

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

DENNIS VAN CAMP,

Petitioner,

v.

DANIEL WESTFIELD,²

Respondent.

OPINION and ORDER

14-cv-230-jdp¹

Petitioner Dennis Van Camp is currently incarcerated at the Oakhill Correctional Center, located in Oregon, Wisconsin. Petitioner seeks a writ of habeas corpus under 28 U.S.C. § 2254 to challenge a conviction entered in the Brown County Circuit Court. 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. 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.

FACTS

The following facts are drawn from the petition and state court records available electronically. On November 3, 2009, a jury found petitioner Dennis Van Camp guilty on charges of (1) possession with intent to deliver more than 40 grams of cocaine, as party to a crime, second

¹ This case was reassigned to me pursuant to a May 19, 2014 administrative order. Dkt. 6.

² In its previous order, the court inadvertently placed both Warden Daniel Westfield and “Oakhill Correctional Institution” in the caption as respondents. Dkt. 5. Because petitioner appears to be naming only Westfield as a respondent, and because Westfield is the appropriate respondent for this habeas action, I have amended the caption by removing the institution itself as a respondent.

or subsequent offense; (2) possession of cocaine, second or subsequent offense; (3) possession of an electric weapon; and (4) possession of drug paraphernalia. On direct appeal, petitioner argued the circuit court erred by denying his request for a jury instruction on the chain of custody regarding the cocaine introduced at trial. The Wisconsin Court of Appeals affirmed the judgment of conviction on December 28, 2011. *State v. Van Camp*, No. 2011AP388–CR, 2012 WI App 11, 338 Wis. 2d 486, 808 N.W.2d 742 (unpublished). Petitioner filed a petition for review with the Wisconsin Supreme Court, but it was denied on April 23, 2012.

In October 2012, petitioner filed a motion for postconviction relief in the circuit court, arguing that he received ineffective assistance from his postconviction and appellate counsel when they failed to raise certain arguments regarding the substantive aspects of plaintiff's entrapment defense, the jury instructions regarding entrapment, and the admissibility and chain of custody of the cocaine. The circuit court denied the motion on October 26, 2012, and his motion for reconsideration on November 30, 2012. The Wisconsin Court of Appeals affirmed the judgment of conviction on June 28, 2013. *State v. Van Camp*, No. 2012AP2637, 2013 WI App 94, 349 Wis. 2d 528, 835 N.W.2d 292 (unpublished). Petitioner filed a petition for review with the Wisconsin Supreme Court, but it was denied on December 26, 2013.

Petitioner filed the present habeas petition in this court on March 26, 2014.

OPINION

In his petition, petitioner brings four claims regarding ineffective assistance on behalf of his trial and appellate counsel: they failed to raise certain arguments regarding (1) the substantive aspects of plaintiff's entrapment defense; (2) the jury instructions regarding entrapment; (3) the admissibility and chain of custody of the cocaine; and (4) whether petitioner actually violated the

statute against possession of an electric weapon. 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.”

As a prerequisite to federal review, a federal habeas corpus petitioner must first exhaust his state remedies by fairly presenting his claims through one full round of state-court review. 28 U.S.C. § 2254(b)(1)(A); *O’Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). The doctrine of exhaustion serves the interests of comity between federal and state sovereigns by giving state appellate courts a meaningful opportunity to consider and correct any alleged constitutional violation. *See Lieberman v. Thomas*, 505 F.3d 665, 670 (7th Cir. 2007).

When a petitioner has already pursued his state court remedies but has failed to exhaust those remedies by presenting them properly to the state courts along the way, he is barred from proceeding with a federal habeas petition. At this point, “it is not the exhaustion doctrine that stands in the path to habeas relief . . . but rather the separate but related doctrine of procedural default.” *Perruquet v. Briley*, 390 F.3d 505, 525 (7th Cir. 12004). Under the procedural default doctrine, a federal court is precluded from reaching the merits of a state habeas claim if the petitioner either (1) failed to present his claim to the state courts and it is clear that those courts would now hold the claim procedurally barred; or (2) presented his claim to the state courts but the state court dismissed the claim on a state procedural ground independent of the federal question and adequate to support the judgment. *Perruquet*, 390 F.3d at 514; *Moore v. Bryant*, 295 F.3d 771, 774 (7th Cir. 2002); *Chambers v. McCaughtry*, 264 F.3d 732, 737–38 (7th Cir. 2001).

If a petitioner has procedurally defaulted a claim, a federal court cannot reach the merits of that claim unless the petitioner demonstrates (1) cause for the default and actual prejudice from failing to raise the claim as required or (2) that enforcing the default would lead to a

“fundamental miscarriage of justice.” *Steward v. Gilmore*, 80 F.3d 1205, 1211–12 (7th Cir. 1996) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)). A fundamental miscarriage of justice results only where the petitioner presents evidence showing that he is “actually innocent” of the charges against him or the punishment imposed. *Dretke v. Haley*, 541 U.S. 386, 393 (2004).

At this point, I cannot say with certainty that the petition should be dismissed. The chief problem with the petition is that petitioner raises some claims that appear to be fully exhausted and others that are not. Petitioner appears to have exhausted his first three claims regarding *appellate* counsel but failed to raise the issue of *trial counsel’s* ineffective assistance to the court of appeals on the appeal of his postconviction motion. The court of appeals stated as follows:

In his brief-in-chief Van Camp argued both his trial and postconviction/appellate counsel rendered ineffective assistance. However, in his reply brief, Van Camp stated, “To clarify for the record, all claims of ineffective assistance of counsel, both trial and appellate, are ineffective assistance of appellate counsel claims” Accordingly, we will not consider any claims with respect to trial counsel.

Van Camp, 2013 WI App 94, ¶ 8 n.6. Moreover, petitioner acknowledges that he did not raise his fourth claim (about whether he actually violated the statute against possession of an electric weapon) in any of the earlier proceedings, “[b]ecause the attorney who was ineffective during [petitioner’s] direct appeal told [him] that [petitioner] could not challenge this issue.” Dkt. 1 at 10.

Although it seems likely that petitioner has procedurally defaulted his ineffective assistance of trial counsel claims by failing to raise them in his initial postconviction motion, procedural default is an affirmative defense that the state must raise and preserve to avoid waiver. *Kaczmarek v. Rednour*, 627 F.3d 586, 591-92 (7th Cir. 2010). In addition, even if the state raises procedural default of petitioner’s electric weapon claim, it appears that petitioner is arguing that he is actually innocent of that charge because he was properly licensed and had the weapon in a

carrying case. Dkt. 2. Finally, the 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 this case shall proceed under the following schedule:

1. **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 Daniel Westfield.
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 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.

4. **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 7th day of January, 2015.

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