

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

NORMAN ANTHONY FOSTER,

Petitioner,

ORDER

v.

07-C-0517-C

RANDALL HEPP, Warden,
Jackson Correctional Institution,

Respondent.

Norman Anthony Foster, an inmate at the Jackson Correctional Institution in Black River Falls, Wisconsin, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is serving a 14-year sentence for two counts of child enticement. He contends that he is in custody in violation of the Constitution of the United States because he was convicted on the basis of unreliable testimonial hearsay, in violation of his Sixth Amendment rights of confrontation and effective assistance of counsel. His request for leave to proceed in forma pauperis has been granted in a separate order. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

As an initial matter, I note that petitioner has named the “State of Wisconsin” as the respondent in this action. However, the proper respondent to a petition for a writ of habeas corpus is the state official having custody over petitioner. 28 U.S.C. § 2243; Rule 2(a) of

the Rules Governing Section 2254 Cases. In this case, that person is Randall Hepp, the warden of Jackson Correctional Institution. I have changed the case caption to reflect this.

According to the petition and state court records available electronically, petitioner was convicted by a jury on December 11, 2003 in the Circuit Court for Kenosha County for two counts of child enticement. Petitioner appealed his conviction to the Wisconsin Court of Appeals, arguing that the trial court had violated his right of confrontation under the Sixth Amendment by permitting the state to introduce testimonial hearsay at petitioner's trial and that his trial lawyer had provided ineffective assistance. On November 23, 2005, the court of appeals issued a decision affirming petitioner's conviction summarily. Although petitioner claims not to have filed a petition for review with the Wisconsin Supreme Court, a review of the appellate docket sheet available at <http://wscca.wicourts.gov>, (search "Appeal Number" for "05ap471" (last visited September 21, 2007)), shows that a petition for review was filed on December 23, 2005 and denied on March 15, 2006.

The Antiterrorism and Effective Death Penalty Act of 1996 established a one year statute of limitations period for all federal habeas proceedings running from certain specified dates. 28 U.S.C. § 2244. In most cases, the one year limitation period begins to run from the date on which judgment in the state case became final by the conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). Because petitioner did not file a petition for a writ of certiorari with the United States Supreme Court, his conviction became "final" 90 days after the Wisconsin Supreme Court denied his

petition for review on direct appeal from the conviction, or June 13, 2006. Anderson v. Litscher, 281 F.3d 672, 674-675 (7th Cir. 2002) (time for seeking direct review under § 2244(d)(1)(A) includes 90-day period in which prisoner could have filed petition for writ of certiorari with United States Supreme Court). Petitioner had one year, or until June 13, 2007, in which to file his federal habeas petition. He filed the instant petition on September 14, 2007.

Accordingly, it appears that the petition is untimely unless petitioner can establish circumstances that would justify starting the running of the limitations period on some later date. A date after the conviction became final may be appropriate if the petitioner is seeking relief on the basis of facts that could not have been discovered earlier, § 2244(d)(1)(D), or on the basis of a new constitutional right recognized by the Supreme Court, if that right was also “made retroactively applicable to cases on collateral review.” § 2244(d)(1)(C). Petitioner has not alleged any facts in his petition to suggest that either of these circumstances is present in this case. Although he is seeking habeas relief partly on the basis of the new rule governing testimonial hearsay announced by the Supreme Court in Crawford v. Washington, 541 U.S. 26 (2004), that decision has no bearing on the timeliness of his petition. Not only was Crawford decided well before petitioner filed his initial brief in his state court appeal, but the Supreme Court has declined to make the rule announced in that case retroactive to cases on collateral appeal. Whorton v. Bockting, 127 S. Ct. 1173 (Feb. 28, 2007).

Further, nothing in the petition suggests that any extraordinary circumstance beyond petitioner's control impeded him from filing his petition sooner. Lawrence v. Florida, 127 S. Ct. 1079, 1085 (Feb. 20, 2007) (describing doctrine of equitable tolling); see also § 2244(d)(1)(B) (providing that limitations period may be tolled if state impeded petitioner from filing petition sooner). Finally, petitioner did not file any "application for State post-conviction or other collateral review with respect to the pertinent judgment," so tolling is not available under § 2244(d)(2).

For all these reasons, the petition appears to be untimely. Before dismissing the petition, however, I will allow petitioner the opportunity to present any facts and arguments he can muster to show that his petition is in fact timely, that circumstances exist that would justify tolling the statute of limitations for equitable reasons or that the interests of justice would be better served by addressing the merits of the petition. Day v. McDonough, 547 U.S. 198, 209-10 (2006) (district court may consider timeliness of habeas petition on its own initiative so long as it gives petitioner opportunity to present his position). In preparing his response, it would be of benefit to petitioner to provide more details about the hearsay evidence that he claims was wrongfully admitted at his trial.

ORDER

IT IS ORDERED that petitioner has until October 12, 2007, in which to show cause why his petition should not be dismissed pursuant to 28 U.S.C. § 2244(d).

The clerk of court is directed to amend the case caption to reflect that the respondent is Randall Hepp, Warden of the Jackson Correctional Institution.

Entered this 21st day of September, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge