

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

JON SOTO,

Petitioner,

v.

JEFFREY PUGH,

Respondent.

OPINION AND ORDER

13-cv-719-bbc

Petitioner Jon Soto, a prisoner at the Stanley 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 April 14, 2009, a criminal complaint was filed in Trempealeau County, Wisconsin, against petitioner Jon Soto for harm he allegedly caused a former girlfriend. The complaint included one count of stalking resulting in bodily harm, one count of false imprisonment, two counts of aggravated battery and one count of second-degree reckless endangerment. All of the counts included sentence enhancements for the use of a dangerous weapon, domestic abuse and commission by a repeater. On May 4, 2009, the charges were

incorporated into the information filed against petitioner. The information also included charges for first-degree sexual assault and attempted first-degree sexual assault, both of which included repeater enhancements.

On July 8, 2009, petitioner pleaded guilty to the second-degree reckless endangerment charge with the repeater enhancement removed, but with the dangerous weapon and domestic abuse enhancements included. In exchange, the state agreed to dismiss and read in the false imprisonment and aggravated battery charges with their enhancements. Additionally, the state agreed to dismiss the stalking, first-degree sexual assault and attempted sexual assault charges.

On November 12, 2009, petitioner was sentenced to ten years of confinement and five years of extended supervision. On May 4, 2010, petitioner filed a motion to withdraw his plea, arguing that his rights under Wisconsin statute and to due process under the United States Constitution were violated because the plea hearing had been conducted by videoconference. The motion was denied by the circuit court and petitioner filed an appeal. The Wisconsin Court of Appeals certified the question to the Wisconsin Supreme Court. On July 12, 2012, the Wisconsin Supreme Court affirmed the circuit court's ruling.

On February 20, 2013, petitioner filed a petition for writ of habeas corpus in the Wisconsin Court of Appeals, arguing that his appellate counsel had provided ineffective assistance for failing to argue that trial counsel was ineffective "for failing to argue issues set forth in the state court record that were stronger and [more] obvious than the one issue that the appellate attorney argued." On March 7, 2013, the Wisconsin Court of Appeals denied

the petition. On August 1, 2013, the Wisconsin Supreme Court denied a petition for review.

Petitioner filed the present habeas corpus petition on October 16, 2013.

OPINION

As an initial matter, from the limited record available to the court—petitioner's filings and the electronic Wisconsin Circuit Court Access and Court of Appeals and Supreme Court Access website—it is unclear whether petitioner's current petition for writ of habeas corpus is timely. Under the Antiterrorism and Effective Death Penalty Act of 1996, all habeas corpus petitions are subject to a one-year limitations period found in 28 U.S.C. § 2244(d)(1). As a general rule, this one-year statute of limitations begins to run at "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," 28 U.S.C. § 2244(d)(1)(A), but the proper filing of a state court motion for collateral review tolls the one-year limitations period, 28 U.S.C. § 2244(d)(2). I will reserve a decision on this point until respondent has had an opportunity to be heard.

The next question is whether petitioner can pursue the grounds he has set out in his petition. Under the statute governing petitions for writs of habeas corpus, 28 U.S.C. § 2254(b)(1)(A), a petitioner cannot pursue in federal court any ground on which he has not exhausted the remedies available to him in the state courts. Petitioner states that he raised each of the grounds for his petition in his February 20, 2013 state habeas petition. Those

grounds are that his appellate counsel provided ineffective assistance of counsel for failing to argue that his trial counsel was ineffective for failing to raise the following issues: (1) the trial court lacked subject jurisdiction because the criminal complaint was neither verified nor signed by the district attorney; (2) the complaint was multiplicitous; and (3) the complaint included the false statement that the victim suffered multiple stab wounds. At this point, I cannot ascertain whether petitioner properly raised these issues in state court, as petitioner has not provided the court the Wisconsin Court of Appeals decision on his state court petition, and the Wisconsin Supreme Court and Court of Appeals Access website does not have an electronic copy of the decision. Thus, although at this stage I conclude that petitioner's allegations merit a substantive response, the state remains free to raise failure to exhaust or procedural default arguments.

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 for writ of habeas corpus filed by Jon Soto and this order are being sent today to the Attorney General for service on respondent Jeffrey Pugh.

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 19th day of November, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge