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

SHANE E. RITTMILLER,

Petitioner, ORDER

v. 05-C-093-C

SAWYER COUNTY CIRCUIT COURT,

Respondent.

On February 25, 2005, this court entered an order dismissing petitioner Shane Rittmiller's application for a writ of habeas corpus on the ground that petitioner had failed to exhaust his state court remedies. In a letter to the Court of Appeals for the Seventh Circuit dated May 31, 2005, petitioner stated that he would like to appeal that order. This notice of appeal was forwarded to this court on June 16, 2005. On June 21, 2005 this court construed petitioner's letter as a motion for an extension of time within which to appeal and denied the request on the ground that petitioner had filed it too late, in violation of Fed.R. App. P. 4(a)(5)(A). Now the court of appeals has directed this court to enter an order ruling on petitioner's request to appeal in forma pauperis.

When reviewing a state habeas petitioner's request for leave to proceed in forma pauperis on appeal, this court must determine whether petitioner is taking his appeal in good faith. 28 U.S.C. § 1915(a)(3). Then, pursuant to 28 U.S.C. § 2253(c)(1)(A) and Fed. R.

App. P. 22, this court must determine whether to issue a certificate of appealability to petitioner. To find that an appeal is in good faith, a court need find only that a reasonable person could suppose the appeal has some merit. Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000). However, a certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Id.; see also 28 U.S.C. § 2253(c)(2). In order to make this showing, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893, n.4 (1983)).

"When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at484. Thus, "[d]etermining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." Id. at 484-85.

In the instant case the petitioner is confined in Massachusetts on state charges and challenges Wisconsin's failure to extradite him on a bail jumping charge pending in Sawyer County, Wisconsin. Because petitioner had not yet been tried on the Wisconsin charge, any "custody" to which he is subject as a result of that charge is pretrial custody. Challenges to pretrial custody are appropriate only under 28 U.S.C. § 2241, not 28 U.S.C. § 2254. Soler v. State of Indiana, 47 F.3d 1173 n. 1 (7th Cir. 1995) (citations omitted).

Although applicants for habeas relief under § 2241 are not subject to the statutory requirement of exhaustion of remedies, 28 U.S.C. § 2254(b) (exhausting state remedies required of "person in custody pursuant to the judgment of a State court"), "federal courts nevertheless may require, as a matter of comity, that such detainees exhaust all avenues of state relief before seeking the writ." United States v. Castor, 937 F.2d 293, 296-97 (7th Cir. 1991). Although petitioner asserts that he presented his claim to a federal district judge in Massachusetts, he does not aver that he has presented his failure-to-extradite claim to the state courts of Wisconsin. In Wisconsin, challenges to the propriety of extradition or speedy trial claims can be litigated by means of a petition for a writ of habeas corpus. See, e.g., State ex rel. Graves v. Williams, 99 Wis. 2d 65, 298 N.W. 2d 392 (Ct. App. 1980).

Starting with petitioner's request for a certificate of appealability, I conclude that he does not qualify for such a certificate. On February 25, 2005, I dismissed the petition upon concluding that petitioner must seek relief from the state courts before he can obtain relief from this court. I sent a copy of this order to petitioner's public defender in Wisconsin. The

instant appeal followed on May 31, 2005, two months too late and a month beyond the forgiveness period allowed by Rule 4. Petitioner has made no attempt to exhaust his state court remedies, he has made no showing that he is entitled to substantive relief, he missed his deadlines to appeal and to seek an extension, and he has not shown excusable neglect or good cause. Therefore, petitioner is not entitled to a certificate of appealability.

I turn then to defendant's request for leave to proceed in forma pauperis on appeal. Even applying the lower standard applicable to this request, I conclude that defendant is not proceeding in good faith. Given the manner in which petitioner has chosen to proceed, no reasonable jurist could believe that petitioner's current appeal has merit. Accordingly, I must certify that defendant's appeal is not taken in good faith and that he cannot proceed in forma pauperis on appeal.

ORDER

IT IS ORDERED that petitioner Shane E. Rittmiller's request for leave to proceed in forma pauperis on appeal is DENIED because I am certifying that his appeal is not taken in good faith.

Further, IT IS ORDERED that petitioner's request for a certificate of appealability is DENIED. Pursuant to Fed. R. App. P. 22(b), if a district judge denies an application for

a certificate of appealability, the defendant may request a circuit judge to issue the certificate.

Entered this 1st day of August, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge