his repeater conviction on January 21, 2001. His federal statute of limitations had already expired by that time, so tolling under § 2244(d)(2) is not available. See Fernandez v. Sternes, 227 F.3d 977, 979 (7th Cir. 2000).

ORDER

Accordingly, it is ordered that, pursuant to Rule 4 of the Rules Governing Section 2254 Cases, Ritchie Dumer's petition for a writ of habeas corpus is DISMISSED WITH PREJUDICE for his failure to file it within the one-year statute of limitations.

Dated this 12th day of May, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge