

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

GEORGE C. REIMERS,

Petitioner,

OPINION AND
ORDER

v.

00-C-213-C

WISCONSIN DEPARTMENT
OF CORRECTIONS, DIVISION OF
PROBATION AND PAROLE,

Respondent.

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In previous orders, this court has construed petitioner George Reimers's petition as attacking two separate state court judgments: 1) his June 4, 1992 conviction and sentence in the Circuit Court for Wood County for second degree sexual assault of a child; and 2) a 1998 order of the Circuit Court of Wood County denying petitioner's motion for credit against his prison sentence for time spent on electronic monitoring before the state revoked his probation.

This case has been remanded by the court of appeals for reconsideration of my order of May 25, 2000, in which I dismissed claim one of the petition for failure to prosecute and claim two for failure to exhaust. (I shall assume that the parties are familiar with the procedural history of this case.) Upon reconsideration, I conclude that dismissal of claim one for failure

to prosecute is not warranted because petitioner has attempted to provide this court with information about his state court proceedings. However, because it is clear from the documents provided by petitioner that his challenge to his June 4, 1992 conviction is untimely, this claim of his petition will be dismissed with prejudice. As for his challenge to the denial of sentencing credit, this claim will be dismissed without prejudice because he has not yet exhausted his state court remedies.

From the documentation submitted by petitioner, I find the following facts.

FACTS

In 1992, petitioner was convicted in the Circuit Court for Wood County of sexually assaulting a child. The court sentenced petitioner to ten years of probation with a suspended five-year sentence of incarceration. Petitioner did not appeal his conviction or sentence at that time.

On or about August 13, 1997, the state revoked petitioner's probation and imposed the suspended sentence. On April 28, 1998 and December 17, 1998, petitioner filed *pro se* motions for credit against his prison sentence for time spent on electronic monitoring; the trial court denied these motions. In addition, petitioner filed a series of motions between April 20, 1998 and June 4, 1998, in the court of appeals in which he requested the court to extend the time in which he could file a notice of intent to pursue postconviction relief from his underlying

conviction. See July 14, 1999 Order, attached to petition, at fn.1. The court of appeals denied those motions. The state circuit court denied petitioner's motions for sentence credit on July 28, 1998 and February 4, 1999, respectively.

On or around December 17, 1998, defendant filed a postconviction motion in the trial court pursuant to Wis. Stat. § 974.06 to vacate the 1992 judgment of conviction and sentence, as well as motions for appointment of counsel and the provision of transcripts. Among the claims asserted in support of his § 974.06 motion, petitioner alleged that his trial attorney had promised to file a direct appeal of petitioner's conviction but never did so; petitioner claimed that he had not learned this until the state initiated his probation revocation. By this time, petitioner's trial attorney had died.

On March 22, 1999, the state circuit court denied petitioner's motions. The court denied all of petitioner's claims filed under § 974.06, including his claim that his trial attorney was ineffective for failing to appeal the conviction. The court found that all of petitioner's substantive claims challenging his conviction, including petitioner's claims against his attorney, were untimely because petitioner did not raise any of these issues until his probation was revoked five years after his conviction. Additionally, the court noted that petitioner's attorney had died, which prevented petitioner from presenting evidence that would rebut the presumption that counsel had been effective. See March 22, 1999 Order in Case #91CF172, attached to the petition.

Petitioner filed notices of intent to pursue postconviction relief from the trial court's denial of his motions for sentence credit and the denial of his § 974.06 motion. The office of the state public defender appointed counsel to represent him on appeal from the denial of sentencing credit, but would not appoint counsel to represent him on the denial of the § 974.06 motion. Petitioner appealed *pro se* from the denial of the § 974.06 motion; the appeal was assigned number 99-0859. Eventually, petitioner's appointed counsel filed an appeal from the denial of sentencing credit; that appeal was assigned number 00-0231. See No Merit Brief, attached to dkt. #7.

On August 9, 1999, the court of appeals issued an order in case no. 99-0859 noting that petitioner had not filed a brief and appendix as required by the rules of appellate procedure. The court stated that the appeal would be dismissed unless petitioner filed his brief or requested an extension within five days of the date of the order.

On August 27, 1999, the court of appeals issued an order dismissing petitioner's appeal in 99-0859 because he had failed to file a brief or request an extension as required by the court's order of August 9, 1999.

As of September 13, 2000, the court of appeals had not yet decided petitioner's appeal of the trial court's order denying him sentence credit.

OPINION

The Antiterrorism and Effective Death Penalty Act of 1996 took effect on April 24, 1996. The act created a one-year period of limitation for a state prisoner in custody pursuant to a judgment of a state court to apply for a federal writ of habeas corpus. 28 U.S.C. § 2244(d)(1). Generally, the one-year period runs from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A). However, in Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), the Court of Appeals for the Seventh Circuit held that prisoners who were in custody subject to judgments that became final before the act’s effective date had until one year after the act’s enactment, or April 23, 1997, to file a habeas petition. Id. at 865-66. Because petitioner’s time for seeking a direct appeal of his state court conviction expired in 1992, he had until April 23, 1997, to file a federal habeas petition.

Petitioner did not file the instant petition until April 13, 2000. Thus, his petition is untimely unless one of the tolling provisions set forth in § 2244(d) applies or there are other equitable reasons to toll the one-year limitations period. Under 28 U.S.C. § 2244(d)(2), “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.” As discussed in the facts, petitioner did file a motion for postconviction relief in the state trial court in which he raised various challenges to

his 1992 conviction. However, he did not file this postconviction motion until December 1998, well over a year after the one-year limitations period for filing a federal habeas petition had expired. At that point, it was too late to trigger § 2244 (d)(2)'s tolling provision because there was no time left on petitioner's federal habeas clock that could be tolled.

Thus, petitioner's application for habeas relief is untimely unless equitable reasons exist for tolling the statute of limitations. See Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) (discussing doctrine of equitable tolling). They do not. As the state circuit court found when it denied petitioner's motion for postconviction relief for untimeliness, petitioner took no steps to determine whether his attorney had filed a direct appeal from his conviction or to pursue any state or federal postconviction relief until his probation was revoked, nearly five years after he was convicted. Equitable tolling is not available when a petitioner misses a deadline because of his own lack of diligence.

Accordingly, petitioner's challenge to his 1992 conviction must be dismissed with prejudice because he did not file a federal habeas petition or a motion for state postconviction relief by April 23, 1997. However, his challenge to the state circuit court's denial of his motion for sentence credit will be dismissed without prejudice because petitioner has not exhausted all the state court remedies available to him on that claim. See 28 U.S.C. § 2254(b)(1)(A). Specifically, petitioner's claims will be exhausted when they have been presented to the Wisconsin Supreme Court for a ruling on the merits of the claims or when state remedies no

longer remain available to the petitioner. See O'Sullivan v. Boerckel, 526 U.S.838, 845 (1999).

At the moment, petitioner's appeal of the circuit court's denial of his motion for sentence credit is pending before the court of appeals and has not yet been presented to the Wisconsin Supreme Court. Therefore, it is unexhausted and must be dismissed.

ORDER

IT IS ORDERED that petitioner's petition for a writ of habeas corpus is DISMISSED WITHOUT PREJUDICE as to his claims regarding sentencing credit following revocation of probation and DISMISSED WITH PREJUDICE on all remaining claims for his failure to bring them within the statute of limitations, 28 U.S.C. § 2244(d)(1).

Entered this 7th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge