

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

HARRY L. GANT,

Petitioner,

OPINION AND ORDER

v.

04-C-0953-C

PHIL KINGSTON, Warden,
Waupun Correctional Institution,

Respondent.

Harry Gant has filed a motion pursuant to Rule 60(b) of the Rules of Federal Civil Procedure for relief from this court's June 13, 2005 judgment denying his petition for a writ of habeas corpus. As explained below, nothing in petitioner's motion suggests that extraordinary circumstances exist warranting relief from the judgment. Accordingly, the motion will be denied.

BACKGROUND

To review the facts of this case briefly, after petitioner was convicted in state court, he was appointed a lawyer who initiated a direct appeal on petitioner's behalf. However, the lawyer later withdrew the appeal voluntarily, apparently at petitioner's request. Petitioner then filed a *pro se* motion pursuant to Wis. Stat. § 974.06, Wisconsin's collateral attack statute, in which he raised various challenges to his conviction and sentence, including

numerous claims of ineffective assistance of trial counsel. After the trial court denied the motion on the merits, petitioner appealed to the state court of appeals and state supreme court, who both rejected his appeal. He then filed his federal habeas petition.

In an order entered January 6, 2005, United States Magistrate Judge Stephen Crocker determined that the petition raised six main claims, each with several subparts, that warranted a response from the state. Order, Jan. 6, 2005, dkt. #4, at 2. The claims did not include any claim that petitioner's appellate lawyer was ineffective, that petitioner had been denied his right to direct appeal or any claim related to the withdrawn direct appeal. Although the magistrate judge instructed petitioner that petitioner should notify the court immediately if the court had overlooked any claim, *id.*, at 3, petitioner did not do so.

In its response to the petition, the state contended that petitioner had satisfied the habeas statute's exhaustion requirement because there were no state court avenues through which petitioner could present his claims: petitioner had withdrawn his direct appeal and then pursued a collateral attack under Wis. Stat. § 974.06. See 28 U.S.C. § 2254(b)(1). However, the state contended that because petitioner had fairly presented only two of his claims to both state appellate courts on appeal from the denial of his postconviction motion, he had not *properly* exhausted the remaining claims and therefore, those claims were procedurally defaulted. In his reply, petitioner did not disagree that no state court avenues of relief remained available to him, but argued that he had fairly presented five, not two, claims to the state appellate courts. This court ultimately agreed with the state that all but

two of petitioner's claims were procedurally defaulted; it denied on the merits the two claims that had been properly exhausted.

According to documents attached to petitioner's Rule 60(b) motion, some time after this court denied his habeas petition, petitioner filed a petition for a writ of habeas corpus in the Wisconsin Court of Appeals pursuant to State v. Knight, 168 Wis. 2d 509, 484 N.W. 2d 540 (1992), alleging that his state court appellate lawyer was ineffective in numerous ways, one of which was agreeing with petitioner's request to dismiss his direct appeal voluntarily even though the lawyer had reason to doubt petitioner's competence to make that request. The appellate court accepted the petition and ordered the state to respond; apparently, the court has not yet resolved the merits of petitioner's claim.

OPINION

Rule 60(b) permits a party to seek relief from a final judgment, order, or proceeding on the grounds of mistake, inadvertence, excusable neglect, newly discovered evidence, fraud or "any other reason justifying relief from the operation of the judgment." Relief under Rule 60(b) "is an extraordinary remedy and is granted only in exceptional circumstances." Dickerson v. Board of Educ. of Ford Heights, Ill., 32 F.3d 1114, 1116 (7th Cir.1994) (quotations omitted).

Petitioner contends that the state appellate court's acceptance of his Knight petition shows that the state committed fraud or misrepresentation when it averred in its response

to petitioner's federal habeas petition that petitioner had no state court avenues available through which to present his claims. According to petitioner, the petition actually was a "mixed" petition that should have been dismissed at the outset so that petitioner could exhaust the unexhausted claims in state court. See Rose v. Lundy, 455 U.S. 509 (1982).

Petitioner is incorrect. As noted above, nowhere in his petition or in any of his other submissions did petitioner allege that the lawyer appointed to represent him on direct appeal was ineffective, that petitioner was incompetent when he instructed his lawyer to dismiss his appeal or any other fact relating to the state court proceedings on direct appeal. In averring that petitioner had exhausted all the state court remedies that were available to him, the state was responding to the claims presented in the petition. The state cannot be faulted for failing to address a claim that petitioner never raised. Indeed, even petitioner conceded that he had exhausted his state court remedies with respect to the claims raised in the petition. Because the petition did not include the unexhausted claim of ineffective assistance of appellate counsel that petitioner is now pursuing in state court, it was not a mixed petition and the state made no misrepresentation.

The possibility that the state appellate court may reinstate petitioner's direct appeal in the event it rules in his favor on the merits of his Knight petition is not a circumstance rendering the judgment in this case unjust. First, it is unknown at this point whether petitioner will be permitted a new appeal, so it would be premature to reopen this case on that basis. Second, if petitioner does get a new appeal, he may obtain relief from his

conviction from the state courts, making it unnecessary to return to this court for federal review of his conviction. Third, in the event petitioner is granted a new appeal and is unsuccessful in state court, then he can bring a new federal habeas petition presenting any claims that he exhausted in his new state court appeal. At that time, after the facts and claims have been clearly developed, petitioner can argue why the judgment in this case should not operate to bar him from bringing a second petition or presenting claims that were already raised or which could have been raised in his first petition. At this point, petitioner's pursuit in state court of a new claim that he failed to present to this court in his first petition is not a ground warranting relief under Rule 60(b).

ORDER

IT IS ORDERED that the motion of petitioner Harry Gant for relief under Fed. R. Civ. P. 60(b) is DENIED.

Entered this 14th day of June, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge