

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

ADAM M. STURDEVANT,

Petitioner,

v.

RANDALL HEPP,

Respondent.

ORDER

14-cv-697-jdp

Petitioner Adam Sturdevant is a Wisconsin prisoner currently housed at the Oregon Correctional Center. Petitioner seeks a writ of habeas corpus under 28 U.S.C. § 2254 to challenge a 2012 conviction in the Wisconsin Circuit Court for Columbia County. Petitioner has paid the \$5 filing fee. The next step is for the court to conduct a preliminary review of the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases. Under Rule 4, I must dismiss the petition “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court.” In screening a pro se litigant’s petition, I must read the allegations of the petition generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972) (per curiam). After reviewing the petition with this principle in mind, I conclude that the state should be served with the petition.

Petitioner was charged with a fifth or subsequent offense of operating a motor vehicle while under the influence (OWI) in November 2011, and he attended an initial appearance that month in the Columbia County court. The court set a return date for a month later and released petitioner on bond. But while he was out on bond, petitioner was arrested on a bail-jumping charge in Dane County. The Columbia County court rescheduled petitioner’s pretrial and return hearings for March 2012. When petitioner did not appear at the hearing

(because he was being held in the Dane County jail), the court rescheduled for May 2012 and issued a writ of habeas corpus directing the Dane County sheriff's department to produce petitioner. For unknown reasons, the sheriff's department did not execute the writ, and petitioner did not appear at the next hearing. But petitioner's counsel indicated that his client wanted to accept a plea offer that the state had made several months earlier. According to petitioner, the proposed plea agreement would have ensured that his sentence ran concurrently to any sentence that he received from the Dane County court, and the agreement would have guaranteed that he would have started receiving credit for the Columbia County court's sentence immediately after his conviction.

The Columbia County court set a new return date for June 2012 and issued another writ of habeas corpus. The Dane County sheriff's department again failed to execute the writ, this time because petitioner had a hearing in the Dane County court on the same day. Petitioner finally appeared in the Columbia County court in August 2012. The court set a date for a preliminary hearing, and the prosecutor indicated that the state had withdrawn the earlier plea offer. In September 2012, petitioner waived his right to a preliminary hearing and pleaded no contest to the OWI charge. A month later, the Columbia County court sentenced him to two years of initial confinement and one year of extended supervision, to be served consecutively to the sentence that petitioner had by then received in the Dane County court.

Petitioner appealed to the Wisconsin Court of Appeals, which summarily affirmed. Petitioner did not seek review in the Wisconsin Supreme Court. But in a separate proceeding, petitioner filed a post-conviction motion in the Wisconsin Court of Appeals. The court of appeals denied the petition, and petitioner sought review in the Wisconsin Supreme Court.

After the state supreme court denied review, petitioner filed a timely petition for a writ of habeas corpus in this court on October 14, 2014.

Petitioner asserts the following grounds for habeas relief:

1. Due process violations for failing to produce him for the hearings in May 2012 and June 2012, which led to him being unable to accept the state's plea offer;
2. Ineffective assistance of trial counsel for failing to object to petitioner's absence at the May 2012 hearing;
3. Due process violations by the Columbia County court for failing to hold an evidentiary hearing on petitioner's post-conviction motion;
4. Ineffective assistance of appellate counsel for failing to raise issues relating to trial counsel's performance, possible collateral attack on an earlier OWI conviction, and sentence credit;
5. Due process violations by the Wisconsin Court of Appeals for concluding that petitioner waived his arguments about ineffective assistance of appellate counsel by choosing to proceed pro se in his direct appeal;
6. Ineffective assistance of trial counsel in an earlier OWI case that resulted in enhanced penalties for petitioner's current OWI conviction; and
7. Denial of the constitutional protections announced in *State v. Hahn*, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528, *opinion clarified on denial of reconsideration*, 2001 WI 6, 241 Wis. 2d 85, 621 N.W.2d 902, which permits offenders to challenge prior convictions during an enhanced sentencing proceeding by alleging that they received ineffective assistance of counsel during the earlier proceeding.

Petitioner has probably procedurally defaulted Ground Two in his petition. Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner must exhaust his administrative remedies by fully and fairly presenting his claims to the state courts. *Bolton v. Akpore*, 730 F.3d 685, 694 (7th Cir. 2013). To "fairly present" a federal claim, a habeas petitioner must "assert that claim throughout at least one complete round of state-court review, whether on direct appeal of his conviction or in post-conviction proceedings." *Richardson v. Lemke*, 745 F.3d 258, 268 (7th Cir.), *cert. denied sub nom., Richardson v. Pfister*, 135 S. Ct. 380 (2014). This "requirement

means that the petitioner must raise the issue at each and every level in the state court system, including levels at which review is discretionary rather than mandatory.” *Id.* A habeas petitioner who misses an opportunity to properly present a claim in state court commits a procedural default that may forfeit federal review of that claim. *Curtis v. Montgomery*, 552 F.3d 578, 582 (7th Cir. 2009) (citations omitted). Here, petitioner indicates that he raised Ground Two on direct appeal. Dkt. 1, at 6. But because petitioner did not petition the Wisconsin Supreme Court for review of his direct appeal, he failed to present this ground through one complete round of state review.

I will allow petitioner to proceed with Ground Two because procedural default is an affirmative defense, which the state may or may not raise. *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004). But petitioner should be aware that *if* the state raises this defense, then I will be able to review Ground Two only if he can demonstrate “cause for the default and actual prejudice as a result of the alleged violation of federal law,” or that “failure to consider the claim[] will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Petitioner alleges that he raised each of his remaining grounds for habeas relief through his post-conviction motion. Thus, it appears that petitioner has exhausted his state court remedies and that his petition is timely and not plainly without merit. I will direct service of the petition on respondent.

ORDER

IT IS ORDERED that:

1. **Service of petition.** Pursuant to an informal service agreement between the Attorney General and the court, copies of the petition and this order are being sent today to the Attorney General for service on respondent.
2. **Answer deadline.** Within 60 days of the date of service of this order, respondent must file an answer to the petition, in compliance with Rule 5 of the Rules Governing Section 2254 Cases, showing cause, if any, why this writ should not issue.
3. **Motion to dismiss.** 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, then it may 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 may have 20 days following service of any dismissal motion within which to file and serve his responsive brief and any supporting documents. The state may 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, then 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. **Briefing on the merits.** If respondent does not file a dispositive motion, then the parties must adhere to the following briefing schedule regarding the merits of petitioner's claims:
 - a. Petitioner must file a brief in support of his petition within 30 days after the respondent's answer is filed.
 - b. Respondent must file a brief in opposition within 30 days.
 - c. Once respondent files a brief in opposition, petitioner may have 20 days to file a reply if he wishes to do so.

Entered April 6, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge