

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

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ROBERT D. WHEELER,

Petitioner,

OPINION AND ORDER

v.

04-C-603-C

THOMAS BORGEN, Warden, Fox Lake  
Correctional Institution,

Respondent.

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Petitioner Robert D. Wheeler, an inmate at the Fox Lake Correctional Institution, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. §2254. 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. Because it is clear from the petition and its attachments that petitioner is not entitled to relief, I am dismissing the petition with prejudice without requiring a response from respondent.

As an initial matter, I note that petitioner has filed his petition in the wrong district. Under 28 U.S.C. § 2241(d), the petition may be filed either in the federal district court for the district where the inmate is in custody or in the district where sits the state court whose judgment the inmate is challenging. In this case, both the Fox Lake Correctional Institution and the Circuit Court for Milwaukee County are located in the Eastern District of Wisconsin. Nonetheless, petitioner's blunder does not deprive this court of jurisdiction to

consider his petition. In Moore v. Olson, 368 F.3d 757, 759 (7th Cir. 2004), the Court of Appeals for the Seventh Circuit explained that neither § 2241(a) or (d) places limits on a federal district court's subject matter jurisdiction; rather, those subsections operate merely to establish venue for collateral litigation. Because the petition arguably raises a federal question, see United States v. Dougherty, 269 U.S. 360, 363 (1926) (criminal sentences should be definite and certain), subject matter jurisdiction is present.

Under § 2241(d), this court may transfer the petition to the Eastern District of Wisconsin for hearing and determination. However, such a transfer would merely delay the inevitable. Accordingly, I will consider the petition even though it should have been filed in the Eastern District.

#### ALLEGATIONS OF FACT

According to the petition, on March 8, 2000, petitioner was sentenced in the Circuit Court for Milwaukee County to 66 months in prison after being convicted for one count of receiving stolen property. The sentence was ordered to run consecutively to any other sentence. Petitioner did not take a direct appeal from his conviction. Two years later, on March 19, 2002, he filed a postconviction motion seeking permission to withdraw his plea; the motion was denied. Three subsequent motions filed by petitioner were also denied, the last of these on December 10, 2002.

In his last postconviction motion, petitioner contended that the trial court lacked the authority to impose a consecutive sentence in his case. In its December 10, 2002 order denying the motion, the court found that petitioner's claim was barred under State v. Escalona-Naranjo, 185 Wis. 2d 169, 178 (1994) and Wis. Stat. § 974.06(4) because petitioner had not raised that issue in his previous postconviction motions. In addition, the court found that petitioner's interpretation of the law was incorrect. The court noted that under Wis. Stat. § 973.15(2)(a), a trial court "may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously." The court observed that the fact that petitioner's "other sentence" might have been imposed by a federal court was irrelevant. Petitioner did not file any appeal from the circuit court's decision.

Petitioner filed the instant petition for federal habeas relief on August 23, 2004. He contends that his Milwaukee County sentence is invalid because it "was ordered to run consecutive to any other sentence even those not yet ordered."

## DISCUSSION

There are numerous reasons why the petition must be dismissed. First, the documents that petitioner has attached to his petition contradict his contention that his sentence was ordered to run consecutively to a sentence not yet ordered. No such language appears in the judgment of conviction. Further, in its December 10, 2002 order, the trial

court rejected petitioner's suggestion that its judgment ordering a consecutive sentence could be interpreted in that manner.

Second, petitioner's claim is barred by the doctrine of procedural default. A habeas petitioner may procedurally default, or forfeit his opportunity to have his federal claims decided by a federal court in two ways. First, a petitioner commits a procedural default if he fails to exhaust his available state court remedies. Chambers v. McCaughtry, 264 F.3d 732, 737 (7th Cir. 2001); 28 U.S.C. § 2254(b)(1)(A). Exhaustion entails more than merely obtaining a decision from the state's highest court; rather, the petitioner must present his federal claims fully and fairly to the state courts along the way. Id.; O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) ("[T]he exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts."). In order to meet the "fair presentment" precondition to exhaustion, "[t]he petitioner must have placed both the operative facts and the controlling legal principles before the state courts." Id. at 737-38 (internal citations omitted).

The second way a petitioner may procedurally default a federal claim is to fail to meet a *state* procedural requirement. See Moore v. Bryant, 295 F.3d 771, 774 (7th Cir. 2002). "A federal court will not review a question of federal law decided by a state court if the decision of the state court rests on a state procedural ground that is independent of the federal question and adequate to support the judgment." Id. (citations omitted). In assessing whether a state court ruling is based on an "independent and adequate"

determination of state law, the federal court must refer to the decision of the last state court to have ruled on the merits. Page v. Frank, 343 F.3d 901, 905 (7th Cir. 2003).

Petitioner committed both kinds of procedural defaults. First, he violated an independent and adequate state law when he failed to raise his illegal sentence claims in his first postconviction motion before the circuit court, resulting in the court finding his claim barred under Wis. Stat. § 974.06 and Escalona-Naranjo. Second, he failed to exhaust his state court remedies by failing to take any appeal from the circuit court's denial of his postconviction motion. Although a federal court can overlook a procedural default if the petitioner can show 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, see Rodriguez v. Scillia, 193 F.3d 913, 917 (7th Cir. 1999), there is nothing in the petition to suggest that petitioner could make either of these showings.

Finally, the petition is untimely because petitioner did not file it within one year of the date on which his conviction became final, as required by 28 U.S.C. § 2244.

For all these reasons, the petition must be dismissed with prejudice insofar as I have construed it as a challenge to the sentence imposed by the Milwaukee County Circuit Court. However, it is possible that what petitioner really seeks to challenge is not the facial validity of the court's consecutive sentence, but rather the way in which the Department of Corrections has implemented it. I infer from the petition that the Department of Corrections has determined that the Milwaukee County sentence should run consecutively

to a federal sentence that petitioner was ordered to serve. Petitioner appears to believe that he had not yet been ordered to serve that federal sentence when the Milwaukee County Circuit Court issued its sentence so therefore the Milwaukee County sentence could not run consecutively to the federal sentence. (However, documents attached to the petition suggest that petitioner *was* serving his federal sentence before he was sentenced in Milwaukee.) It appears from the documents that petitioner has attached that he has not presented this claim formally to the Department of Corrections by way of any administrative challenge that might be allowed under the department's rules. Accordingly, because avenues of relief might still exist by which petitioner could exhaust any claim that the department has miscalculated his sentence, that claim, should petitioner be seeking to raise it, will be dismissed without prejudice.

#### ORDER

Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, IT IS ORDERED that Robert D. Wheeler's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DISMISSED WITH PREJUDICE insofar as it is construed as a challenge to the facial validity of the sentence imposed by the Circuit Court for Milwaukee County on March 8, 2000. Insofar as the petition can be construed as a challenge to the manner in which the

Department of Corrections has implemented that sentence, that claim is DISMISSED  
WITHOUT PREJUDICE.

Dated this 14<sup>th</sup> day of September, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge