

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

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RICHARD L. GIESE,

Petitioner,

OPINION and ORDER

v.

13-cv-62-bbc

LIZZIE TEGELS,

Respondent.

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Petitioner Richard Giese, a prisoner at the New Lisbon Correctional Institution,<sup>1</sup> 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 give petitioner an opportunity to explain why this case should not be dismissed under Stone v. Powell, 428 U.S. 465 (1976).

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

FACTS

On February 2, 2009, the state filed a criminal complaint against petitioner Richard Giese, charging him with a count of possessing drug paraphernalia, a count of possessing

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<sup>1</sup> Petitioner has recently moved to this institution and has filed a motion to amend the caption to name Warden Lizzie Tegels as the respondent. I will grant that motion and the caption is amended accordingly.

with intent to deliver more than 40 grams of cocaine and a count of operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood. The charges stemmed from traffic stops that had occurred on January 5 and January 28, 2009. Petitioner was charged as a repeater because he had a prior felony conviction.

On July 31, 2009, petitioner filed motions to suppress the statements he made and the items seized after the traffic stops, arguing that the officer pulling him over did not have reasonable suspicion to do so based on a citizen's tip regarding erratic driving, where the officer followed petitioner for ten miles without observing any erratic driving. (It is not entirely clear from the petition whether petitioner is contesting both stops; for now, I will assume that he is.) The court denied petitioner's motions. On October 16, 2009, petitioner pleaded no contest to possession with intent to deliver more than 40 grams of cocaine. The circuit court imposed a sentence consisting of 10 years of initial confinement and five years of extended supervision.

Petitioner appealed the judgment to the Wisconsin Court of Appeals, which affirmed the conviction on June 17, 2011. Petitioner filed a petition for review in the Wisconsin Supreme Court, which denied the petition on October 24, 2011.

## OPINION

I understand petitioner's claim to be that his rights under the Fourth Amendment were violated by the unlawful stops and arrest and the failure of the courts to suppress the evidence obtained from that unlawful stops should have been suppressed. However, under

Stone v. Powell, 428 U.S. 465 (1976), federal courts cannot consider Fourth Amendment claims on habeas corpus review in cases in which the state courts have allowed the petitioner a full and fair opportunity to litigate those claims.

A petitioner receives a full and fair opportunity to litigate if

(1) he has clearly informed the state court of the factual basis for that claim and has argued that those facts constitute a violation of his fourth amendment rights and (2) the state court has carefully and thoroughly analyzed the facts and (3) applied the proper constitutional case law to the facts.

Hampton v. Wyant, 296 F.3d 560, 563 (7th Cir. 2002) (citing Pierson v. O’Leary, 959 F.2d 1385, 1391 (7th Cir. 1992)). Under these criteria, “full and fair” means the right to *present* the Fourth Amendment claim. So long as the state court gives a claim adequate and unbiased consideration, it is irrelevant whether the court ultimately reaches the correct decision. Cabrera v. Hinsley, 324 F.3d 527, 531-32 (7th Cir. 2003).

Therefore, to establish that his hearing was not full and fair, a petitioner must show that it was a “sham” because it had been subverted in some obvious and disturbing way. Id. Federal court review of Fourth Amendment claims is limited to exploring for possible abuses of the hearing process. Id. Examples of such abuses would be “if the judge had his mind closed to the necessity of a hearing, or was bribed, or decided . . . that probable cause is not required [to make an arrest], or was sleepwalking . . . or in some other obvious way subverted the hearing.” Id. at 531; see also Brock v. United States, 573 F.3d 497, 501 (7th Cir. 2009). Petitioner does not say whether such abuses occurred at his suppression hearings. Accordingly, I will give him a short time to supplement his petition to say whether he believes there were such abuses at his hearings, and if so, provide the court a detailed

account of why he thinks so. If petitioner fails to submit these materials by the deadline stated below, I will dismiss the petition with prejudice.

Finally, petitioner has filed a motion for the court's assistance in recruiting counsel to represent him. Petitioner has not provided financial information indicating whether he requires the court's assistance. In any case, petitioner does not require counsel to respond to this order. Accordingly, I will deny the motion without prejudice to petitioner's refiling it later in the case.

#### ORDER

IT IS ORDERED that

1. Petitioner Richard Giese's motion to amend the caption, dkt. #2, is GRANTED.
2. Petitioner has until April 30, 2013 to submit a supplement to his petition as described above. If petitioner fails to submit these materials by the deadline, I will dismiss the petition with prejudice.
3. Petitioner's motion for the court's assistance in recruiting counsel to represent him, dkt. #5, is DENIED without prejudice.

Entered this 9th day of April, 2013.

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