

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

MARK RENALDO LOWE,

Petitioner,

ORDER

v.

03-C-0077-C

DARREN SWENSON, Warden, Prairie
Correctional Facility,

Respondent.

Mark Renaldo Lowe, a Wisconsin inmate currently incarcerated at the Prairie Correctional Facility, in Appleton, Minnesota, has filed an application for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges his February 2000 convictions in the Circuit Court for St. Croix County for possession with intent to deliver cocaine, possession with intent to deliver marijuana, and corresponding tax stamp violations under Wis. Stat. § 139.89. Petitioner contends that he is in custody in violation of the laws or Constitution of the United States because the state obtained his convictions with evidence obtained during an illegal traffic stop. In addition, he contends that his convictions under Wisconsin's tax stamp law are unconstitutional because the law violates his Fifth Amendment right not to incriminate himself. Petitioner has paid the five dollar filing fee.

Pursuant to 28 U.S.C. § 2254(b)(1), an applicant for a federal writ of habeas corpus must exhaust the remedies available to him in the state courts before presenting his federal

claims to this court. In O’Sullivan v. Boerckel, 526 U.S. 838 (1999), the United States Supreme Court held that in order to comply with this requirement, a state prisoner “must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” Id. at 845. This means that state prisoners must seek discretionary review of their claims in the state’s highest court “when that review is part of the ordinary appellate review procedure in the State” Id. at 847.

From the documents attached to the petition, it appears that petitioner has completely exhausted his state court remedies with respect to his Fourth Amendment claim by raising the issue in the trial court, on direct appeal from his conviction and in a petition for review by the Wisconsin Supreme Court. However, he has not quite finished exhausting his tax stamp claim. According to the petition, petitioner raised that issue in a postconviction motion after the conclusion of his direct appeal; the trial court found the statute was constitutional and denied the motion. On appeal, the court of appeals affirmed the trial court, citing two reasons: 1) petitioner had failed to raise the issue on direct appeal, which meant that his claim was barred under State v. Escalona-Naranjo, 185 Wis. 2d 168, 517 N.W. 2d 157 (1994); and 2) the court of appeals had already concluded in an earlier decision that the tax stamp law was constitutional. According to the petition, petitioner filed a petition for review with the Wisconsin Supreme Court on January 15, 2003; the supreme court has not yet decided the petition for review.

The fact that petitioner's petition for review is pending before the Wisconsin Supreme Court means that he has not yet completely exhausted his tax stamp claim. Considering that the Wisconsin Supreme Court declined recently to review a court of appeals' decision upholding the constitutionality of the tax stamp statute under which petitioner was convicted, see State v. Jones, 257 Wis. 2d 319, 651 N.W. 2d 305 (Ct. App. 2002), pet. for review dismissed, 257 Wis. 2d 122, 653 N.W. 2d 893 (Oct. 21, 2002), it appears to be a foregone conclusion that the supreme court will deny petitioner's petition for review. Nonetheless, principles of federalism and comity preclude federal courts from considering the constitutional claims of state prisoners unless the state courts have first had an opportunity to remedy the alleged constitutional errors. This court would violate those principles if it decided petitioner's constitutional claims without giving the state supreme court the opportunity to do so first.

Accordingly, I am dismissing the petition without prejudice because petitioner has filed it prematurely. Petitioner may file a new petition after the Wisconsin Supreme Court decides his petition for review.

ORDER

IT IS ORDERED that, pursuant to Rule 4 of the Rules Governing Section 2254 Cases, the petition of Mark Renaldo Lowe for a writ of habeas corpus is DISMISSED WITHOUT PREJUDICE for his failure to exhaust his state court remedies.

Dated this 21st day of February, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge