

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

MICHEAL LOCKLEAR,

Petitioner,

ORDER

v.

02-C-651-C

JON LITSCHER, Secretary, Wisconsin
Department of Corrections,

Respondent.

This is an action for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner Micheal Locklear has filed three motions: 1) a motion for a stay of proceedings pending exhaustion of his state court certiorari action, State ex rel. Locklear v. Schwarz, Appeal No. 01-3142, currently pending before the Wisconsin Court of Appeals, District II; 2) a motion to strike respondent's answer; and 3) a motion for an extension of time to file a reply to the respondent's answer. For the reasons set out below, petitioner's first two motions will be denied; his third will be granted.

To decide these motions, it is helpful to review the relevant procedural facts.

BACKGROUND

A. State Court Proceedings

On March 11, 1992, petitioner was convicted of forgery–uttering, as party to a crime, in the Circuit Court for Milwaukee County, Case No. F-914001. He was sentenced to seven years in prison, to run consecutively to any other sentence. The court stayed execution of the sentence and placed him on five years’ probation, to run consecutively to any other sentence.

On April 28, 1992, petitioner was convicted of uttering in Waukesha County, Case No. 91CF408. He was sentenced to four years in prison, consecutive to his “present sentence.” The court stayed execution of the sentence and placed him on five years’ probation, to be served concurrently with any other term of probation, and “consecutive to prison.”

At the time of his sentencings in the Milwaukee County and Waukesha County cases, petitioner was serving a sentence imposed in Milwaukee County Case No. 914180. He was released on January 17, 1997, at which time he began serving his probation in both the Milwaukee County and Waukesha County cases.

On August 20, 1998, a hearing was held in Franklin, Wisconsin, to determine whether petitioner’s probation should be revoked. On September 16, 1998, an administrative law judge issued a decision revoking petitioner’s probation, finding that petitioner had violated his rules of probation supervision. Petitioner appealed to David

Schwarz, the Administrator for the Division of Hearings and Appeals, who on October 6, 1998, affirmed the revocation and issued a warrant ordering petitioner to be returned to prison pursuant to the sentences imposed and stayed by the circuit courts in Milwaukee and Waukesha counties. The revocation order indicated that it applied to petitioner's probation in both the Milwaukee and Waukesha County cases.

In October 1998, petitioner initiated certiorari proceedings in the Waukesha County circuit court to review the revocation decision. Wis. Stat. § 801.50(5) provides that “[v]enue of an action to review a probation, extended supervision or parole revocation or a refusal of parole by certiorari shall be the county in which the relator was last convicted of an offense for which the relator was on probation.” The clerk of court rejected petitioner's submissions on the ground that his application to proceed without prepayment of costs and fees was incomplete. Over the next six months, petitioner was stymied by various state agencies as he attempted to obtain the documentation required to complete his application. (For a detailed description of the procedural gymnastics that petitioner went through to get his certiorari petition filed, see State ex rel. Locklear v. Schwarz, Appeal No. 99-3211, 242 Wis. 2d 327, 330-32, 629 N.W. 2d 30, 32-33 (Ct. App. 2001)). The court finally accepted the petition for filing on April 19, 1999, only to conclude, in a decision issued November 11, 1999, that it was untimely.

Petitioner appealed that ruling to the state court of appeals. On February 21, 2001, the court of appeals issued a decision reversing the circuit court and remanding the case,

finding that petitioner's certiorari petition was timely. Id., 242 Wis. 2d at 337-39. The court held that petitioner's 45-day deadline for filing his certiorari petition was equitably tolled during the time that he was waiting for the Wisconsin Department of Justice to provide him with documentation that he needed in order to proceed *in forma pauperis*. See id., 242 Wis. 2d at 337-39. It appears that on remand, the Waukesha County court denied petitioner's claims on their merits; petitioner appealed. The case is pending before the Wisconsin Court of Appeals, District II.

In December 1998, while petitioner was jumping through hoops trying to get his certiorari petition filed in Waukesha County, he simultaneously filed a petition for a writ of certiorari in Milwaukee County. In that petition, he challenged the same action that he was challenging in Waukesha County, namely, Schwarz's October 6, 1998, decision to revoke petitioner's probation. On December 11, 1998, the Milwaukee County court accepted the petition and ordered Schwarz to provide a certified copy of the record of the probation revocation proceedings. On November 10, 1999, the circuit court issued a decision, rejecting on the merits petitioner's challenges to his revocation. In a footnote, the court noted that it was considering only petitioner's challenge to the probation imposed in Milwaukee County Case No. F914001, noting that the proper venue concerning the probation imposed in Waukesha County Case No. 91-CF-0408 was Waukesha County.

Petitioner appealed. On March 22, 2001, the Wisconsin Court of Appeals, District I, issued a decision affirming summarily the circuit court's decision. Among the arguments

rejected by the court was petitioner's contention that venue properly belonged in Waukesha County, not Milwaukee County. After citing Wis. Stat. § 801.50(5), the court held:

In this case, Locklear's probation was revoked in both Milwaukee and Waukesha County. Locklear is currently serving the sentence which was imposed and stayed in Milwaukee. Consequently, Milwaukee is the appropriate venue.

Secondly, even if Milwaukee is not the proper venue, Wis. Stat. § 801.50(1) states that a defect in venue shall not affect the validity of any order or judgment. We reject Locklear's argument that the court's order was void because of improper venue.

State ex rel. Locklear v. Schwarz, Appeal No. 99-3823, March 22, 2001, attached to respondent's answer, dkt. #21, at exh. N. In a footnote, the court noted that "Locklear is apparently proceeding simultaneously in Waukesha County," and cited District II's opinion in State ex rel. Locklear v. Schwarz, Appeal No. 99-3211. Id.

Petitioner filed a petition with the Wisconsin Supreme Court for review of the court of appeals, District I's decision. The supreme court denied his petition for review. The instant habeas petition followed.

B. Proceedings in This Court

In his habeas petition, petitioner alleges that his current confinement is the result of unconstitutional actions taken by the Department of Corrections in connection with the revocation of his probation. This court has allowed petitioner to proceed on the following claims: 1) he was denied a fundamentally fair hearing as a result of the department's failure

to produce his treatment and attendance records and other favorable evidence; and 2) the department denied petitioner the right to have a lawyer present at the revocation hearing. As proof that he had exhausted his state court remedies, petitioner attached copies of the Milwaukee circuit court's decision affirming the revocation decision and of the Wisconsin Court of Appeals, District I's decision affirming the Milwaukee circuit court.

Respondent has conceded that petitioner's petition is timely. With respect to exhaustion, Litscher states:

It is Litscher's position at this time that Locklear is entitled to only one review of his probation revocation and the Milwaukee County proceeding is that review. The Waukesha County case, which is still pending, is barred by claim preclusion. Locklear has, therefore, exhausted his state court remedies. Since his Milwaukee County case raised neither of the two claims he advances in this court, he has procedurally defaulted those claims.

Answer to Pet. for Writ of Habeas Corpus, dkt. #21, at 4.

Petitioner has filed a motion to strike respondent's answer to the extent it raises a defense of "claim preclusion," on the ground that it constitutes an affirmative defense that respondent should have included in his earlier motion to dismiss. In addition, petitioner asks this court to stay proceedings in this case until he has exhausted his appeal with respect to the Waukesha County action.

DISCUSSION

As should be clear from the foregoing discussion, this case arrives at this court in a rather strange procedural posture. Although petitioner is challenging a single state action,

namely, the Department of Corrections' decision to revoke his probation, he has been allowed by the state courts to challenge the decision simultaneously in two separate state courts. Why he has been allowed two kicks at the same cat in the state courts baffles me. Wis. Stat. 801.05(5) seems to state that the only court in which venue would have been proper was Waukesha County, which was "the county in which the relator was last convicted of an offense for which the relator was on probation." On its face, the statute does not appear to support the view, held by the Milwaukee circuit court, that an individual serving concurrent terms of probation imposed by courts in two separate counties could pursue identical challenges to a single revocation decision. Principles of *res judicata* would seem to bar petitioner from challenging the same revocation decision in another county.

I surmise that this is exactly the point respondent makes when he asserts that petitioner's Waukesha County action is barred by claim preclusion. (Indeed, it is possible that the Waukesha County circuit court has already reached that conclusion, but whether that is *actually* the case is unclear from respondent's answer.) I do not understand respondent to be raising claim preclusion as a defense to the instant habeas petition, as petitioner contends. Rather, I interpret respondent's claim preclusion statement as merely stating his position with respect to the pending Waukesha County action. For that reason, I am denying petitioner's motion to strike respondent's answer as unnecessary.

Whether petitioner's challenge to his revocation proceeding in Waukesha County is barred by claim preclusion is a matter for the state courts to decide. For now, however, I

conclude that petitioner's unexhausted Waukesha County case does not preclude this court from proceeding on the instant petition. At least with respect to that portion of his current sentence that is a result of the revocation of the probation that was imposed by the Milwaukee circuit court, petitioner has exhausted his state court remedies and his habeas petition is ready for a decision on the merits by this court.

Petitioner is concerned that a ruling by this court on the merits of the instant petition will mean that he will be barred by the successive petition doctrine from bringing a future habeas petition with respect to the Waukesha County action. Petitioner's concern is understandable because a second petition challenging the very same revocation proceeding would seem to meet the criteria for a successive petition. On the other hand, there are two separate state court judgments at issue, and this fact appears to be the basis upon which the state courts have allowed petitioner to pursue two separate certiorari actions.

I conclude that the Milwaukee and Waukesha county cases constitute two separate state court judgments (albeit arising from the same facts and the same revocation proceeding) and therefore that petitioner may bring separate habeas actions with respect to each case without running afoul of the successive petition doctrine. For that reason, it is unnecessary to stay these proceedings while petitioner exhausts his state court remedies with respect to the Waukesha County case.

We will proceed as follows. Petitioner shall have 20 days from the date of this order to file his reply to the respondent's answer. At that point, this case will be under advisement

to the court. This court will consider the merits of petitioner's claims, but will limit its review to the claims petitioner raised in the Milwaukee circuit court. In other words, petitioner cannot rely on any part of the Waukesha County proceedings to show *in this action* that he fairly presented his claims to the state courts. He is limited to the claims that he has fully exhausted.

After petitioner has exhausted his state court remedies with respect to the Waukesha County action, if he chooses he may file a separate federal habeas petition challenging that judgment. This court will treat any such action as a free-standing, separate habeas petition that is not successive to this one, so long as petitioner limits his claims to those presented in his Waukesha County certiorari petition and does not attempt to rely on any of the Milwaukee County proceedings.

ORDER

IT IS ORDERED that:

1. Petitioner's motion to strike respondent's defense of claim preclusion is DENIED as unnecessary.
2. Petitioner's motion to stay proceedings is DENIED.

3. Petitioner's motion for an extension of time within which to file his reply is GRANTED. Petitioner shall have until December 23, 2002 in which to file his reply.

Dated this 2nd day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge