

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

CURTIS J. PIDGEON,

Petitioner,

OPINION and ORDER

v.

13-cv-57-bbc

LIZZIE TEGELS,

Respondent.

Petitioner Curtis Pidgeon, a prisoner at the Jackson 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 and state court records available electronically, I find the following facts.

FACTS

On October 2, 2007, petitioner Curtis Pidgeon was charged with four counts of second-degree sexual assault of a child and two counts of fourth-degree sexual assault for events occurring allegedly on September 29, 2007. The state alleged that petitioner touched two girls in a sexual manner and had sexual intercourse with one of them.

In the early stages of the criminal case, petitioner, proceeding pro se, filed a suppression motion. He brought the motion pursuant to Wis. Stat. § 971.31(11), which states

if the court finds that the crime was sexually motivated . . . evidence which is admissible under s. 972.11(2) must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.

(Wis. Stat. § 972.11(2), Wisconsin's rape shield law, generally prohibits a defendant from introducing evidence concerning a victim's prior sexual experiences or manner of dress.) Also, petitioner sought exclusion under Wis. Stat. §971.23(9), which requires a party submitting DNA evidence to notify the other party at least 45 days before trial. (I understand petitioner to be asserting that he was not given proper notice.) Petitioner's motion was ignored by the court and was "unavailable" at his next court appearance. Following this, petitioner agreed to take on counsel, but counsel did not pursue the suppression motion.

Petitioner eventually pleaded no contest to one count of second-degree sexual assault of a child; the other counts were dismissed and read in. The state induced petitioner to plead no contest by stating that he would be facing life in prison because of a previous "strikes" on his criminal record. However, one of the previous strikes did not actually exist. Defense counsel did not investigate this, but rather went along with the state's interpretation. Petitioner was sentenced to 10 years of initial confinement and 10 years of

extended supervision. Petitioner filed a motion for a Machner hearing, alleging ineffective assistance by his counsel, but it was denied without a hearing.

Petitioner filed a pro se motion for post conviction relief, which was denied on February 19, 2010. He appealed and the court of appeals affirmed the denial on August 23, 2011. Petitioner's petition for review was denied by the Wisconsin Supreme Court on January 24, 2011.

OPINION

I understand plaintiff to be raising the following claims in his petition: (1) the trial court's decision not to hear his suppression motion violated his right to due process; (2) his plea was not voluntarily made because the state and his counsel misrepresented that he would be facing a life sentence under Wisconsin's three-strikes law; (3) trial counsel was ineffective because he did not pursue a suppression motion and did not properly understand the three-strikes law.

At this stage, petitioner's allegations are sufficient to state valid constitutional claims. In addition, it appears that petitioner has exhausted his state court remedies and filed his petition within the one-year limitations period. 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 Lizzie Tegels.

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 9th day of April, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge