

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

ANDREW MATTHEW OBRIECHT,

Petitioner,

v.

LARRY JENKINS, Warden,
Kettle Moraine Correctional Institution,

Respondent.

ORDER

07-C-409-C

Andrew Matthew Obrieht, an inmate at the Kettle Moraine Correctional Institution, has filed 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 review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

The subject of the petition is petitioner's November 19, 1999 conviction in the Circuit Court for Dane County of one count of attempted second-degree assault of a child, four counts of fourth-degree sexual assault and one count of disorderly conduct. Petitioner contends that his conviction was obtained in violation of the laws or Constitution of the United States because:

- 1) petitioner's trial counsel was ineffective for failing to produce evidence of petitioner's prior consensual sexual contact with some of the alleged victims;

- 2) trial counsel was ineffective for conceding petitioner's guilt on the disorderly conduct charge and for arguing that the jury should find petitioner guilty of disorderly conduct, not sexual assault, on the other counts, while at the same time not requesting a lesser-included instruction;
- 3) the lawyer who was appointed to represent petitioner in postconviction proceedings and/or direct appeal had a conflict of interest because he worked for the same public defender's office as trial counsel; and
- 4) petitioner was denied his due process right to be notified of the elements of "attempt" because the complaint was facially deficient.

This is not petitioner's first federal habeas attack on this conviction: in late 2002, petitioner filed a similar petition. On January 23, 2003, this court dismissed that petition without prejudice because petitioner had not yet exhausted his state court remedies. The court declined to stay the federal proceeding while petitioner pursued his state court remedies, finding that petitioner had enough time remaining on his federal habeas clock within which to pursue his state court remedies without jeopardizing the timeliness of a federal habeas challenge.

As it turns out, petitioner failed to file a state court postconviction motion before his federal deadline expired, so the instant petition is untimely. Petitioner, now represented by counsel, urges this court to allow the petition under the doctrine of equitable tolling, contending that his failure to file his petition within § 2244(d)'s one-year limitations period was caused by a combination of gross misconduct on the part of his lawyer and petitioner's medical segregation during the relevant time period. In the alternative, petitioner asks the

court to vacate its January 2003 dismissal of his original habeas petition, accept the instant petition as an amended petition and allow it to relate back to that filing.

As an initial matter, I am satisfied from reviewing the allegations of the petition that it ought to survive summary dismissal. *See* Rule 4 of the Rules Governing Section 2254 Cases (district court may dismiss petition summarily if “it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court”). In the petition, petitioner alleges, by way of reference to a letter sent to his appellate attorney, that a witness named Tracey Aide saw petitioner having consensual sexual contact with one of the victims, Katie Benson, on the night prior to petitioner’s alleged assault of Benson; that petitioner told this to his trial lawyer; and that trial counsel failed to interview Aide. These allegations are sufficient to state a claim of ineffective assistance of counsel. Petitioner’s remaining claims, though of questionable merit, also are stated with sufficient particularity to set forth viable constitutional issues. That said, all of petitioner’s claims, assuming the court allows the petition, are likely procedurally defaulted because of various blunders committed by petitioner in state court.

I have deferred providing a detailed recitation of the facts or procedural history of this case because the court will never reach the merits or decide questions of default if the petition is deemed untimely. The court will not decide this issue without allowing the state an opportunity to be heard.

One last housekeeping matter requires mention. Petitioner has named Darren Swenson, Warden of the Prairie Correctional Facility in Appleton, Minnesota, as the respondent. However, petitioner is now confined at the Kettle Moraine Correctional Institution. Accordingly, the proper respondent in this action is that institution's warden, Larry Jenkins. I have changed the caption to reflect this and will direct the clerk to do the same.

ORDER

1. The clerk shall serve copies of the petition, the appendix, petitioner's motion to extend his deadline and this order by mail to Warden Jenkins and to the Wisconsin Attorney General.
2. Before filing a response to petitioner's claims, the state shall file a response to petitioner's motion to extend his deadline for filing his petition. That response is due on September 14, 2007.
3. Petitioner shall file a brief in reply to the state's response no later than September 28, 2007.

Entered this 14th day of August, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge