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

STEPHEN B. WAINWRIGHT,

Petitioner,

OPINION AND ORDER

v.

13-cv-112-wmc

ERIC D. WILSON,

Respondent.

Petitioner Stephen B. Wainwright is presently incarcerated at the Federal Medical Center in Devens, Massachusetts. Wainwright has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging the validity of a later state court conviction that he claims was somehow used to enhance an earlier federal sentence imposed in this district. He has paid the filing fee and this case is currently before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. After completing this review, the court concludes that the petition must be dismissed.

FACTS

In April 2006, Wainwright was charged by information in this district with distributing child pornography in violation of 18 U.S.C. § 2252(a)(2). *United States v. Wainwright*, 06-cr-81-jcs (W.D. Wis.) Wainwright waived his right to a grand jury indictment and pled guilty on May 10, 2006. The district court sentenced him to 151 months' imprisonment on July 19, 2006.

On direct appeal, Wainwright argued that the district court erred at sentencing by applying a five-level enhancement in the advisory guidelines for distributing child pornography to a minor. *See* U.S.S.G. § 2G2.2(b)(2)(C). The United States Court of

Appeals rejected that argument, affirming the conviction and sentence. *See United States v. Wainwright*, 509 F.3d 812 (7th Cir. 2007). Wainwright did not appeal further or pursue certiorari review of that decision by the United States Supreme Court.

Wainwright does not attempt to challenge further his underlying conviction or sentence by this court. Instead, he seeks relief pursuant to 28 U.S.C. § 2254 from a state court conviction that was entered against him in 2009, some three years after his federal conviction. In particular, Wainwright challenges his conviction for second-degree sexual assault of a child in Dane County Circuit Court Case No. 08CF1442 to which he pled "no contest" and received a 4-year prison sentence on January 29, 2009. Even though that sentence was imposed to run concurrently with his much longer federal sentence, Wainwright maintains that he is entitled to relief from his 2009 state court conviction because neither the circuit court nor his appointed defense attorney advised him of his right to appeal.

OPINION

As an initial matter, Wainwright's petition is stale. To the extent that Wainwright challenges his state court conviction in Dane County Case No. 08CF1442, the one-year statute of limitations for federal habeas corpus review began to run from "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). Wainwright concedes that he did not file an appeal or any other post-conviction motion to challenge his January 2009 conviction in state court. Thus, the one-year statute of limitations expired sometime in 2010 at the latest. Wainwright offers no explanation for his delay in seeking federal habeas corpus review and

provides no basis for statutory or equitable tolling of the limitations period. For this reason alone, his petition must be dismissed as untimely filed.

Even if the statute of limitation were somehow tolled here, Wainwright also concedes that he discharged the sentence received in Case No. 08CF1442 before he even filed the pending federal habeas petition in this court. The Supreme Court has held that a petitioner is not in custody for purposes of federal habeas corpus review once the challenged sentence has fully expired. *See Maleng v. Cook*, 490 U.S. 488, 492 (1989). As a result, this court also lacks subject matter jurisdiction to determine the legality of Wainwright's now discharged state court conviction. *See id*. at 492-93.

Finally, Wainwright argues that he remains in custody for purposes of federal habeas corpus review because his January 2009 state court conviction was somehow used to enhance the federal sentence that he received in 2006. Not only does review of the pre-sentence report prepared in Wainwright's federal case shows that he was placed in Criminal History Category I, but the only prior conviction mentioned in Wainwright's pre-sentence report was a class A misdemeanor for criminal sexual abuse of a minor from Tazewell County (Illinois) Circuit Court Case No. 87CF31, which resulted in no criminal history points.

According to the PSR, Wainwright did admit to sexual contact with a young boy from Sun Prairie, Wisconsin, in "2004 or 2005," which *may* have been the conduct for which he was later charged and convicted as second-degree sexual assault of a child in Dane County Case No. 08CF1422. Even assuming that this *conduct* was used to increase his federal sentence, it would not be a basis to challenge a later state court conviction, nor to review his pending federal habeas petition, which is still barred because that conviction is no longer

open to collateral attack. *See Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 403-04 (2001) (explaining that, "once a state conviction is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), the conviction may be regarded as conclusively valid") (quoting *Daniels v. United States*, 523 U.S. 374, 382 (2001)). Wainwright does not meet the only exception to this rule for felony convictions entered without the right to counsel. *See Daniels,* 523 U.S. at 382 (recognizing an exception for convictions entered without the right to appointed counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963)). Accordingly, Wainwright's petition will be dismissed.

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 the petitioner is not "in custody" as required for federal habeas corpus review of the challenged

conviction or that the petition is untimely filed. Therefore, no certificate of appealability will issue.

ORDER

IT IS ORDERED THAT:

1. The federal habeas corpus petition filed by Stephen B. Wainwright is DISMISSED.

2. Wainwright's pending motion to stay his transfer to another prison facility (Dkt. # 6) is 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 14th day of May, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge