

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

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SHAWN MCGARVEY,

Petitioner,

OPINION AND ORDER

v.

04-C-431-C

THOMAS BORGAN, Warden, Fox Lake  
Correctional Institution,

Respondent.

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This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner Shawn McGarvey, an inmate at the Fox Lake Correctional Institution, challenges a decision of a prison disciplinary committee finding him guilty of violating prison rules. Petitioner contends that his rights to due process were violated because his hearing was not held within state-prescribed time limits and his prison advocate was ineffective. According to the petition, the conduct report resulted in a 45-day extension of petitioner's mandatory release date. 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.

The petition will be dismissed with prejudice because it fails to show that petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Petitioner alleges first that his hearing on the charges was not timely

under Wisconsin prison disciplinary procedures. However, § 2254 is not a remedy for errors of state law. Dellinger v. Bowen, 301 F.3d 758, 764 (7th Cir. 2002).

Second, petitioner contends that his lay advocate did not effectively represent him. However, prisoners do not have a due process right to lay counsel unless they are illiterate or unable to understand complex charges against them. Wolff v. McDonnell, 418 U.S. 539, 570 (1974). Petitioner does not allege that he is illiterate or that he was unable to understand the charges against him. In fact, his petition demonstrates that he is literate and could understand the charges against him. Because petitioner did not have any due process right to the assistance of an advocate, the advocate's alleged ineffectiveness does not amount to a constitutional violation.

Furthermore, even if petitioner had viable constitutional claims, this court would dismiss his petition on procedural grounds. Attachments to the petition show that petitioner attempted to present his claims to the state courts by way of a petition that the state trial court construed as a petition for a writ of certiorari. Although the state court found that a petition for a writ of certiorari was the proper mechanism for challenging a decision of a prison disciplinary committee, it dismissed the petition with prejudice because petitioner had not filed it within 45 days of the hearing decision, as required by Wis. Stat. § 893.735(2). It appears that petitioner did not appeal the trial court's dismissal order.

Before this court may grant a writ of habeas corpus under § 2254, the state prisoner must fulfill the exhaustion requirement set forth in 28 U.S.C. § 2254(b)(1). To satisfy the

exhaustion requirement, the petitioner 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.” O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). In addition, the petitioner must have complied with all state procedural requirements along the way. See Moore v. Bryant, 295 F.3d 771, 774 (7th Cir. 2002). Failure to satisfy the exhaustion requirement or to comply with state procedural rules constitutes a “procedural default” that bars this court from considering the merits of the constitutional claims unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Chambers v. McCaughtry, 264 F.3d 732, 737 (7th Cir. 2001).

Here, petitioner committed two procedural defaults. First, he violated the state’s rule that a writ of certiorari must be filed within 45 days of the decision being challenged. The 45-day rule is followed regularly and applied consistently in Wisconsin, making it an “independent and adequate” state rule sufficient to support the judgment. See Page v. Frank, 343 F.3d 901, 909 (7th Cir. 2003). Second, petitioner procedurally defaulted by failing to appeal the dismissal of his certiorari petition to the state court of appeals and then to the Wisconsin Supreme Court, as required by O’Sullivan.

Petitioner’s defaults would bar this court from adjudicating his claims on the merits unless petitioner could meet either the cause and prejudice or fundamental miscarriage of justice exceptions to the procedural default rule. There is nothing in the petition that

suggests that petitioner could make either of these showings. Accordingly, even if the petition stated any viable constitutional claims, it would be dismissed on grounds of procedural default.

ORDER

Accordingly, the petition of Shawn McGarvey for a writ of habeas corpus is  
DISMISSED WITH PREJUDICE.

Dated this 20<sup>th</sup> day of July, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge