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

DAVID D. BROWN,

Petitioner, ORDER

v. 04-C-0041-C

DANIEL BENIK, Warden, Stanley Correctional Institution,

Respondent.

David D. Brown, an inmate at the Stanley Correctional Institution, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the five dollar filing fee. The petition is before the court for preliminary consideration under Rule 4 of the Rules Governing Section 2254 Cases.

Petitioner challenges his March 23, 2001 conviction in the Circuit Court for Outagamie County for burglary, sexual assault and false imprisonment. Petitioner was convicted by a jury after a trial in which he testified that the victim had consented to have sexual intercourse with him. The state courts affirmed his conviction on appeal. See State v. Brown, 259 Wis. 2d 482, 655 N.W. 2d 547 (Ct. App. 2002) (unpublished opinion), pet. for rev. denied, 259 Wis. 2d 104, 657 N.W. 2d 708 (Jan. 21, 2003) (Table). It appears that petitioner filed his federal habeas petition within the one-year limitations period prescribed by 28 U.S.C. § 2244(d).

Petitioner complains that his trial lawyer was ineffective for: 1) failing to call his pastor to testify at trial as to his previous consistent statements; 2) failing to present evidence of his Social Anxiety Disorder, which petitioner contends "causes one not to be able to reliably testify;" 3) failing to challenge the police reports, which were full of "misrepresentations and untruths;" 4) failing to have a trial strategy; 5) failing to challenge the state's proof regarding where he entered the house; and 6) failing to interview the emergency room staff who treated the victim. In addition, petitioner alleges that his postconviction/appellate lawyer was ineffective for failing to raise these deficiencies in postconviction proceedings and on appeal.

It is well established that a prisoner seeking a writ of habeas corpus must exhaust his state remedies before seeking federal relief. Moleterno v. Nelson, 114 F.3d 629, 633 (7th Cir. 1997) (citing cases). Principles of comity require that the 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. Engle v. Isaac, 456 U.S. 107, 125 n. 28, 1570 n. 28 (1982). Failure to exhaust one's claims "constitutes a procedural default," Chambers v. McCaughtry, 264 F.3d 732, 737 (7th Cir. 2001), which bars federal review

unless the petitioner demonstrates cause for the default and actual prejudice as a result of the violation or demonstrates that the failure to consider the claims will result in a fundamental miscarriage of justice. See Rodriguez v. Scillia, 193 F.3d 913, 917 (7th Cir. 1999).

A review of the state court of appeals' decision indicates that petitioner did present his first claim, his trial lawyer's failure to call his pastor to testify, to the state court of appeals. The court addressed the claim on the merits, concluding that petitioner could not show prejudice under Strickland v. Washington, 466 U.S. 668, 694 (1984), because the pastor's testimony would not have corroborated petitioner's. Therefore, petitioner's first claim of ineffective assistance of trial counsel has been exhausted. Further, the claim is sufficient to require a response from the state.

As for petitioner's remaining claims, however, petitioner failed to present them to the state courts on direct appeal from his conviction. Petitioner asserts that his failure to present his claims of ineffective assistance of trial counsel was caused by his postconviction lawyer, whom petitioner contends also was ineffective. It is true that ineffective assistance of counsel can establish cause for a procedural default. However, in Edwards v. Carpenter, 529 U.S. 446 (2000), the Supreme Court held that because the assertion of ineffective assistance as a cause to excuse a procedural default in a § 2254 petition is, itself, a constitutional claim, the petitioner must have raised this claim first to the state court or he has procedurally

defaulted it. Id. at 453. It appears that petitioner never presented a claim of ineffective assistance of appellate counsel to the state courts.

Thus, the question is whether petitioner still may exhaust this claim (as well as his predicate claims of ineffective assistance of trial counsel) by presenting the claim to the state courts. 28 U.S.C. § 2254(c) ("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"). Wisconsin's statute governing postconviction motions, Wis. Stat. § 974.06, allows defendants to attack their convictions collaterally on constitutional grounds after expiration of the time for seeking a direct appeal or other post-conviction remedy. However, a petitioner is procedurally barred from raising a claim in a post-conviction motion that he could have raised on direct appeal unless he has a "sufficient reason" for not raising the issue on direct appeal. State v. Escalona-Naranjo, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 164 (1994); Wis. Stat. § 974.06(4). Ineffective assistance of post-conviction or appellate counsel may provide a sufficient reason. State ex rel. Rothering v. McCaughtry, 205 Wis. 2d 675, 682, 556 N.W. 2d 136, 139 (Ct. App. 1996) (describing procedure for challenging effectiveness of postconviction counsel); State v. Knight, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992) (appellate counsel). (Because petitioner is alleging that his postconviction attorney was ineffective for failing to raise a claim of ineffective assistance of trial counsel and because a prerequisite to bringing such a claim on appeal was an evidentiary hearing in the trial court, it appears that petitioner

would use the Rothering procedure and not the Knight procedure.) Thus, there still are avenues of relief available to petitioner in the state courts through which he could present his claim that his postconviction lawyer was ineffective for failing to raise his additional claims of ineffective assistance of trial counsel. The fact that the state courts are not likely to rule in petitioner's favor does not eliminate the exhaustion requirement. See Cawley v. DeTella, 71 F.3d 691, 695 (7th Cir. 1995); White v. Peters, 990 F.2d 338, 342 (7th Cir. 1993).

Rose v. Lundy, 455 U.S. 509 (1982), instructs federal district courts to dismiss a petition, like petitioner's, that presents a mix of exhausted and unexhausted claims. Id. at 510. Alternatively, the petitioner may choose to amend his petition by deleting the unexhausted claims and then proceed solely on the exhausted claim. Id., at 520. Before dismissing the petition, I will give petitioner the opportunity to decide whether he prefers to abandon his unexhausted claims of ineffective assistance of trial and appellate counsel and proceed solely on the one claim that has been exhausted, namely, his claim that his lawyer was ineffective for failing to call his pastor to testify as a witness.

In deciding which course of action to pursue, petitioner should consider the following: If petitioner decides to give up his unexhausted claims and present only the one that he has already exhausted, it is unlikely that this court would allow him to raise the unexhausted claims in a subsequent federal habeas petition. See Lundy, 455 U.S. at 521 ("[A] prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his

unexhausted claims risks dismissal of subsequent federal petitions") (citing 28 U.S.C. § 2254 Rule 9(b), authorizing dismissal for abuse of the writ). That said, petitioner also should consider that his chances of success on his unexhausted claims are slim unless he can support his conclusory allegations of ineffective assistance of trial counsel with specific facts that actually establish prejudice as required under Strickland v. Washington, 466 U.S. 668 (1984). See id., 466 U.S. at 691 (error by counsel, even if professionally unreasonable, does not warrant setting aside criminal judgment if error had no effect on judgment).

Another factor to consider is the statute of limitations for filing a federal habeas petition. Under the federal statutes governing habeas petitions, a state prisoner has only one year from the date his judgment became "final" in which to file a federal habeas petition. 28 U.S.C. § 2244(d)(1)(A). In this case, petitioner's judgment became final 90 days following the Wisconsin Supreme Court's denial of his petition for review, or April 21, 2003. See Anderson v. Litscher, 281 F.3d 672, 674-675 (7th Cir. 2002) (where petitioner does not file petition for writ of certiorari, one-year statute of limitations begins to run at expiration of the 90-day period in which prisoner could have filed petition for writ of certiorari with United States Supreme Court).

Petitioner's federal statute of limitations began to run on April 22, 2003, and it has continued to run during the time that the petition has been pending in this court. Newell v. Hanks, 283 F.3d 827, 834 (7th Cir. 2002); Jones v. Berge, 101 F. Supp. 2d 1145, 1150 (E.D. Wis. 2000). As of the date of this order, petitioner has 80 days remaining on his

federal habeas clock. If petitioner chooses to have this court dismiss his petition so that he may pursue his unexhausted claims in state court, he will not get a new one-year clock. Rather, he will have 80 days in which to: 1) file a postconviction motion in the proper state court; 2) exhaust his appeals in the state courts by appealing any denial of the motion to the state's court of appeals and then to the state supreme court; and then 3) file a new federal habeas application in this court. O'Sullivan v. Boerckel, 526 U.S. 838, 847 (1999) (discussing exhaustion requirement).

This task is not as daunting as it may sound. Assuming petitioner would not miss any of Wisconsin's deadlines for filing an appeal or petition for review, all time that petitioner spends exhausting his claims in state court would not count against the 80 days remaining on petitioner's federal habeas clock. 28 U.S.C. § 2244(d)(2); Fernandez v. Sternes, 227 F.3d 977, 979-980 (7th Cir. 2000) (properly filed application for state postconviction relief is "pending" within meaning of § 2244(d)(2) and continues to be "pending" during period between one court's decision and timely request for further review by higher court). See also Artuz v. Bennett, 531 U.S. 4, 8 (2000) (discussing what it means for application to be "properly filed"). Thus, should petitioner choose to exhaust in state court his as-yet unexhausted claims, the only time that will count against petitioner's federal habeas clock is that which elapses between now and the date on which petitioner properly files a postconviction motion in state court, plus that which elapses between the date on which the

Wisconsin Supreme Court denies his petition for review and the date on which petitioner files a new federal habeas petition.

Because a total of 80 days affords petitioner enough time, at the front end, within which to file a postconviction motion in state court, and, at the back end, to file a new habeas petition in this court after he exhausts his appeals in the state court, I would not be inclined to stay the instant habeas application while petitioner exhausts his state court remedies. See Freeman v. Page, 208 F.3d 572, 577 (7th Cir. 2000) (noting that district courts have discretion to stay habeas corpus action while prisoner exhausts state court remedies if dismissal could jeopardize timeliness of collateral attack); Tinker v. Hanks, 172 F.3d 990, 991 (7th Cir. 1999) (same). However, although 80 days is enough, it is not a lot. Because petitioner will need to make sure there is enough time remaining on his federal clock within which to prepare and file a new federal habeas petition after he gets a decision from the Wisconsin Supreme Court, he will need to act promptly in filing a postconviction motion in state court. When deciding between pursuing his unexhausted claims in state court or amending his petition to include solely the exhausted claim, petitioner should consider whether he realistically will be able to take the steps necessary to exhaust his claims without jeopardizing the timeliness of a future federal habeas petition.

ORDER

IT IS ORDERED that petitioner David D. Brown has until February 13, 2004, within which to advise the court whether he wishes to pursue his unexhausted claims in state court or whether he prefers to amend his petition to delete the unexhausted claims and proceed solely on the exhausted claim. If petitioner chooses the former, or if he does not report his choice by the deadline, then his petition will be dismissed without prejudice for his failure to exhaust his state court remedies, pursuant to Rose v. Lundy. If petitioner chooses the latter, then the state will be ordered to respond to Claim 1 as identified in this order.

Dated this 2nd day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge