

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

WILLIAM FREDERICK WILLIAMS,

Petitioner,

OPINION AND ORDER

v.

02-C-0530-C

JUDY P. SMITH, Warden, Oshkosh
Correctional Institution,

Respondent.

This is an action for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner William Frederick Williams, currently confined at the Oshkosh Correctional Institution, challenges a 1996 judgment entered by the Circuit Court for Dane County convicting him of false imprisonment and substantial battery and imposing a term of probation. Petitioner also challenges the subsequent revocation of his probation in 1998. In an order to show cause, the magistrate judge interpreted the petition as raising the following claims: 1) petitioner's no contest plea on January 29, 1996 was involuntary because the prosecutor tricked him into changing his plea by lying to him about her sentencing recommendation; 2) petitioner's attorney was ineffective in 1996 because he failed to object to the prosecutor's conduct; 3) petitioner's due process rights were violated in 1996 when the court refused to make an accurate record regarding the habitual offender enhancement, then incorrectly applied that enhancement to petitioner; 4) petitioner's due

process rights were violated at the 1998 revocation hearing because the prosecutor relied upon the incorrect information from the 1996 sentencing; and 5) petitioner's attorney during the 1998 revocation was ineffective because he did not object to the prosecutor's use of the old incorrect information.

The state has filed a motion to dismiss the petition in its entirety. It contends that petitioner did not file it within the one-year statute of limitations set forth in 28 U.S.C. § 2244(d), or, alternatively, that he has procedurally defaulted all of his claims by failing to raise them properly in the state courts. Because the parties' submissions show that petitioner did not raise his challenges to either the 1996 or the 1998 proceedings within the statutory limitations period, the petition must be dismissed. (Although it appears from petitioner's response to the state's motion to dismiss that his claims of constitutional error relate only to his initial conviction in 1996 and not to the 1998 resentencing after revocation, for the sake of completeness I have assumed that petitioner also intends to challenge the 1998 proceedings.)

From the parties' submissions, I find the following facts.

FACTS

On January 29, 1996, petitioner entered a no contest plea to one count of false imprisonment and one count of substantial battery in Case No. 95-CF-2235 pursuant to a joint plea agreement between petitioner's attorney and the prosecutor. In accordance with

the parties' plea agreement, the court sentenced petitioner to four years' probation with nine months in jail as a condition. About a month later, petitioner was sentenced after probation revocation in another case, Case No. 89-CM-297.

Petitioner's lawyer filed a notice of appeal with respect to 89-CM-297, but he did not file a notice with respect to 95-CF-2235. According to petitioner, he requested the state public defender to appoint him a new lawyer to appeal his conviction in 95-CR-2235. Petitioner asserts that the public defender appointed counsel and ordered the transcripts, but rescinded its decision four days later after determining that petitioner was not indigent. Thereafter, petitioner attempted to pursue an appeal of 95-CF-2235 on his own. The court of appeals allowed petitioner until June 21, 1996, in which to file his notice of intent to seek postconviction relief. Petitioner filed a notice within the deadline and asked the court to find him indigent and appoint a lawyer to represent him. Apparently, the circuit court held an indigency hearing on August 7, 1996, after which it concluded that petitioner was not indigent. Thereafter, petitioner did not file a motion for postconviction relief or an appeal of his conviction or sentence.

In January or February 1998, the Department of Corrections revoked petitioner's probation. On April 22, 1998, the circuit court sentenced petitioner to consecutive four-year and three-year prison terms. Although petitioner's attorney filed a notice of intent to seek postconviction relief on petitioner's behalf and transcripts were prepared, petitioner never filed a postconviction motion or notice of appeal. Instead, nearly two years later, he began

a collateral attack on his sentence by filing a “Motion to Relieve Judgment or Order” on July 27, 2000. After the circuit court denied the motion, petitioner filed an appeal with the state court of appeals. The court rejected petitioner’s claims and affirmed the sentence imposed by the trial court. The Wisconsin Supreme Court denied petitioner’s request for review on September 19, 2001.

OPINION

I. STATUTE OF LIMITATIONS

A. 1996 Proceedings

Under 28 U.S.C. § 2244(d)(1), a state prisoner has one year from “the date on which the judgment became final by the conclusion of direct review or the expiration of such time for seeking such review” within which to file a federal habeas petition. To determine when petitioner’s time for seeking direct review of his 1996 conviction expired, it is necessary to review Wisconsin’s rules governing criminal appeals. A defendant like petitioner who files a notice of intent to pursue postconviction relief and who is denied representation by the state public defender has 90 days from the date of filing the notice within which to request a transcript of the reporter’s notes. § 809.30(2)(f). A notice of appeal or postconviction motion must be filed within 60 days from the date on which the last transcript was served. § 809.30(2)(h).

The record in this case shows that petitioner filed a notice of intent to pursue postconviction relief on June 18, 1996. However, it appears that petitioner never requested a copy of the transcripts. In his response to the state's motion, petitioner asserts that he was unable to obtain the transcripts because he could not afford to pay for them and the circuit court denied his motions for indigent status. Thus, it appears that petitioner's deadline for seeking direct appeal expired on September 16, 1996, 90 days after he filed his notice of intent to pursue postconviction relief.

Petitioner's deadline for filing a petition for a writ of habeas corpus in federal court expired one year later, on September 16, 1997, unless it was tolled by the filing of a postconviction motion or other motion for collateral relief as provided under 28 U.S.C. § 2244(d)(2). Petitioner did not file any other motions related to his case until he filed his postconviction motion after revocation in state court on July 27, 2000. Because his federal statute of limitations had already expired by that date, the tolling provision of § 2244(d)(2) does not help him.

Furthermore, none of the tolling provisions set out in § 2244(d)(1) apply. The only provision that could apply theoretically is § 2244(d)(1)(B), which provides that the federal statute of limitations is tolled during the time that an impediment "created by State action" prevented the applicant from filing his habeas petition. None of petitioner's asserted difficulties in prosecuting a direct appeal of his 1996 judgment rise to the level of a state-created impediment that would toll his federal statute of limitations. First, petitioner's

inability to obtain the transcripts was not the result of any state action, but his own lack of financial resources. In any case, because a habeas petitioner need only "set forth in summary form the facts supporting each of the grounds" raised in his petition, see Rules Governing Section 2254 Cases in the United States District Courts, 4.2(c), citations to transcripts are unnecessary in order to allege the grounds for habeas relief. See Lloyd v. Vannatta, 296 F.3d 630, 633 (7th Cir. 2002) (citing cases). Second, neither the refusal of the public defender and the state circuit court to appoint a lawyer nor the failure of his trial lawyer to file a notice of intent to pursue postconviction relief in state court had any bearing on petitioner's ability to file his *federal* petition within the one-year statute of limitations. A prisoner has no constitutional right to have a lawyer assist him in pursuing a habeas challenge to his conviction. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987).

Admittedly, holding that petitioner should have filed a federal habeas petition even though he did not exhaust his state court remedies violates the general rule that a petitioner must exhaust his state court remedies *before* filing a federal habeas petition. See Duncan v. Walker, 533 U.S. 167, 181 (2001). However, "a prisoner who wants to pursue state relief while assuring an entitlement to federal relief can protect himself by filing in both courts." Freeman v. Page, 208 F.3d 572, 577 (7th Cir. 2000). Petitioner could have filed his federal habeas petition within his one-year deadline and explained the trouble he was having with respect to his direct appeal in state court. This court could have stayed the federal action while petitioner attempted to resurrect his direct appeal in state court. See id.

Unfortunately for petitioner, his failure to take that approach means that it is now too late for him to challenge the 1996 proceedings in federal court.

B. 1998 Proceedings

As with the 1996 proceedings, petitioner did not pursue a direct appeal of the 1998 sentence imposed after revocation by the state circuit court. The record indicates that his lawyer filed a notice of intent to pursue postconviction relief on his behalf on May 5, 1998, and the last transcript was prepared on July 9, 1998. Petitioner had 60 days from that date, or until September 7, 1998, in which to file a postconviction motion or notice of appeal. § 809.30(2)(h). Petitioner's failure to file any motion or notice of appeal means that the 1998 judgment sentencing him to two consecutive prison terms became final on September 7, 1998. Under 28 U.S.C. § 2244(d), petitioner had one year from that date in which to file a federal habeas petition or a motion for collateral relief in the state court. Petitioner did not file his postconviction motion in the state circuit court until July 27, 2000, nearly two years after his federal statute of limitations expired. Accordingly, any claims challenging the

1998 proceedings must be dismissed for petitioner's failure to meet the one-year statute of limitations under § 2244(d)(1).

ORDER

IT IS ORDERED that the petition of William F. Williams for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED WITH PREJUDICE for his failure to file it within the statutory limitations period set forth in § 2244(d).

Dated this 26th day of March, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge