

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

DAVID ELIJAH BOWERS, JR.,

Petitioner,

v.

BYRAN BARTON,

Respondent.

ORDER

10-cv-396-bbc

In this petition for a writ of habeas corpus under 28 U.S.C. § 2254, petitioner David Elijah Bowers, Jr., is proceeding on a claim that a state court judge purported to revoke his extended supervision for two sentences in October 2008, even though he had completed serving those sentences. Respondent Byran Barton has filed a motion to dismiss the petition on the ground of procedural default. In particular, respondent argues that petitioner did not fairly present his claim to the state courts because he failed to develop the facts or the law of his claim.

“The procedural default doctrine precludes federal review of a state court's habeas decision when the state court's decision was based on adequate and independent state law, or when the federal issue was not fairly presented to the state courts and those courts would

now hold the claim procedurally barred.” Ward v. Jenkins, 613 F.3d 692, 696-97 (7th Cir. 2010). “As part of this requirement, a petitioner must have fairly presented both the operative facts and legal principles that control each claim to the state judiciary.” Smith v. McKee, 598 F.3d 374, 382 (7th Cir. 2010).

As an initial matter, petitioner does not dispute respondent’s contention that petitioner never filed a petition for review with the Wisconsin Supreme Court and he does not identify any reason for his failure to do so. That alone is enough to require dismissal. Baldwin v. Reese, 541 U.S. 27, 29 (2004) (“[T]he prisoner must ‘fairly present’ his claim in each appropriate state court (including a state supreme court with powers of discretionary review).”

In any event, I agree with respondent that petitioner failed to fairly present his claim to the Wisconsin Court of Appeals. That court concluded that “the reconfinement order should be summarily affirmed because Bowers’ argument is incomprehensible and his briefs and the record do not show any basis for relief.” In particular, the court noted that, in 2007, the Department of Corrections “calculated the remainder of Bowers’s sentence at three years and seven days” and “Bowers does not explain why he believe he was discharged before the reconfinement order and he does not cite any part of the record to establish the discharge.” Dkt. #15, exh. A.

The briefs petitioner filed with the court of appeals confirm the court’s observation.

Petitioner cited no relevant law and never explained why he believed his confinement was unlawful.

“A federal court may excuse a procedural default if a petitioner can show either cause for the default and actual prejudice as a result of the alleged violation of federal law or can demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice.” Smith, 598 F.3d at 382. Because petitioner does not attempt to show cause, prejudice or a miscarriage of justice, respondent’s motion to dismiss will be granted.

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one. For the reasons stated, reasonable jurists would not debate whether petitioner fairly presented his claim to the Wisconsin courts.

ORDER

IT IS ORDERED that respondent Byran Barton's motion to dismiss, dkt. #14, is GRANTED. Petitioner David Elijah Bowers, Jr.'s petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DISMISSED for his failure to fairly present his claim the Wisconsin courts. Petitioner is DENIED a certificate of appealability. He may seek a certificate from the court of appeals under Fed. R. App. P. 22

Entered this 13th day of December, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge