

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

JAMES E. GRANT,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

ORDER

11-cv-583-bbc

Petitioner James Grant has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his state court convictions for possession of drug paraphernalia, violation of a domestic abuse injunction and multiple counts of bail jumping. Petitioner has been granted leave to proceed in forma pauperis. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Petitioner raises four claims in his petition: (1) he received a not guilty verdict on a count of domestic battery included in the case; (2) there was insufficient evidence to convict him on the possession of drug paraphernalia charge; (3) he was never arraigned on the bail jumping charge; and (4) his counsel was ineffective by telling him to plead no contest to the count of violation of a domestic abuse injunction. After reviewing the petition, I conclude that it must be dismissed because petitioner has not exhausted his state court remedies.

Before a federal court may consider the merits of a state habeas petitioner's claims, the petitioner must exhaust the remedies available to him in the state courts. 28 U.S.C. §

2254(b)(1)(A); O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004). 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, 390 F.3d at 514. 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, 526 U.S. at 854 (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). If a petitioner has procedurally defaulted a claim, a federal court cannot reach the merits of that claim unless the petitioner demonstrates (1) cause for the default and actual prejudice from failing to raise the claim as required or (2) that enforcing the default would lead to a "fundamental miscarriage of justice." Steward v. Gilmore, 80 F .3d 1205, 1211-12 (7th Cir. 1996) (quoting Wainwright v. Sykes, 433 U.S. 72, 87 (1977)).

In this case, it is unclear whether petitioner even filed a direct appeal of his convictions. The judgment of conviction was entered July 17, 2008. Petitioner states that he appealed this judgment, raising the grounds that there was insufficient evidence to convict him on the possession of drug paraphernalia charge and that he was never arraigned on the bail jumping charge, but the Wisconsin Court of Appeals and Supreme Court online case database shows no direct appeal. <http://wscca.wicourts.gov>. Rather, it shows that petitioner filed a petition for supervisory writ with the court of appeals on November 16, 2009, which was summarily dismissed. In any case, petitioner concedes that he did not fairly present any of his claims to the Wisconsin Supreme Court.

Petitioner explains these problems largely by stating that his counsel failed to present his arguments, and it is true that ineffective assistance of counsel can establish “cause” for a procedural default. However, in Edwards v. Carpenter, 529 U.S. 446 (2000), the Supreme Court held that because the assertion of ineffective assistance as a cause to excuse a procedural default in a § 2254 petition is itself a constitutional claim, the petitioner must have raised this claim first to the state court or he has procedurally defaulted it. Id. at 452-53. It appears that petitioner never presented a claim of ineffective assistance of counsel to the state courts.

Thus, the question is whether petitioner still may exhaust his claims by presenting the claim of ineffective assistance of counsel to the state courts. 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”). Wisconsin’s statute governing post conviction motions, Wis. Stat.

§ 974.06, allows defendants to attack their convictions collaterally on constitutional grounds after expiration of the time for seeking a direct appeal or other post conviction remedy. However, a petitioner is procedurally barred from raising a claim in a post conviction motion that he could have raised on direct appeal unless he has a “sufficient reason” for not raising the issue on direct appeal. State v. Escalona-Naranjo, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 164 (1994); Wis. Stat. § 974.06(4). Ineffective assistance of post conviction or appellate counsel may provide a sufficient reason. State ex rel. Rothering v. McCaughtry, 205 Wis. 2d 675, 682, 556 N.W. 2d 136, 139 (Ct. App. 1996) (describing procedure for challenging effectiveness of post conviction counsel); State v. Knight, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992) (appellate counsel). Thus, there are avenues of relief available to petitioner in the state courts through which he could present his claim that his lawyer was ineffective for failing to properly appeal his conviction. The fact that the state courts may not rule in petitioner’s favor does not mean he can ignore the exhaustion requirement. Cawley v. DeTella, 71 F.3d 691, 695 (7th Cir. 1995); White v. Peters, 990 F.2d 338, 342 (7th Cir. 1993). Accordingly, I must dismiss the petition for petitioner’s failure to exhaust his administrative remedies.

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

1. The petition of James Grant for a writ of habeas corpus, dkt. #1, is DISMISSED WITHOUT PREJUDICE for his failure to exhaust his state court remedies.

2. 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 3d day of November, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge