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

ANTONIO P. BROWN,

Petitioner,

OPINION AND ORDER

v.

04-C-405-C

GARY R. MCCAUGHTRY, Warden, Waupun Correctional Institution,

Respondent.

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner Antonio P. Brown, an inmate at the Waupun Correctional Institution, is serving two consecutive 12-year sentences after having been convicted in the Circuit Court for Milwaukee County for two counts of armed robbery as party to a crime. The petition is before the court for preliminary consideration under Rule 4 of the Rules Governing Section 2254 Cases. Petitioner has paid the five dollar filing fee. Because petitioner is in custody in this district, this court has jurisdiction over the petition. 28 U.S.C. § 2241(d). It appears that petitioner filed his petition within the one-year limitations period.

Petitioner raises three claims: 1) the prosecution violated his right to due process when it failed to disclose exculpatory statements by two witnesses; 2) the trial court interfered with his decision whether to testify in his own defense at trial by suggesting that petitioner had made inculpatory statements to police, when in fact petitioner had not made

such statements; and 3) the evidence adduced at trial was insufficient to support the guilty verdict. Petitioner asserts that he presented the third claim to the state appellate courts on direct appeal but that he did not present his first two claims to the state courts "because of the lawyers I had, and my lack of knowledge about the judicial system."

It is well established that a prisoner seeking a writ of habeas corpus must exhaust his state remedies before seeking federal relief. Moleterno v. Nelson, 114 F.3d 629, 633 (7th Cir. 1997) (citing cases). Principles of comity require the habeas petitioner to present his federal constitutional claims first to the state courts to give the state the "'opportunity to pass upon and correct alleged violations of its prisoners' federal rights."' Duncan v. Henry, 513 U.S. 364, 365 (1995) (quoting Picard v. Connor, 404 U.S. 270, 275 (1971) (internal quotation marks omitted)). Claims are exhausted when they have been presented to the highest state court for a ruling on the merits of the claims or when state remedies no longer remain available to the petitioner. Engle v. Isaac, 456 U.S. 107, 125 n.28 (1982). Failure to exhaust one's claims "constitutes a procedural default," Chambers v. McCaughtry, 264 F.3d 732, 737 (7th Cir. 2001), which bars federal review unless the petitioner demonstrates cause for the default and actual prejudice as a result of the violation or demonstrates that the failure to consider the claims will result in a fundamental miscarriage of justice. Rodriguez v. Scillia, 193 F.3d 913, 917 (7th Cir. 1999).

Petitioner concedes that he has not exhausted claims 1 and 2 of the petition. He asserts that his failure to do so was the fault of his lawyers. Such assertions of ineffective

assistance of counsel can establish cause for a procedural default, if petitioner can prove them. However, in Edwards v. Carpenter, 529 U.S. 446 (2000), the Supreme Court held that because the assertion of ineffective assistance as a cause to excuse a procedural default in a § 2254 petition is a constitutional claim itself, the petitioner must raise this claim first to the state court. Failure to do so means a procedural default. Id. at 453. It appears that petitioner never presented a claim of ineffective assistance of post-conviction or appellate counsel to the state courts.

Thus, the question is whether petitioner has any opportunity to exhaust this claim (as well as his predicate due process claims) by presenting it to the state courts. 28 U.S.C. § 2254(c) ("An applicant 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"). Wisconsin's statute governing post-conviction motions, Wis. Stat. § 974.06, allows defendants to attack their convictions collaterally on constitutional grounds after the time for seeking a direct appeal or other post-conviction remedy has expired. However, a petitioner is procedurally barred from raising a claim in a post-conviction motion that he could have raised on direct appeal unless he has a "sufficient reason" for not raising the issue on direct appeal. State v. Escalona-Naranjo, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 164 (1994); Wis. Stat. § 974.06(4). Ineffective assistance of post-conviction or appellate counsel may provide a sufficient reason. State ex rel. Rothering v. McCaughtry, 205 Wis. 2d 675, 682, 556 N.W. 2d 136, 139 (Ct. App. 1996) (describing

procedure for challenging effectiveness of post-conviction counsel); State v. Knight, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992) (appellate counsel). Thus, avenues of relief are available to petitioner in the state courts through which he could present a claim that his post-conviction or appellate lawyer was ineffective for failing to raise his additional due process claims.

Under Rose v. Lundy, 455 U.S. 509 (1982), federal district courts must dismiss a petition like petitioner's that presents a mix of exhausted and unexhausted claims. Pliler v. Ford, __ U.S. ___, 2004 WL 1373174, *4 (2004) (citing Rose, 455 U.S. at 510). However, this does not mean that petitioner *must* return to state court and pursue his unexhausted claims. Instead, he may choose to amend his petition by deleting the unexhausted claims and then proceed solely on the exhausted claim. Rose, at 520.

In deciding which course of action to pursue, petitioner should be aware that if he decides to give up his unexhausted due process claims and present only his claim that the evidence was insufficient to support the guilty verdict, it is unlikely that this court would allow him to raise the unexhausted claims in a subsequent federal habeas petition. Lundy, 455 U.S. at 521 ("[A] prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions") (citing 28 U.S.C. § 2254 Rule 9(b), authorizing dismissal for abuse of the writ); 28 U.S.C. § 2244 (disallowing second of successive petitions for writ of habeas corpus except in narrow circumstances and then only with prior authorization of court of appeals).

Petitioner should also consider the statute of limitations for filing a federal habeas petition. Under the federal statutes governing habeas petitions, a state prisoner has only one year from the date his judgment became "final" in which to file a federal habeas petition. 28 U.S.C. § 2244(d)(1)(A). Assuming petitioner did not file a petition for a writ of certiorari in the United States Supreme Court, his conviction would have become final 90 days after the Wisconsin Supreme Court denied his petition for review. See Anderson v. Litscher, 281 F.3d 672, 674-675 (7th Cir. 2002) (where petitioner does not file petition for writ of certiorari, one-year statute of limitations begins to run upon expiration of 90-day period in which prisoner could have filed petition for writ of certiorari with United States Supreme Court). Petitioner's one-year statute of limitations began to run on that date and continued to run while the petition has been pending in this court. Newell v. Hanks, 283 F.3d 827, 834 (7th Cir. 2002); Jones v. Berge, 101 F. Supp. 2d 1145, 1150 (E.D. Wis. 2000). If petitioner chooses to pursue his unexhausted claims in state court, he will not get a new one-year time period in which to refile a federal habeas petition. Although the time during which any properly filed state court post-conviction motion is pending will not count against whatever is left of that one-year period, 28 U.S.C. § 2244(d)(2), petitioner cannot gain back the time that has already elapsed since his conviction became final. When deciding between pursuing his unexhausted claims in state court or amending his petition to raise only the exhausted claim, petitioner should consider whether it is realistic to think

that he will be able to take the steps necessary to exhaust his claims before the time expires for filing a future federal habeas petition.

ORDER

Petitioner Antonio P. Brown's petition for a writ of habeas corpus it is DISMISSED WITHOUT PREJUDICE pursuant to Rose v. Lundy, 455 U.S. 509 (1982), because it presents a mix of exhausted and unexhausted claims.

Entered this 30th day of June, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge