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

LEON TYRONE HARDY,

Petitioner, OPINION AND ORDER

v. 07-C-004-C

STATE OF WISCONSIN,
Department of Probation and
RYAN HARTWIG,

Respondents.

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Leon Hardy, a Wisconsin probationer, contends that the Wisconsin Department of Corrections is violating his constitutional rights by classifying him as a sex offender on the basis of a 1980 conviction and subjecting him to sex offender rules of supervision. Petitioner contends that by subjecting him to these rules, the department is violating the prohibition against double jeopardy by punishing him twice for his 1980 conviction and is interfering unduly with his due process liberty interest in associating with his children and his right of privacy embodied in the Fourteenth Amendment. In addition, petitioner contends that the department's application of the sex offender rules to him violates Wis. Stat. § 301.45.

The state has moved to dismiss the petition on the ground that petitioner has either failed to exhaust his state court remedies or has procedurally defaulted his claims. Because

it is undisputed that petitioner has not exhausted his state court remedies, I will dismiss the petition. However, I decline to dismiss the petition with prejudice, as the state proposes, because it is not clear that the state courts would hold petitioner's claims procedurally barred if petitioner attempted to cure his failure to exhaust. Accordingly, I will dismiss the petition without prejudice.

From documents attached to the parties' submissions, I find the following facts.

FACTS

Petitioner is in custody of the Wisconsin Department of Corrections pursuant to two judgments of conviction entered on May 9, 2006 by the Circuit Court for Rock County. In case 2005CM539, petitioner was convicted of one count of disorderly conduct, with a penalty enhancer for use of a dangerous weapon. In case 2005CM2557, petitioner was convicted of one count of disorderly conduct (domestic abuse) and misdemeanor bail jumping. The court ordered petitioner to serve a term of 18 months' probation on each count, all to be served concurrently with each other.

Petitioner has a 1980 conviction in Tennessee for aggravated rape. On the basis of that conviction, petitioner's probation agent, Ryan Hartwig, determined that petitioner was a sex offender under the department's rules and that therefore, petitioner's rules of supervision would include standard sex offender rules. Among other things, those rules forbid petitioner from having unsupervised contact with anyone under the age of 18 or from

engaging in a sexual or romantic relationship with anyone without approval from petitioner's agent.

Around August 2006, petitioner filed an administrative complaint objecting to Hartwig's imposition of the sex offender rules. Petitioner appealed Hartwig's denial of that complaint to Field Supervisor Tom Gubbin, who affirmed Hartwig's decision to impose the sex offender rules. Petitioner then appealed to the regional chief, who also affirmed Hartwig's decision. Under Wisconsin's administrative rules, petitioner's next step was to appeal the regional chief's decision to the administrator of probation and parole. Wis. Admin. Code § DOC 328.11(8). Petitioner did not take this step.

Instead, in October 2006, petitioner filed in the Circuit Court for Rock County a petition for a writ of habeas corpus and a motion for release from custody in both of his cases. In his motions, petitioner complained that the department's imposition of the sex offender rules was unlawful. The circuit court denied petitioner's motions by letter on November 2, 2006. On November 8, 2006, petitioner filed a notice of appeal in both cases. On November 14, 2006, the court of appeals issued orders indicating that petitioner had 10 days in which to pay the appellate filing fee or submit a petition for waiver of fees. Petitioner did not submit the fee or request a waiver. Accordingly, on December 12, 2006, the court of appeals dismissed petitioner's appeals.

In November 2006, petitioner filed in the circuit court in both cases a motion titled "Request for Reduction of Time." Petitioner again argued that he should not be subject to

the sex offender rules and asked the court to release him from probation. In a letter dated November 21, 2006, the Circuit Court for Rock County denied the motion. Petitioner had until February 19, 2007, at the latest, to appeal that order. Petitioner did not appeal from the court's order.

Petitioner filed the instant habeas petition on January 3, 2007.

OPINION

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); 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"). When a petitioner raises claims that have not been exhausted in state court and state remedies

remain available, the federal court must dismiss the petition without prejudice to allow the petitioner to return to state court. Rhines v. Weber, 544 U.S. 269, 274 (2005); Rose v. Lundy, 455 U.S. 509, 510 (1982). After exhausting his claims in state court, the petitioner may then re-present his claims to the federal court in a new habeas petition, assuming he does not run afoul of the statute of limitations. Rhines, 544 U.S. at 275.

However, when the petitioner has already pursued his state court remedies but failed to properly present his claims to the state courts along the way, "it is not the exhaustion doctrine that stands in the path to habeas relief . . . but rather the separate but related doctrine of procedural default." Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004). The procedural default doctrine requires that state prisoners "not only become ineligible for state relief before raising their claims in federal court, but also that they give state courts a sufficient opportunity to decide those claims before doing so." O'Sullivan v. Boerckel, 526 U.S. 838, 854 (1999) (Stevens, J., dissenting). Under the procedural default doctrine, a federal court is precluded from reaching the merits of a habeas claim if the petitioner either 1) failed to present his claim to the state courts and it is clear that those courts would now hold the claim procedurally barred; or 2) presented his claim to the state courts but the state court dismissed the claim on a state procedural ground independent of the federal question and adequate to support the judgment. Perruquet, 390 F.3d at 514; Moore v. Bryant, 295 F.3d 771, 774 (7th Cir. 2002); Chambers v. McCaughtry, 264 F.3d 732, 737-38 (7th Cir. 2001). When a petitioner has procedurally defaulted his claims, the federal court denies the

petition with prejudice, thereby foreclosing petitioner's opportunity for federal review of the claims.

The state contends that petitioner has failed to exhaust his state court remedies by failing to appeal the circuit court's denial of his "Motion for Reduction of Time." Further, argues the state, because petitioner's deadline for filing that appeal has expired, petitioner has not only failed to exhaust his state court remedies but has procedurally defaulted his claims. Alternatively, the state contends that petitioner's failure to exhaust the administrative complaint procedure and his subsequent failure to seek certiorari review of the department's final decision constitute a separate basis for a finding of procedural default. In either case, the state argues, this court should dismiss the petition with prejudice.

I would agree with the state's position if this were a typical habeas petition brought by a state prisoner attacking the lawfulness of his conviction. In general, Wisconsin allows its prisoners allowed only one opportunity to challenge their convictions, either on direct appeal or by way of a collateral attack brought pursuant to Wis. Stat. § 974.06. State v. Escalona-Naranjo, 185 Wis. 2d 168, 178, 517 N.W. 2d 157 (1994). If a prisoner files an appeal or post-conviction motion but fails to raise all of his constitutional claims, he will not be allowed to raise those claims in a later post-conviction motion unless he demonstrates that a sufficient reason exists for his failure to raise the issue in his initial appeal or post-conviction motion. Id. In other words, at some point it becomes "too late" for a state prisoner to exhaust his federal claims in state court.

However, in this case petitioner is not challenging his underlying convictions but is challenging the rules of his probation, which takes his case outside the reach of Escalona-Naranjo. Unlike discrete errors committed during the course of criminal proceedings, the alleged constitutional violation in this case is ongoing and occurs every day that the department applies its sex offender rules to petitioner. The state has cited no authority to suggest that under these circumstances, the state would not entertain a new administrative complaint or state court action filed by petitioner raising the same allegations that he raised in his previous complaints and motions. Because the state has failed to show that petitioner lacks "the right under the law of the State to raise, by any available procedure, the question presented," dismissal of this case with prejudice is inappropriate. Cf. Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004) (because state may allow prisoner to cure failure to exhaust, dismissal of prisoner's civil suit under § 1983 for failure to exhaust should always be without prejudice). Instead, I will dismiss the petition without prejudice so that petitioner may attempt to exhaust his claims in state court.

Petitioner suggests that this court should not require him to exhaust his state court remedies because his efforts to obtain relief from the department and the circuit court have been futile. However, when a petitioner claims that he cannot obtain relief from the state courts, the pertinent question is not whether the state court would be inclined to rule in the petitioner's favor, but whether there is any available state procedure for determining the merits of petitioner's claim. White v. Peters, 990 F.2d 338, 342 (7th Cir. 1993). A

petitioner "cannot simply opt out of the state review process because he is tired of it or frustrated by the results he is getting." Cawley v. DeTella, 71 F.3d 691, 695 (7th Cir. 1995). The parties' submissions make clear that a state procedure exists for determining the merits of petitioner's claims: petitioner may follow the administrative complaint procedure set forth in Wis. Admin. Code § DOC 328.11 and, after obtaining a final decision from the administrator, may challenge that determination in state court by filing a petition for certiorari. Once petitioner has completed that process and has exhausted the state court appellate process, he may return to federal court.

ORDER

IT IS ORDERED that the petition of Leon Hardy for a writ of habeas corpus is DISMISSED WITHOUT PREJUDICE for petitioner's failure to exhaust his state court remedies.

Entered this 11th day of April, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge