

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

BENJAMIN WALKER,

Petitioner,

v.

PETER HUIBREGTSE, Warden,

Respondent.

ORDER

10-cv-692-bbc

Petitioner Benjamin Walker has filed a motion for reconsideration of the decision dismissing his petition for a writ of habeas corpus on the ground that he failed to exhaust his state court remedies, as required by 28 U.S.C. § 2254(b)(1)(A). Petitioner admitted that he had not received a decision from the Wisconsin Court of Appeals or the Wisconsin Supreme Court and the Wisconsin courts' electronic docket showed that an appeal was pending in the Wisconsin Court of Appeals.

In a 20-page brief, petitioner argues that he was not required to exhaust his state court remedies, but the bulk of this argument seems to be devoted to the merits of his claims. Petitioner's logic is not clear, but he seems to believe that he is excused from proceeding through the state courts if he can show that his constitutional rights were violated.

Petitioner is confusing the requirement for showing that he is custody in violation of federal law with the requirement that he exhaust his state court remedies. The Supreme Court made it clear long ago that prisoners must complete the exhaustion process regardless of the perceived strength of their claims. Duckworth v. Serrano, 454 U.S. 1, 4 (1981) (no exception to exhaustion requirement for “clear violations” of federal law).

Similarly, petitioner seems to believe that the state court “lacked subject matter jurisdiction” to sentence him because he is challenging the constitutionality of the stalking statute under which he was convicted. Again, petitioner is confusing the merits with procedure. Because petitioner was charged, tried, convicted and sentenced under a Wisconsin criminal statute, Wis. Stat. § 940.32, the Circuit Court for Outagamie County had jurisdiction to sentence him. No court has declared Wisconsin’s stalking statute unconstitutional, e.g., State v. Ruesch, 214 Wis. 2d 548, 571 N.W.2d 898 (Ct. App. 1997), and it is presumed valid until that time. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). A court does not lose jurisdiction simply because the defendant is challenging the validity of the conviction.

Finally, petitioner makes a nearly unintelligible argument regarding his pending appeal with the Wisconsin Court of Appeals. First, he suggests that his pending appeal is not a challenge to the convictions that are the subject of his petition, even though the appeal has been docketed as an appeal to the same criminal case and even though he admits that

the court of appeals is “treating the appeal as a criminal appeal.” Alternatively, he says that “the court of appeals doesn’t care to afford pro se prisoners a fair hearing,” suggesting that he believes an appeal is futile. Neither of these contradictory arguments is persuasive. To the extent petitioner has not filed an appeal of his conviction, he has made no showing that he is unable to do so. If he has appealed his conviction, he has made no showing that the court of appeals has prejudged his case or that the appeal is otherwise futile.

ORDER

IT IS ORDERED that petitioner Benjamin Walker’s motion for reconsideration, dkt. #13, is DENIED.

Entered this 26th day of January, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge