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

JOHN P. RASSBACH,

OPINION and ORDER

Petitioner,

v. 14-cv-55-jdp[1]

BRADLEY J. KOSBAB,

Respondent.

Petitioner John P. Rassbach is currently incarcerated at the McNaughton Correctional Center, located in Lake Tomahawk, Wisconsin. Petitioner seeks a writ of habeas corpus under 28 U.S.C. § 2254 to challenge a conviction entered in the St. Croix County Circuit Court.

However, petitioner did not initiate this case by filing the habeas petition itself. Rather, he filed the $5 filing fee for a habeas action along with a motion for appointment of counsel, stating that he was unqualified to prepare the petition himself. Dkt. 1. Under 18 U.S.C. § 3006A(a)(2), a district court may appoint counsel for a habeas corpus petitioner only where the petitioner is (1) "financially eligible" for such an appointment under the Criminal Justice Act, and (2) such an appointment would serve "the interests of justice."

Because it is highly unusual for a pro se filer to ask for counsel before filing so much as an initial pleading, and because it was unclear whether petitioner intended to file his own attempt at a pro se petition or whether he was waiting for a ruling on his motion for appointment of counsel, the clerk of court directed petitioner to submit a petition if it was his intention to do so. Dkt. 2. Plaintiff responded by submitting his pro se petition for writ of habeas corpus, Dkt. 3, which is easy to understand and sets forth the information required by the rules governing habeas

[1] This case was reassigned to me pursuant to a May 16, 2014 administrative order. Dkt. 4.

petitions. Because the petition is relatively well-written, I cannot conclude that the interests of justice would be served by appointing counsel for petitioner. Accordingly, I will deny his motion for appointment of counsel without prejudice to his renewing his motion if he believes that he cannot properly litigate the case.

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. In reviewing this pro se petition, I must read the allegations generously, reviewing them under "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). After review of the petition with this principle in mind, I conclude that the state should be served with the petition.

The following facts are drawn from the petition and state court records available electronically.

FACTS

On November 2, 2009, petitioner John Rassbach was charged with fourteen counts of theft by fraud, contrary to Wis. Stat. § 943.20(1)(d), in conjunction with his delivery of propane and diesel fuel to thirteen customers. The first five counts were felonies and the remaining nine misdemeanors, each based on the value of property at issue for each customer. The alleged value of the defrauded property for counts one through four was greater than $2500, and for the fifth count was greater than $5000.[2]

Petitioner used several different methods to defraud his customers. For each of the felony counts, the method used by petitioner was printing duplicate tickets for purported diesel fuel

[2] In order to qualify as a felony, the value of the property taken must exceed $2500. *See* Wis. Stat. § 943.20(3).

deliveries and submitting them to multiple customers. The duplicate tickets stated identical fuel amounts and delivery times. The criminal complaint stated the details of each duplicate ticket, including the ticket number, delivery time, fuel amount, and names of customers who were billed for each ticket. With respect to each ticket, the complaint alleged that petitioner had defrauded every customer who received it for the full amount stated on the ticket. The charges were organized by customer, and the values of the alleged losses from each transaction were combined for each customer to determine the total value of fraudulent loss for each criminal charge.

At the preliminary hearing, the felony victims testified that they paid their respective fuel tickets but would not have had they known that other customers received identical tickets. On cross-examination, counsel for petitioner attempted to get the victims to admit that, if they had actually received the fuel indicated on the ticket, they would have paid for it. Two victims testified that they would have paid for fuel they actually received, but most stated that they would have questioned the ticket and that there was no way to know if they actually received the fuel.

Ultimately, petitioner pleaded no contest to the five felony counts and guilty or no contest to the misdemeanor counts. The court accepted the plea and sentenced petitioner to one year of initial confinement and two years and six months of extended supervision on each of the first four felony counts, consecutively, as well as an imposed and stayed sentence of three years of initial confinement and three years of extended supervision on the fifth felony count.

Petitioner filed a postconviction motion seeking resentencing, arguing that the complaint and preliminary hearing did not provide a factual basis for the value of the property necessary to prosecute felony charges and that the court failed to adequately explain its rationale for giving him consecutive sentences he characterized as "near-maximum." The court denied the motion.

Petitioner raised the same arguments on appeal. On June 4, 2013, the Wisconsin Court of Appeals rejected these arguments and affirmed the conviction. *State v. Rassbach*, 2013 WI App 94, 349 Wis. 2d 526, 835 N.W.2d 291 (unpublished). The Wisconsin Supreme Court denied petitioner's petition for review on October 21, 2013. *State v. Rassbach*, 2013 WI 87, 350 Wis. 2d 730, 838 N.W.2d 638 (unpublished).

OPINION

The federal statute governing petitions for writs of habeas corpus, 28 U.S.C. § 2254, provides for a "highly deferential" standard of review. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (internal quotation and citation omitted). Under 28 U.S.C. § 2254(d), a district court may not grant a state prisoner's petition

> with respect to any claim that was adjudicated on the merits in State court proceedings unless the 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.

Petitioner raises the following claims in his petition: (1) the trial court accepted his plea without having a factual basis for the amount of loss on each of the felony counts; and (2) the circuit court did not explain the reasons for giving petitioner "near maximum or maximum" sentences consecutive to each other. Under Rule 4 of the Rules Governing Section 2254 Cases, 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."

Keeping these standards in mind, it appears that petitioner has raised plausible

constitutional claims regarding the factual basis of his felony convictions, *see McCarthy v. United States*, 394 U.S. 459, 466-67 (1969) (due process requires factual basis for plea "to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."), and regarding the length of his sentence, *Solem v. Helm*, 463 U.S. 277, 288 (1983) (sentence violates Eighth Amendment if it is extreme and "grossly disproportionate" to crime); ("[Sentence] that falls within legislatively prescribed limits will not be considered disproportionate unless the sentencing judge has abused his discretion." *United States v. Vasquez*, 966 F.2d 254, 261 (7th Cir. 1992).

Moreover, because these are the same issues petitioner raised on appeal, it appears that he has exhausted all available state court remedies. § 2254(b)(1)(A) (petitioner must "exhaust[] the remedies available in the courts of the State" before seeking relief in federal court). Finally, his petition is timely. 28 U.S.C. § 2244(d) (generally, person in custody has one year from date conviction "became final by the conclusion of direct review" in which to file habeas petition); *Anderson v. Litscher*, 281 F.3d 672, 674-675 (7th Cir. 2002) (one-year deadline to file habeas petition starts running after expiration of the 90-day period in which person in custody could have filed petition for writ of certiorari with United States Supreme Court). Accordingly, I will direct the state to respond to the petition.

ORDER

IT IS ORDERED that

1. Petitioner John P. Rassbach's motion for appointment of counsel, Dkt. 1, is DENIED without prejudice.

2. **Service of petition**. Pursuant to an informal service agreement between the Attorney General for the State of Wisconsin and the court, copies of the petition and this order are being sent today to the Attorney General for service on respondent Bradley J. Kosbab.

3. **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.

4. **Motions 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, 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.

5. **Briefing on the merits**. 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).

- 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.

Entered this 2nd day of June, 2014.

BY THE COURT:
/s/
JAMES D. PETERSON
District Judge