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

---

MARK P. STAFFA,

Petitioner,

OPINION
AND ORDER

v.

03-C-701-C

GARY McCAUGHTRY, Warden,
Waupun Correctional Institution,

Respondent.

---

Petitioner Mark P. Staffa, who is presently confined at the Waupun Correctional Institution, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner attacks a decision by the Wisconsin Department of Corrections revoking his probation and the six-year sentence imposed by the Circuit Court for Eau Claire County after revocation. Petitioner has paid the five dollar filing fee. The petition is before the court for preliminary consideration under Rule 4 of the Rules Governing Section 2254 Cases. For the reasons explained below, the petition must be dismissed.

The following facts are drawn from the petition, its attachments and matters of public record.

## ALLEGATIONS OF FACT

Sometime before September 2001, petitioner was charged in Branch 1 of the Circuit Court for Eau Claire County with one count of sexual assault and two counts of bond

jumping. In September 2001, petitioner was acquitted of the sexual assault charge but convicted of the bond jumping charges. On October 31, 2001, the circuit court withheld sentence on the bond jumping charges and placed petitioner on probation for a term of five years, with the condition that he serve one year in the county jail. Petitioner did not appeal his conviction or sentence.

On October 21, 2002, petitioner was released from jail and placed on electronic monitoring. Two weeks later, a woman accused him of sexual assault. Although the district attorney did not prosecute petitioner for the alleged assault, the Department of Corrections began revocation proceedings against petitioner on the basis of the allegations. The department revoked petitioner's probation after finding him guilty of the assault and of violating a probation rule requiring him to sign sex offender rules and to register as a sex offender.

Petitioner asked his appointed lawyer to file a writ of certiorari challenging the department's revocation decision; however, the deputy first assistant from the public defender's office forbade the lawyer to file the writ. After petitioner wrote to the circuit court, the court directed the public defender's office to allow petitioner's appointed lawyer to file a writ of certiorari. However, petitioner fired his appointed lawyer before any writ was filed. Petitioner then filed his own petition for a writ of certiorari, which was assigned to Branch 2 of the Circuit Court for Eau Claire County.

Petitioner has not explained in his petition how the circuit court ruled on his petition or whether he appealed from that ruling. According to Wisconsin's Consolidated Court

Access Program (http://wcca.wicourts.gov), petitioner filed his civil action challenging the probation revocation on March 21, 2003; the case's status is described as "closed" with no other explanatory information. A search of the Wisconsin Supreme Court and Court of Appeals Case Access (www.courts.state.wi.us/wscca) shows no cases filed in which petitioner was a party.

Petitioner returned to circuit court (Branch 1) to be sentenced after revocation. On April 4, 2003, the circuit court imposed consecutive terms of three years on each of the two bond jumping charges, with credit for 691 days. Petitioner filed his habeas petition in this court on December 10, 2003.

## DISCUSSION

The petition and its attachments fairly can be read as asserting the following claims: 1) petitioner's conviction for two counts of felony bond jumping was illegal because he was acquitted of the original felony charge at trial; 2) it was illegal for the court to withhold sentence but at the same time sentence petitioner to a year in county jail; 3) it was illegal for his probation agent to require him to register as a sex offender and for the department to revoke his probation for his failure to comply with that condition; 4) the department's decision to revoke his probation was not supported by adequate evidence; 5) his rights under the double jeopardy clause were violated when the court re-sentenced him to six years in prison after his probation was revoked; 6) the circuit court abused its discretion when it sentenced him to six years after revocation of his probation; and 7) his rights to due process

and the assistance of counsel were violated when the deputy public defender forbade his appointed lawyer to file a writ of certiorari on petitioner's behalf.

For this court to grant federal habeas relief to petitioner, he must show that he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Pursuant to the Antiterrorism and Effective Death Penalty Act, petitioner must have filed his habeas petition within one year from the date on which the judgement he is challenging became final by the conclusion of direct review or the time for seeking such review, unless one of the statutory tolling provisions apply. 28 U.S.C. § 2244(d). In addition, before this court can consider the merits of this petition, it must ensure that petitioner has overcome two procedural hurdles: exhaustion of his state court remedies and procedural default.

Petitioner's claims can be grouped into three categories: 1) those challenging the propriety of his conviction and original sentence (claims 1 and 2); 2) those challenging the propriety of the department's decision to revoke his probation (claims 3 and 4); and 3) those challenging the propriety of the sentence imposed by the circuit court after revocation (claims 5 and 6). (The last claim does not fall into any of these categories. However, it can be dispensed with quickly because it fails to state the deprivation of any constitutional right. The Sixth Amendment does not guarantee the right to counsel on certiorari proceedings challenging a revocation decision. See United States v. Yancey, 827 F.2d 83, 89 (7th Cir. 1987).)

Thus, the petition states claims against three different judgments: 1) the original Branch 1 judgment of conviction ordering that petitioner be placed on probation; 2) the department's decision revoking his probation; and 3) the amended Branch 1 judgment of conviction sentencing him after revocation to six years on the bond jumping charges. However, under Rule 2 of the Rules Governing Section 2254 Cases, "[a] petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court . . . [i]f a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody . . . he shall do so by separate petitions."

At the least, Rule 2 requires petitioner to file a separate petition if he seeks to challenge the department's decision to revoke his probation. That decision is independent of the judgments of Branch 1 of the Circuit Court for Eau Claire County and serves as an independent basis for petitioner's present custody. Furthermore, although the department's decision to revoke petitioner's probation is not the "judgment of a state court," petitioner asserts that he filed a certiorari petition challenging that decision in Branch 2 of the Circuit Court for Eau Claire County; presumably, that court entered a judgment when it closed the case. Because that court is different from the court that sentenced him on the bond jumping charges, petitioner must raise any challenges to the court's certiorari decision in a separate petition. Accordingly, I am striking claims 3 and 4 from the petition and am not considering them in this order. If petitioner wants to challenge his probation revocation, he must do so in a separate petition.

Petitioner's remaining challenges to the sentences imposed in Branch 1 involve two separate judgments as well: the original judgment on October 31, 2001 and the modified judgment after resentencing on April 4, 2003. See Beyer v. Litscher, 306 F.3d 504, 508 (7th Cir. 2002) (recognizing that "one indictment sometimes ends in multiple judgments, for example after resentencing"). Rule 2 allows a petitioner to file one petition challenging multiple judgments of the same state court, so petitioner's simultaneous challenge to both judgments does not run afoul of that rule. However, his petition suffers from other problems.

First, petitioner's challenges to his October 2001 sentence are untimely. According to the petition, petitioner did not appeal from his conviction or original sentence, meaning that the judgment became "final" on or about November 20, 2001. See Wis. Stat. § 809.30(2)(b) (defendant has 20 days in which to file notice of intent to appeal). Petitioner did not file his habeas petition until more than two years later, well after the one-year statute of limitations expired. Although the court modified petitioner's judgment when it resentenced him after probation revocation, the resentencing did not open up his original judgment of conviction to a second round of direct review. State v. Drake, 184 Wis. 2d 396, 399, 515 N.W. 2d 923, 924 (Ct. App. 1994). In Drake, the court held that a direct appeal from a judgment of conviction and sentence entered after post-revocation sentencing is limited to challenges to the sentence alone and cannot be used to raise issues that predated and were unaffected by the resentencing. Id. In other words, once petitioner's initial judgment of conviction became "final," it stayed final. Because his habeas petition was not

filed until more than two years after that date and because it appears that none of §2244(d)'s tolling provisions apply, the petition is untimely.

Even if petitioner's challenges to his original judgment of conviction were timely, his claims are frivolous. There is simply no merit to petitioner's contention that he could not be found guilty of felony bail jumping because he was acquitted of the felony that formed the basis for the bail jumping charges. Bail jumping is a charge different from the charge for which the defendant is on bail. Whether the bail jumping charge is classified as a misdemeanor or a felony depends on the severity of the charge for which the defendant has been released on bail. See Wis. Stat. § 946.49(1). A review of the Wisconsin Consolidated Court Access Program shows that petitioner was charged with sexual assault of a child–a felony–at the time he was charged with bail jumping. Therefore it was proper for the state to charge petitioner with felony bail jumping under Wis. Stat. § 946.49(1)(b), which provides that a person who intentionally fails to comply with a condition of bond is guilty of a felony "[i]f the offense with which the person is charged [and released on bail] is a felony." The fact that petitioner was acquitted of the sexual assault charge does not mean that he could not be convicted of the separate offense of violating a condition of his bail while he was on release pending trial for sexual assault.

Claim 2 is without merit as well. Petitioner contends that the court had no authority to declare that it was withholding sentence but at the same time order that he serve one year in the county jail. However, Wis. Stat. § 973.09(1)(a) is expressly to the contrary. Under that statute, trial courts may withhold sentence, place a defendant on probation and impose

"any conditions which may appear to be reasonable and appropriate." Wis. Stat. § 973.09(4)(a) provides that "[t]he court may . . . require as a condition of probation that the probationer be confined during such period of the term of probation as the court prescribes, but not to exceed one year." In Wisconsin, "probation is not considered a sentence, and the imposition of incarceration as a condition of probation is likewise not a sentence." State v. Fearing, 239 Wis. 2d 105, 110, 619 N.W. 2d 115, 118 (Ct. App. 2000) (citations omitted). These authorities defeat petitioner's contention that it was inconsistent for the court to order that he serve one year in jail as a condition of his probation and at the same time declare that it was withholding sentence. Accordingly, because it is plain from the petition that petitioner's challenges to his original conviction and sentence are frivolous, those claims must be dismissed pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Finally, it appears that petitioner has not exhausted his state court remedies with respect to his challenges to the court's post-revocation sentence. Before bringing his claims in federal court, a habeas petitioner must first exhaust his state court remedies. 28 U.S.C. § 2254(b)(1)(A). As the Supreme Court explained in O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999), "[s]ection 2254(c) provides that a habeas petitioner shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." It appears from the petition that petitioner did not file any appeal from the circuit court's April 4, 2003 judgment sentencing him after revocation. Thus, the state appellate courts have not yet had an opportunity to pass on petitioner's claims. Although it may be too late for petitioner to

file a direct appeal under Wis. Stat. § 974.02, he can raise any claims of constitutional error in a postconviction motion under Wis. Stat. § 974.06. See State v. Lo, 264 Wis. 2d 1, 22, n.4, 665 N.W. 2d 756, 766, n. 4 (2003) (constitutional issues can be raised in § 974.06 motion where defendant has not sought direct appeal). Accordingly, because there is a procedure available in the state courts by which petitioner can present his constitutional challenges to the circuit court's post-revocation sentence, he has not exhausted his state court remedies. Therefore, this portion of his petition will be dismissed without prejudice.

ORDER

IT IS ORDERED that Claims 3 and 4 of petitioner Mark P. Staffa's petition for a writ of habeas corpus are STRICKEN under Rule 2(d) of the Rules Governing Section 2254 Cases.

Claims 1, 2 and 7 of the petition are DISMISSED WITH PREJUDICE under Rule 4 of the Rules Governing Section 2254 Cases.

Claims 5 and 6 of the petition are DISMISSED WITHOUT PREJUDICE for petitioner's failure to exhaust his state court remedies.

Entered this 30th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge