

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

JOHN W. TALBOT,

Petitioner,

OPINION and ORDER

v.

12-cv-908-bbc

MICHAEL DITTMANN, Warden,
Redgranite Correctional Institution,

Respondent.

Petitioner John Talbot, a prisoner at the Redgranite Correctional Institution, has filed a petition for a writ of habeas corpus under 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. After completing this review, I will direct the state to respond to the petition.

From the petition, this court's records and state court records available electronically, I find the following facts.

FACTS

This is petitioner's third habeas petition in this court regarding his June 17, 2003 conviction in the Circuit Court for Wood County for homicide by use of a vehicle while intoxicated, see Case Nos. 08-cv-561-slc, 09-cv-28-bbc. Petitioner's original petition was dismissed without prejudice on November 12, 2008 because he had failed to exhaust all but one of his claims in state court: that the trial court had not conducted a thorough colloquy

with petitioner to insure that he had knowingly waived his rights by entering into a plea agreement. Case No. 08-cv-561-slc, dkt. ##2, 5. The court found that petitioner had not exhausted his state court remedies with respect to the following claims: 1) the state breached the plea agreement by altering it after he had signed it; 2) the altered plea agreement was ambiguous; 3) his trial counsel was ineffective for not explaining the plea agreement, ascertaining whether petitioner understood it and altering it after petitioner had signed it; and 4) his appellate counsel was ineffective for failing to raise petitioner's first three claims on appeal. Id., dkt. #5.

In his second case, initially I entered an order staying his petition while he completed the process of exhausting his state court remedies for claims of ineffective assistance of appellate counsel, but vacated that stay on July 21, 2010, noting that petitioner had 48 days left on his federal habeas clock in which to exhaust all of his claims. Case No. 09-cv-28-bbc, dkt. ##7, 18. In the meantime, petitioner had filed a post conviction motion on April 26, 2010 in an effort to exhaust his remaining claims as well as the claim that appellate counsel was ineffective in post conviction proceedings by failing to raise his unexhausted claims. The circuit court denied that motion on September 9, 2010, concluding that his four previously unexhausted claims were barred by State v. Escalona-Naranjo, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and denying the ineffectiveness of post conviction counsel claim on the merits. The Wisconsin Court of Appeals affirmed the dismissal on May 31, 2012, addressing only petitioner's claim of ineffectiveness of post conviction counsel. The

Wisconsin Supreme Court denied the petition for review on this motion on November 14, 2012. Petitioner filed this petition on December 4, 2012.

OPINION

As an initial matter, I note that petitioner filed his petition before his federal habeas clock ran out, which was 48 days from the Wisconsin Supreme Court's November 14, 2012 denial of his petition for review. He filed his current petition within 20 days of that denial.

Turning to his individual claims, it is not necessary to discuss petitioner's claim that the trial court did not conduct a thorough colloquy with him. As to his other claims, petitioner says that he did not present them because of his counsel's ineffective assistance. Although ineffective assistance may provide cause for failing to raise a claim in state court, an ineffective assistance claim must be exhausted in state court as well. Edwards v. Carpenter, 529 U.S. 446 (2000). Now petitioner has presented evidence showing that he raised his ineffectiveness of post conviction counsel claim in state court in his April 26, 2010 post conviction motion.

At this stage, the allegations in the petition are sufficient to state valid constitutional claims. Therefore, I will direct the state to respond to the petition.

ORDER

IT IS ORDERED that

1. Pursuant to an informal service agreement between the Attorney General for the State of Wisconsin and the court, copies of the petition and this order are being sent today to the Attorney General for service on respondent Michael Dittmann.

2. Within 30 days of the date of service of this order, respondent must file an answer to the petition. The answer must comply with Rule 5 of the Rules Governing Section 2254 Cases and must show cause, if any, why this writ should not issue.

3. **Dispositive motions.** If the state contends that the petition is subject to dismissal on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion or procedural default, it is authorized to file a motion to dismiss, a supporting brief and any documents relevant to the motion, within 30 days of this order, either with or in lieu of an answer. Petitioner shall have 20 days following service of any dismissal motion within which to file and serve his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

If the court denies the motion to dismiss in whole or in part, it will set a deadline within which the state must file an answer, if necessary, and establish a briefing schedule regarding any claims that have not been dismissed.

4. **When no dispositive motion is filed.** If respondent does not file a dispositive motion, then the parties shall adhere to the following briefing schedule regarding the merits of petitioner's claims:

- Petitioner shall file a brief in support of the petition within 30 days of the date of service of respondent's answer. Petitioner bears the burden to show that his conviction or sentence violates the federal Constitution, United States Supreme Court case law, federal law or a treaty of the United States. With respect to any claims that were adjudicated on the merits in a state court proceeding, petitioner bears the burden to show that the state court's adjudication of the claim:
 1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or,
 2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Petitioner should keep in mind that in a habeas proceeding, a federal court is required to accept the state court's determination of factual issues as correct, unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

NOTE WELL: If petitioner already has submitted a memorandum or brief in support of his petition that addresses the standard of review set out above, then he does not need to file another brief. However, if petitioner's initial brief did not address the standard of review set out in § 2254(d), then he should submit a supplemental brief. If he fails to do so, then he risks having some or all of his claims dismissed for his failure to meet his burden of proof.

- Respondent shall file a brief in opposition within 30 days of the date of service of petitioner's brief.
- Petitioner shall have 20 days after service of respondent's brief in which to file a reply brief.

5. For the time being, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not consider any submission that has not been served upon the state. Petitioner should note on each of his submissions whether he has served a copy of that document upon the state.

Entered this 22d day of February, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge