

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

MICHAEL C. O'BRIEN,

Petitioner,

v.

ORDER

14-cv-868-wmc

LIZZIE TEGELS, Warden,
Jackson Correctional Institution,

Respondent.

Petitioner Michael C. O'Brien is presently incarcerated by the Wisconsin Department of Corrections at the Jackson Correctional Institution. O'Brien seeks a writ of habeas corpus under 28 U.S.C. § 2254 to challenge a state judgment of conviction from Outagamie County Circuit Court. After conducting a preliminary review of the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases, the court concludes that an answer is needed from the respondent.

FACTS

On July 1, 2010, O'Brien entered a plea of no contest and was found guilty of an assortment of offenses outlined in Outagamie County Case Nos. 09CF384, 09CF745, and 10CF83. In Case No. 09CF384, O'Brien was convicted of the following: (1) possession of an electric weapon; (2) possession of cocaine; (3) resisting or obstructing an officer; and (4) misdemeanor bail jumping (four counts). In Outagamie County Case No. 09CF745, O'Brien was convicted of felony bail jumping. In Outagamie County Case No. 10CF83, O'Brien was convicted of operating while under the influence as a 5th or 6th offense. According to

O'Brien, the circuit court imposed a sentence in all three cases, consisting of 634 days' imprisonment, on March 26, 2012.

On direct appeal, O'Brien argued that the circuit court should have allowed him to withdraw his pleas of no contest in Case Nos. 09CF384, 09CF745, and 10CF83. O'Brien had filed a motion to withdraw his pleas before sentence was imposed, arguing that the attorney who represented him during the plea process had given inadequate advice because she not known that he had a previous federal conviction for homicide by negligent use of a motor vehicle, stemming from an alcohol-related incident. The Wisconsin Court of Appeals rejected that argument and affirmed the circuit court's decision in an unpublished opinion. *See State v. O'Brien*, 2013 WI App 30, 346 Wis. 2d 281, 827 N.S.2d 930. The Wisconsin Supreme Court summarily denied his petition for review on November 13, 2014.

In his pending habeas corpus petition, O'Brien contends that he is entitled to relief pursuant to 28 U.S.C. § 2254 for the following reason: his trial counsel was ineffective for failing to investigate his "prior criminal history" and his no-contest plea should be withdrawn for that reason. It appears that O'Brien has exhausted all available state court remedies with respect to this claim. Therefore, the court will authorize service of the petition on the respondent.

ORDER

IT IS ORDERED THAT:

1. **Service of petition.** Pursuant to an informal service agreement between the Attorney General and the court, the Attorney General is being notified to seek

service on the respondent, Lizzie Tegels, in her official capacity as warden of the Jackson Correctional Institution.

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. **Motions to dismiss.** If the state contends that the petition is subject to dismissal on its face - - on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion or procedural default - - then it is authorized to file within 30 days of this order, a motion to dismiss, a supporting brief and any documents relevant to the motion. Petitioner shall have 20 days following service of any dismissal motion within which to file and serve a responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.
4. **Denial of motion to dismiss.** If the court denies such a motion to dismiss in whole or in part, then it will set deadlines for the state to file its answer and for the parties to brief the merits.
5. **Briefing on the merits.** In the event that the respondent does not file a motion to dismiss as outlined above, the court will proceed to consider the merits. The court notes that petitioner has not filed a separate memorandum or brief in support of his petition. Therefore, the parties shall adhere to the following briefing schedule with respect to the merits of petitioner's claims:

- a. If petitioner wishes to file a brief in support of his petition he must do so within 30 days after the respondent files an answer.
- b. Once petitioner submits his brief or his time to submit a brief expires, respondent shall file a brief in response to the petition within 30 days.
- c. Once respondent files a brief in opposition, petitioner shall have 20 days to file a reply if he wishes to do so.

Entered this 12th day of January, 2015.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge