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

CARLOS A. AUSTIN,

Petitioner, ORDER

v. 00-C-0439-C

GERALD A. BERGE, Warden, Supermax Correctional Institution,

Respondent.

Petitioner Carlos Austin, currently incarcerated at the Supermax Correctional Institution in Boscobel, Wisconsin, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is challenging a five-year prison term imposed by the Circuit Court for Sheboygan County in March 1999 following his no contest pleas to two charges of battery to a correctional officer.[1] He has paid the five dollar filing fee.

Petitioner's claims stem from his prison disciplinary proceeding and subsequent criminal prosecution for battering two correctional officers while he was an inmate at the Kettle Moraine Correctional Institution. Specifically, petitioner raises three claims: 1) the state violated the double jeopardy clause when it punished him administratively—by placing him in

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[1] It is unclear from the petition whether petitioner has started to serve the five-year sentence or whether he is still in custody pursuant to an earlier state court judgment.

administrative segregation and extending his mandatory release date by 184 days—and criminally—by imposing a five-year consecutive sentence, for the same crime; 2) the Department of Corrections failed to give him adequate notice that it could seek to have him prosecuted for a felony in the state courts in addition to imposing prison discipline; and 3) the lawyer who defended him in state court on the battery charges was ineffective. It appears that petitioner seeks to attack his March 1999 conviction and sentence rather than the extension of his mandatory release date, a distinction that is not material at this stage but that will become so in the event petitioner is unsuccessful and wishes to appeal. See Walker v. O'Brien, 216 F.3d 626, 637 (7th Cir. 2000) (holding that prisoners challenging prison disciplinary proceeding not subject to § 2253(c)'s certificate of appealability requirement).

Because petitioner's first two claims are unsupported by any Supreme Court case law, I am dismissing them at this time without requiring a response from the state. As for the double jeopardy claim, the Court of Appeals for the Seventh Circuit has considered this very issue in light of Supreme Court case law and concluded that "prison discipline does not preclude a subsequent criminal prosecution or punishment for the same acts." Garrity v. Fiedler, 41 F.3d 1150, 1151 (7th Cir. 1994). Noting that the Supreme Court has held that parole revocation does not violate the double jeopardy clause, the court found that "Wisconsin's mandatory release date closely resembles parole in that both are explicitly conditioned on the maintenance of good behavior." Id. at 1152. "In both cases, 'the offender has, by his own actions, triggered the condition that permits the appropriate modification of the terms of confinement.'" Id. (quoting Ralston v. Robinson, 454 U.S. 201, 220 n. 14 (1981)). Therefore, the extension of

a prisoner's mandatory release date does not constitute "punishment" for double jeopardy purposes. Id.

My review of the Supreme Court's double jeopardy cases since Garrity has located no case suggesting, much less holding, that the double jeopardy clause precludes a subsequent criminal prosecution for acts for which the prisoner has already received prison discipline. Habeas relief under § 2254(d)(1) is appropriate only if "the Supreme Court has 'clearly established' the propositions essential to [the petitioner's] arguments." Mueller v. Sullivan, 141 F.3d 1232, 1234 (7th Cir. 1998). In the absence of any Supreme Court case that clearly established the relevant legal principle at the time of petitioner's direct appeal, habeas relief is unavailable to him. Schaff v. Snyder, 190 F.3d 513, 522 (7th Cir. 1999).

Petitioner's due process claim suffers from the same deficiency. Petitioner appears to be arguing, on the basis of an opinion from an appellate court in the state of Washington, that he should have been notified that his major rule violation in the prison could also give rise to a felony prosecution in the state courts. He is wrong. The Washington case, State v. Brown, 95 Wash. App. 952, 955, 977 P. 2d 1242 (Ct. App. 1999) is inapposite; it is not a decision from the United States Supreme Court; and its holding does not rest on clearly established Supreme Court case law. In Brown, the crime for which the defendant was prosecuted was committing an infraction that had been designated by the Department of Corrections as "serious." See id. The court found that the statute creating the crime of "persistent prison misbehavior," which was defined as knowingly committing a serious infraction, as designated under Department of Corrections rules, after the prisoner had lost all of his good time credits, violated the state

constitution by impermissibly delegating legislative power to the Department of Corrections. Id.

Petitioner does not claim that he was not aware that striking a correctional officer constituted an offense punishable as a felony in Wisconsin; even if he did, his ignorance would not be a defense. See Bryan v. United States, 524 U.S. 184, 194 (1998) (ignorance of law generally no defense to criminal charge except in cases involving highly technical statutes presenting danger of ensnaring individuals engaged in apparently innocent conduct). Where the law is definite and knowable, people are presumed to know the law. Cheek v. United States, 498 U.S. 192, 199 (1991). The Supreme Court has never held that a prisoner who strikes a correctional officer may not be prosecuted criminally unless he is first notified in writing that such conduct may have such consequences. And, as noted previously, the Court has never held that a prisoner can not be punished both administratively and criminally for the same misconduct.

Finally, petitioner asserts in the conclusion of his petition that his trial counsel "failed to even explore Austin's contention and did nothing more than persuade Austin to plea this matter and waive various rights." Petition for Writ of Habeas Corpus, dkt. # 1, at 8. Assuming that petitioner is referring to the lawyer who represented him on the battery charges that are the subject of this petition, this assertion appears to be a claim of ineffective assistance of counsel. Without more facts, however, it is not appropriate to require the state to respond at this time. Instead, I will allow petitioner the opportunity to support his claim with a precise description of the errors or omissions allegedly committed by his attorney. Petitioner should

also indicate whether he complained of these errors on appeal to the Wisconsin Court of Appeals and the Wisconsin Supreme Court. Petitioner should provide this information to the court no later than September 5, 2000. If petitioner fails to respond, the court will dismiss the petition for failure to prosecute it. Petitioner should keep in mind that, in order to succeed on a "failure to investigate" claim against his attorney, he must describe the information that might have been discovered had there been further inquiry and must establish that the evidence probably would have changed the outcome at trial. See Hill v. Lockhart, 474 U.S. 52, 59 (1985).

ORDER

IT IS ORDERED that claims 1 and 2 of petitioner Carlos Austin's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 are DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that petitioner has until September 5, 2000 in which to provide the following information to the court:

1. A precise description of the errors or omissions allegedly committed by his attorney; and

2. A statement as to whether he complained of these errors on appeal to the Wisconsin Court of Appeals and the Wisconsin Supreme Court.

If petitioner does not timely provide the ordered information, then this court will dismiss his petition for failure to prosecute it.

Entered this 21st day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge