

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

MILLARD PATRICK II,

Petitioner,

OPINION AND ORDER

v.

13-cv-230-wmc

MICHAEL BAENEN, Warden,
Green Bay Correctional Institution,

Respondent.¹

State inmate Millard Patrick II seeks relief pursuant to 28 U.S.C. § 2254, which seeks to challenge, among other things, his conviction from Eau Claire County. Patrick has paid the filing fee and this case is now before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. After considering all of the pleadings, the court concludes that the petition must be dismissed without prejudice for the reasons that follow.

FACTS

Patrick entered no contest plea in Eau Claire County Case No. 09CF167 to misappropriating identification to obtain money (count one) and fraud against a financial institution (count five). The remaining charges for credit card fraud (counts two and three) and felony bail jumping (count four) were dismissed as the result of Patrick's plea.

¹ The original petition lists the State of Wisconsin as the respondent. Because petitioner is in state custody at the Green Bay Correctional Institution, the court substitutes Warden Michael Baenen as the proper respondent for purposes of Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

After an initial term of probation was revoked, the Eau Claire County Circuit Court sentenced Patrick to prison on November 9, 2010. He did not pursue a direct appeal, nor has he filed a post-conviction motion to challenge his conviction or subsequent probation revocation.

On April 3, 2013, Patrick filed a petition for a writ of habeas corpus in this court. Patrick contends that he was denied effective assistance of counsel during his criminal proceeding because his defense attorney did not “fight harder” to show that he was mentally ill and, therefore, not guilty by reason of insanity. Patrick also claims that his civil rights were violated while in state custody because he has been forced to make payments to his appointed counsel, employed by the Eau Claire County Public Defender’s Office. Finally, Patrick appears to claim that he has been physically and/or sexually abused while in state prison.

OPINION

A. Civil Rights Claims

As an initial matter, Patrick’s claims of official misconduct and physical or sexual abuse stem from the conditions of his confinement in state prison. These claims are not actionable in a habeas corpus proceeding, which is restricted to claims seeking relief from the “fact or duration of confinement.” *Prieser v. Rodriguez*, 411 U.S. 475, 500 (1973). The proper vehicle for a state prisoner to challenge the conditions of his confinement is a civil rights action pursuant to 42 U.S.C. § 1983. *See Graham v. Broglin*, 922 F.2d 379,

380-81 (7th Cir. 1991). The Seventh Circuit has emphasized that a civil rights suit improperly brought in a habeas corpus action should be dismissed, nor recharacterized nor converted. *See Pischke v. Litscher*, 178 F.3d 497, 500 (7th Cir. 1999). Here, Patrick has already filed a separate civil rights action in this district. *See Patrick v. State of Wisconsin*, No. 12-cv-231-wmc. Accordingly, all claims concerning the conditions of his confinement in this case will be dismissed without prejudice to consideration under § 1983.

B. Habeas Corpus Claims

Patrick's claim that he was denied effective assistance of counsel is properly considered under the federal habeas corpus statutes. To establish a claim of ineffective assistance of counsel, a petitioner must show that counsel was deficient in his performance and that the deficiency prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prevail on such a claim, the petitioner must demonstrate that the state court's adjudication of his claim was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in the light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

Patrick concedes in the petition that he has not raised this claim previously, meaning that the state courts have not had an opportunity to decide or adjudicate its merit. *See* Dkt. # 1, *Petition* at ¶¶ 8-21, 23. A federal court may not entertain a habeas

corpus petition from a prisoner in state custody unless the petitioner has exhausted his available state remedies before seeking relief in federal court. *See* 28 U.S.C. § 2254(b); *Malone v. Walls*, 538 F.3d 744, 753 (7th Cir. 2008). “This so-called exhaustion-of-state-remedies doctrine serves the interests of federal-state comity by giving states the first opportunity to address and correct alleged violations of a petitioner’s federal rights.” *Lieberman v. Thomas*, 505 F.3d 665, 669 (7th Cir. 2007). Because Patrick has not challenged his conviction previously in state court, his habeas corpus petition must be dismissed without prejudice for his failure to exhaust state 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 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). A petitioner makes a “substantial showing where 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.” *Arredondo v. Huibregtse*, 542 F.3d 1155, 1165 (7th Cir. 2008). Where denial of relief is based on procedural grounds, the petitioner also must show that jurists of reason “would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

For the reasons stated above, reasonable jurists would not debate the decision that Patrick’s ineffective-assistance claim is unexhausted and that his remaining claims are not

actionable under the federal habeas corpus statutes. Therefore, no certificate of appealability will issue.

ORDER

IT IS ORDERED that:

1. The federal habeas corpus petition filed by Millard Patrick II is DISMISSED without prejudice for failure to exhaust state remedies. The claims concerning Patrick's conditions of confinement are DISMISSED without prejudice to consideration in a civil action governed by 42 U.S.C. § 1983.
2. All pending motions are DENIED as moot.
3. A certificate of appealability is DENIED. Petitioner may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 17th day of June, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge