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

ANDREW OBRIECHT,

Petitioner, ORDER

v. 06-C-253-C

BYRAN BARTOW, Director,
Wisconsin Resource Center,

Respondent.

On May 17, 2006, this court entered an order dismissing petitioner Andrew Obriecht's petition for a writ of habeas corpus without prejudice on the ground that it failed to set forth facts showing that petitioner is in custody in violation of the laws, Constitution or treaties of the United States. Petitioner has now filed a copy of an appellate brief and appendix that he filed in connection with state court proceedings that provides further details about his claims and a memorandum, in which he argues that his claims, as augmented, are sufficient to warrant a response from the state. I construe petitioner's submissions as a motion to reopen the case and for permission to file an amended petition to cure the defects noted by this court in the May 17 order.

That motion will be granted. Petitioner's latest submissions shall be construed as an amendment to the petition. Having considered those amendments, I find that some of petitioner's claims now are sufficient to warrant a response from respondent.

As indicated in the May 17, 2006, order, the petition raises four claims:

> 1) Petitioner was deprived of his rights to due process, equal protection and to the effective assistance of counsel when the complaint was amended orally at the plea hearing without petitioner's being arraigned on the amended charge;
>
> 2) Because of the foregoing procedural deficiency, petitioner's plea was not entered knowingly and voluntarily and the court lacked subject matter jurisdiction over the plea hearing;
>
> 3) When sentencing petitioner, the court failed to consider "all relevant evidence" or state its reasons for the sentence it imposed; and
>
> 4) Petitioner was deprived of his right to the effective assistance of trial and postconviction counsel.

I infer from petitioner's submissions that he still wants to raise these four claims.

In the May 17 order, I found that neither of petitioner's first two claims stated a viable constitutional claim. By pleading no contest, petitioner waived his right to complain of procedural defects that occurred before the plea. Gomez v. Berge, 434 F.3d 940, 942 (7th Cir. 2006). In his new submissions, petitioner insists that he be allowed to go forward on these claims, asserting that the defects of which he complains (which appear to be that the prosecutor handed a copy of the pleadings to petitioner's lawyer, not to petitioner), were not merely "procedural" but were necessary to give the court subject matter jurisdiction; without subject matter jurisdiction, he argues, the court had no authority either to accept his plea or to sentence him after his probation was revoked later.

Petitioner's argument rests on a misunderstanding of subject matter jurisdiction. In Wisconsin, a circuit court's jurisdiction over criminal matters is derived from Article VII,

Section 8 of the Wisconsin Constitution and Wis. Stat. § 753.03, and attaches upon the filing of the criminal complaint. State v. Webster, 196 Wis.2d 308, 316-317, 538 N.W.2d 810, 813 (Ct. App. 1995). The circuit court "lacks criminal subject[ ]matter jurisdiction only where the complaint does not charge an offense known to law." Id. at 317, 538 N.W. 2d at 813 (quoting State v. Aniton, 183 Wis.2d 125, 129, 515 N.W.2d 302, 304 (Ct. App. 1994)). Once criminal subject matter jurisdiction attaches, it continues until the court disposes of the case. Id.

In accordance with these principles, the court found in Webster that although the state's failure to obtain the trial court's permission to file an amended information was a procedural defect, it did not implicate the court's subject matter jurisdiction where the defendant did not allege that the complaint, information or amended information failed to charge an offense known to law. Id. at 318-319, 538 N.W. 2d at 814. Moreover, the court found that Webster had waived his right to complain of the defect by failing to object at the time the amended information was filed. Id.

As in Webster, petitioner does not assert that the complaint, information or amended information failed to charge an offense known to law. He contends only that the prosecutor did not follow the precise requirements of Wisconsin law in notifying him of the charges. Such procedural defects did not deprive the state court of power to accept petitioner's no contest plea or to sentence him and did render petitioner's plea involuntary. The alleged

procedural defects in the proceedings simply fail to give rise to any viable constitutional claim. Therefore, claims 1 and 2 will be dismissed with prejudice.

Petitioner also appears to be contending that his plea was involuntary because his lawyer failed to give petitioner an adequate explanation of the nature of the charge and the trial court did not correct this misunderstanding during the plea colloquy. In addition, petitioner alleges that his lawyer never disclosed to him investigator's reports showing that petitioner might have committed the battery in self-defense. Petitioner argues that if he had seen these reports and known that the state had to prove that he acted with intent to harm another, he would not have entered a plea and would have insisted on going to trial. These allegations are sufficient to state a plausible claim that his plea was involuntary because it was caused by the ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 56 (1985) (when defendant enters plea upon advice of counsel, voluntariness of plea depends on whether lawyer's advice was within range of competence demanded of lawyers in criminal cases).

Although I will order respondent to respond to this claim, this court is unlikely to reach its merits. As I noted in the May 17 order, the state court of appeals found that petitioner had procedurally defaulted any claims relating to the validity of his plea by failing to raise them until after his probation had been revoked, State v. Obriecht, 2005 WI App 254, ¶ 5, 706 N.W. 2d 703 (Table) (unpublished opinion). This means that petitioner has procedurally defaulted his claims in *this* court unless he can make the requisite showings of

cause and prejudice. Alternatively, the state may argue that claims attacking the validity of the plea are untimely insofar as petitioner apparently did not institute any state court challenge to the plea until well over one year after the court entered judgment and placed him on probation. 28 U.S.C. §§ 2244(d)(1)(A) and (2) (petitioner has one year after state court conviction becomes final to file federal habeas petition; limitations period may be tolled if petitioner properly files application for state court postconviction relief).

As for petitioner's challenges to the proceedings *after* revocation, however, those challenges appear at this preliminary stage to be timely and not barred by any independent and adequate state court rule. As noted above, the original petition raised two claims relating to the sentencing-after-revocation proceedings in state court: 1) when sentencing petitioner, the court failed to consider "all relevant evidence" or state its reasons for the sentence it imposed; and 2) the lawyer who represented petitioner during those proceedings was ineffective in unspecified ways. In the May 17 order, I found that petitioner's objections to the manner in which the court sentenced him amounted at most to a claim that the trial court had abused its discretion and was insufficient to give rise to a due process violation; petitioner's undefined claim of ineffective assistance of counsel was not specific enough to show that he was entitled to relief.

In his memorandum, petitioner clarifies his ineffective assistance of counsel claim: he asserts that his post-revocation lawyer was ineffective for failing to investigate all the facts surrounding the battery, including the evidence suggesting that it might have been

committed in self defense, and for failing to present this information to the court as a reason to impose a more lenient sentence. This claim is sufficient to warrant a response from respondent.

However, there is nothing in petitioner's latest submissions to suggest that the trial court violated any constitutional right of petitioner's at sentencing. As those new submissions make clear, the information that petitioner avers the court should have considered was never presented to the court; the court cannot be faulted for failing to consider information of which it was not aware. Moreover, as noted in the May 17 order, the court's failure to state reasons for its sentence is not an adequate ground for habeas relief. Accordingly, petitioner's claim that the trial court violated his constitutional rights at the sentencing hearing will be dismissed with prejudice.

Finally, petitioner asks this court to appoint a lawyer to represent him. When considering a request by an indigent civil litigant for the appointment of counsel, the court must consider the difficulty of the case in relation to the petitioner's ability to represent himself and whether counsel might make a difference to the outcome. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993). Having considered these factors, I will deny petitioner's motion. Petitioner's claims of attorney ineffectiveness are straightforward. Petitioner has a great deal of litigation experience insofar as he has represented himself in numerous state court proceedings and in several habeas proceedings in this court. Although his efforts thus far have been unsuccessful, he has made his points effectively and represented himself

adequately. Even if petitioner is correct that the law library at the Wisconsin Resource Center is lacking case law from the Seventh Circuit, the procedural rules and substantive standards this court will apply are derived from United States Supreme Court cases. Accordingly, petitioner should be able to respond adequately to the state's response without citing Seventh Circuit cases.

ORDER

1. The order and judgment entered May 17 and 18, 2006, respectively, dismissing the petition without prejudice are VACATED.

2. Petitioner's constructive motion for leave to file an amended petition is GRANTED.

3. The clerk shall serve by mail copies of the amended petition, which shall consist of petitioner's original petition (dkt. #1), his Memorandum in Support of § 2254 Writ of Habeas Corpus (dkt. #5) and his Appellant's Brief and Appendix (dkt. #6), to Director Bartow and to the Wisconsin Attorney General.

4. Not later than 30 days from the date of service of the petition, the state shall file a response to petitioner's claims of ineffective assistance of trial and post-revocation counsel, as construed in this order, showing cause, if any, why this writ should not issue.

5. Any claims to the state has not been ordered to respond are DISMISSED WITH PREJUDICE.

6. Petitioner's motion for the appointment of counsel is DENIED.

7. If the state contends that petitioner's claims are subject to dismissal with prejudice on grounds such as procedural default or the statute of limitations, it should file a motion to dismiss and all supporting documents within its 30-day deadline. The state must address the issue of cause and prejudice in its supporting brief. 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 10 days following service of the response within which to file a reply.

If at this time the state wishes to argue petitioner's claims on their merits, either directly or as a fallback position in conjunction with any motion to dismiss, then within its 30-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 also must file and serve any additional portions of the record that are material to deciding whether the legal conclusions reached by state courts on these claims was unreasonable in light of the facts presented. 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within 30 days, the state must advise the court when such papers will be filed. Petitioner shall have 20 days from the service of the state's response within which to file a substantive reply.

If the state chooses to file only a motion to dismiss within its 30-day deadline, it does not waive its right to file a substantive response later, if its motion is denied in whole or in

part. In that situation, the court would set up a new calendar for submissions from both sides.

8. Once the state has filed its answer or other response, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not docket or consider any submission that has not been served upon the state. Petitioner should include on each of his submissions a notation indicating that he served a copy of that document upon the state.

9. The federal mailbox rule applies to all submissions in this case.

Entered this 7th day of June, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge