

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

RUBEN WARD,

Petitioner,

ORDER

v.

04-C-0081-C

DAN BENIK, Warden, Stanley Correctional
Institution,

Respondent.

On February 17, 2004, Ruben Ward, an inmate at the Stanley Correctional Institution, filed an application for a writ of habeas corpus under 28 U.S.C. § 2254. A preliminary review of the petition indicates that Ward is serving an eight-year prison term pursuant to a judgment of conviction entered on February 21, 2001, by the Circuit Court for Milwaukee County for one count of burglary. Petitioner's conviction was affirmed on direct appeal, with the Wisconsin Supreme Court denying his petition for review on February 19, 2003.

As an initial matter, I note that petitioner named Matthew Frank, the Secretary of the Wisconsin Department of Corrections, as the respondent. However, under Rule 2 of the Rules Governing Section 2254 Cases, the "state officer having custody of the applicant shall be named as respondent." That officer is the warden of the Stanley Correctional Institution,

Dan Benik. Accordingly, I have amended the caption to reflect this, and am directing the clerk to do the same.

On February 20, 2004, before this court had taken any action on the petition, petitioner submitted a letter stating that he is in the course of pursuing a collateral attack on his conviction in the state court of appeals. According to petitioner, he submitted his federal habeas petition even though he is still pursuing state court remedies as a preventive measure to insure that he did not miss the one-year limitations period for filing a federal habeas petition. I construe petitioner's letter of February 20, 2004, as a request that this court stay the petition while he pursues his state court remedies on claims that have not yet been exhausted.

_____ Federal district courts have the discretion to stay a habeas corpus action while a prisoner exhausts his state court remedies if dismissal could jeopardize the timeliness of the petition. See Freeman v. Page, 208 F.3d 572, 577 (7th Cir. 2000); Tinker v. Hanks, 172 F.3d 990, 991 (7th Cir. 1999). However, petitioner's ability to file a timely federal habeas petition after he exhausts his state court remedies is not in jeopardy. Petitioner appears to have used the date on which the Wisconsin Supreme Court denied his petition for review on direct appeal from his conviction, or February 19, 2003, as the starting point for calculating his one-year period. However, the Court of Appeals for the Seventh Circuit has held that the "time for seeking [direct] review" under 28 U.S.C. § 2244(d)(1) includes the time during which a petitioner could file a petition for a writ of certiorari in the United

States Supreme Court. Anderson v. Litscher, 281 F.3d 672, 674-675 (7th Cir. 2002). When a petitioner does not file a petition for writ of certiorari, as appears to be the case here, the one-year statute of limitations begins to run at the expiration of the 90-day period in which prisoner could have filed such a petition. Id. Thus, petitioner's conviction did not become "final" for purposes of § 2244(d)(1) until May 20, 2003. Petitioner's one-year limitations period for filing a federal habeas petition began to run on May 21, 2003.

Thus, he has approximately three months remaining on his federal habeas clock. Further, assuming the motion that petitioner asserts is now pending in the state court of appeals was "properly filed" as that term has been defined by the Supreme Court, see Artuz v. Bennett, 531 U.S. 4, 8 (2000), under 28 U.S.C. § 2244(d)(2), his federal habeas clock stopped running on the date that he filed that motion. 28 U.S.C. § 2244(d)(2) ("The 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 shall not be counted toward any period of limitation under this subsection."). So long as petitioner does not miss any of Wisconsin's deadlines for filing an appeal or petition for review, none of the time that petitioner spends exhausting his claims in state court will count against the time remaining on petitioner's federal habeas clock. Fernandez v. Sternes, 227 F.3d 977, 979-980 (7th Cir. 2000) (properly filed application for state postconviction relief is "pending" within meaning of § 2244(d)(2) and continues to be "pending" during period between one court's decision and timely request for further review by higher court). This means that the only time that

will count against petitioner's federal habeas clock is that which elapses between the date on which the Wisconsin Supreme Court denies his petition for review (a step that petitioner must take in order to exhaust his state court remedies, see O'Sullivan v. Boerckel, 526 U.S. 838, 847 (1999)) and the date on which petitioner files a new federal habeas petition. I am confident that after the Wisconsin Supreme Court denies his petition for review, petitioner can file a new habeas petition within the time that remains on his federal clock.

ORDER

Accordingly, petitioner Ruben Ward's request for an order staying his habeas petition until he exhausts his state court remedies is DENIED. Further, the petition is DISMISSED WITHOUT PREJUDICE for petitioner's failure to have exhausted his state court remedies.

The clerk of court should amend the caption to reflect that Dan Benik, Warden, Stanley Correctional Institution, is the respondent.

Dated this 25th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge