

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

EDWARD B. DUTY, SR.,

Petitioner,

ORDER

v.

03-C-673-C

STEVE WATTERS, Director, Sand Ridge
Secure Treatment Center,

Respondent.

Edward B. Duty, Sr. has filed an application for a writ of habeas corpus under 28 U.S.C. § 2254. In his application, petitioner asserts that he is detained at the Sand Ridge Secure Treatment Center in Mauston, Wisconsin, pursuant to a judgment entered on September 25, 2000, by the Circuit Court for Kenosha County. I have granted petitioner's petition for leave to proceed *in forma pauperis* in a separate order.

The petition is confusing. Petitioner contends that he is in custody pursuant to a state court judgment, but he does not identify the nature of the judgment or the crime that he is alleged to have committed. Because the institution in which petitioner is confined is a secure treatment facility specializing in the treatment of persons committed under Wisconsin's sexually violent persons law, Wis. Stat. Chapter 980, and because petitioner has identified the term of his sentence as "indefinite," I infer that he may be serving a term of confinement pursuant to Chapter 980. However, a search of Wisconsin's Consolidated

Court Automation Program (CCAP) shows that on September 25, 2000, the Circuit Court for Kenosha County *dismissed* a sexual predator petition the state had filed against petitioner. So, it is unclear under what authority the state is detaining petitioner.

Petitioner appears to be contending that his right to counsel, his right to be present at court hearings and his right to confront witnesses were violated when the court entered judgment on September 25, 2000 without petitioner or his counsel present. (According to the petition, the attorney who was appointed to represent him died on August 17, 2000, but new counsel was not appointed until September 27, 2000, leaving petitioner without representation on the date the judgment was entered.) However, if the circuit court dismissed the sexual predator petition on September 25, 2000, as CCAP indicates, then it is hard to understand how the alleged deprivation of petitioner's right to counsel and to be present had anything to do with his present confinement.

In any case, the petition suffers from other defects apart from its sparseness. First, it appears that petitioner did not file his petition within one year after his alleged September 25, 2000 judgment became final. Under 28 U.S.C. § 2244(d)(1), a petitioner has one year 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" in which to file a federal habeas petition. Petitioner filed his federal habeas petition on November 26, 2003, more than three years after the judgment that he is challenging became final. Thus, his petition is untimely unless there is time that can be excluded under § 2244(d)(2). Under this subsection, "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” is not counted toward the one-year limitations period. From the petition, it appears that petitioner did not file any motions for postconviction or collateral review in the state courts during the three years between September 25, 2000 and November 26, 2003. Petitioner’s filing of an appeal in the Wisconsin Court of Appeals on August 23, 2002, would not toll the statute of limitations because, by petitioner’s own admission, the court did not accept the appeal for filing.

The second problem with the petition is that it appears that petitioner did not properly exhaust his state court remedies by appealing his conviction to the state appellate courts. *See O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (in order to comply with § 2254(b)’s exhaustion requirement, 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”).

In sum, because the petition does not contain enough information to allow this court to determine whether it states a colorable constitutional claim or whether petitioner has satisfied the procedural prerequisites for bringing a federal habeas petition, I am not ordering the state to respond to it at this time. Instead, petitioner must supplement his petition with responses to the following questions:

1. Do you agree that the sexually violent person petition filed by the State in Case No. 99 CI 01 was dismissed by the Circuit Court for Kenosha County on September 25, 2000?

2. If your answer to question #1 is yes, then under what authority is the State currently holding you in custody?

3. How is your current custody related to case 99 CI 01?

4. Apart from the appeal you say was rejected by the Court of Appeals on August 23, 2002, did you ever file any other appeals, petitions or motions in the state courts that raised a challenge to your current confinement? If the answer is yes, please identify the type of appeal or motion you filed, the date on which you filed it, the name of the court in which you filed it, the issues you raised, the result obtained and the date of the result.

5. If the answer to question #4 is no, please explain why you did not file any appeal, petition or motion until August 23, 2002.

Petitioner has until December 19, 2003, within which to submit this information. Failure to submit the requested information on time could result in dismissal of the petition.

Dated this 3rd day of December, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge