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

LEON TYRONE HARDY,

Petitioner, ORDER

v. 07-C-004-C

STATE OF WISCONSIN,
Department of Probation and
RYAN HARTWIG,

Respondents.

Petitioner Leon Tyrone Hardy has filed a petition for a writ of habeas corpus challenging the rules of his state probation. (He has also filed a motion for a temporary restraining order or preliminary injunction in which he seeks immediate release from his placement at the Rock Valley Correctional Program. Because his request for injunctive relief essentially duplicates his request for habeas relief, I have considered it as part and parcel of his habeas application.) He has paid the five dollar filing fee. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

According to the petition, in May 2006 petitioner was sentenced to 18 months' probation on his convictions for misdemeanor battery, misdemeanor disorderly conduct and bail jumping. (A review of electronic records show that petitioner was convicted and sentenced in the Circuit Court for Rock County.) Petitioner signed rules of probation on

May 10, 2006. In August 2006, petitioner's probation officer, respondent Ryan Hartwig, told petitioner that he was being placed under additional rules of supervision for sex offenders because of petitioner's 1980 conviction in Tennessee for a sex offense. Petitioner alleges that these rules forbid him to have unsupervised contact with his three children who are under the age of 18, a prohibition that led to petitioner's having to vacate the family residence. In addition, alleges petitioner, under the sex offender rules he is not allowed to engage in a romantic or sexual relationship with anyone of any age without Hartwig's approval. In early October 2006, petitioner was placed at the Rock Valley Correctional Program as an alternative to probation revocation for his having unapproved contact with a minor.

Petitioner appears to be asserting two bases for habeas relief. First, he contends that by subjecting him to the sex offender rules of supervision, the department is punishing him twice for his 1980 conviction. Although petitioner asserts that the department's action violates the constitution's prohibitions on *ex post facto* laws and cruel and unusual punishment, what petitioner appears to be contending is that the department is subjecting him to double jeopardy for his 1980 conviction. Second, petitioner contends that the department's rules of supervision are interfering unduly with his due process liberty interest in associating with his children, *see Hodgson v. Minnesota*, 497 U.S. 417, 483 (1990) (Scalia, J., concurring in part and dissenting in part), and his right of privacy embodied in the Fourteenth Amendment. *See Roach v. City of Evansville*, 111 F.3d 544, 550 (7th Cir. 1997)

(noting that right of privacy embodied in Fourteenth Amendment protects "an individual's interest in avoiding disclosure of personal matters and the right to make important decisions in the areas of marriage, procreation, contraception, family relationships . . without the interference of government") (citations omitted).

Before turning to the substance of petitioner's claims, I first consider the related questions of who is the proper respondent in this action and whether the petition is properly filed in this district. A federal habeas corpus action brought by a state prisoner must name as the respondent "the state officer who has custody" of the petitioner. *Bridges v. Chambers*, 425 F.3d 1048, 1049 (7th Cir. 2005) (citing Rule 2(a) of the Rules Governing Habeas Corpus Petitions). In Wisconsin, a sentence to probation places the defendant in the custody of the Department of Corrections. Wis. Stat. § 973.10(1). Thus, it appears that Hartwig, a probation officer employed by the department, is the proper respondent if he has the authority to suspend the rules of supervision that petitioner challenges in this action. If Hartwig lacks that authority, then the proper respondent would be an official at the Department of Corrections who does. However, the department itself is not a proper respondent. *Bridges*, 425 F.3d at 1050 (designating "state" as respondent improper in part because it does not identify official with actual authority to release prisoner).

The conclusion that Hartwig or one of his superiors at the Department of Corrections is the proper respondent in this action leads to the conclusion that the action is properly

venued in this district. The Department of Corrections is headquartered in Madison. 28 U.S.C. § 2241(d).

Turning to the substance of petitioner's claims, challenges to conditions of parole or probation made by a state prisoner are properly brought under 28 U.S.C. § 2254. *Williams v. Wisconsin*, 336 F.3d 576, 579 (7th Cir. 2003). At least at this preliminary juncture, petitioner's claim that the department's rules of supervision are unduly restricting his due process liberty interest in associating with his children and his right of privacy appears to state a viable constitutional claim. The same goes for his double jeopardy claim. *See United States v. Teresi*, 484 F.2d 894, 899 (7th Cir. 1993) ("Probation has been held to constitute punishment, though lenient, for the purpose of determining the question of double jeopardy") (citations omitted).

However, before this court can consider the merits of those claims, petitioner must have exhausted his state court remedies by presenting his claims to the state courts in the manner specified by state law. 28 U.S.C. § 2254(b); *Lemons v. O'Sullivan*, 54 F.3d 357 (7th Cir. 1995). It is unclear from petitioner's submissions whether he has done this. I leave it to the state to address the exhaustion issue in its response to the petition.

ORDER

1. The clerk shall amend the caption to reflect that the only respondent in this case is Ryan Hartwig, petitioner's probation officer.

2. The clerk shall serve copies of the petition, the motion for preliminary injunction and this order by mail to respondent Hartwig and to the Wisconsin Attorney General.

3. The state shall file a response to petitioner's claims not later than 30 days from the date of service of the petition, showing cause, if any, why this writ should not issue.

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. *See* 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.

4. 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.

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

Entered this 17th day of January, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge