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

LAMONT WILLIAMS,

Petitioner,

OPINION AND ORDER

v.

04-C-966-C

DANIEL BENIK, Warden, Stanley Correctional Institution,

Respondent.

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner Lamont Williams, an inmate at the Stanley Correctional Institution in Stanley, Wisconsin, challenges his continued confinement in the Wisconsin state prison system for his 1993 conviction in the Circuit Court for Milwaukee County for four counts of armed robbery and one count of carrying a concealed weapon. Petitioner has paid the five dollar filing fee. The petition is before the court for preliminary consideration pursuant to Rule 4 of the Rules Governing Section 2254 Cases. Because it is plain from the petition that petitioner's claims are either without merit or are improperly brought under 28 U.S.C. § 2254, I am dismissing the petition.

ALLEGATIONS OF FACT

Petitioner was convicted in 1993 in the Circuit Court for Milwaukee County for four counts of armed robbery and one count of carrying a concealed weapon. The circuit court imposed a sentence of 36 years. At that time, the Department of Corrections' policy was to grant discretionary parole to prisoners when they had served 25 percent of their sentence. The court's intent when it imposed sentence was to require petitioner to serve only nine years in prison, but because of the department's parole policy at the time the court had to multiply that number by four in order to achieve the court's intended term of incarceration.

Sometime after he began serving his sentence, then-governor Tommy Thompson wrote a letter to the Department of Corrections Secretary instructing him to "pursue any and all available legal avenues to block the release of violent offenders who were sentenced under the old release law, who have reached their mandatory release date," explaining that "[t]he policy of this Administration is to keep violent offenders in prison as long as possible under the law." Petitioner alleges that this change in policy has altered his suitability for discretionary parole and has prolonged his incarceration "by depriving him of an opportunity to be released prior to his mandatory release or discharge date." He further alleges that the policy "by its own terms eliminates early parole for violent offenses regardless of the inmates' good behavior" and will result in his incarceration "until his entire 36-year imposed sentence is complete."

On June 11, 2003, petitioner filed a motion in the circuit court to modify his sentence, alleging that the department's change in policy was a "new factor" that warranted a reduction in his sentence. In addition, he alleged that the new policy constituted an *ex post facto* law. After the circuit court denied his motion, petitioner appealed to the Wisconsin Court of Appeals. In addition to the two claims presented to the circuit court, petitioner alleged that the lawyer who had been appointed to represent him on the postconviction motion provided ineffective assistance.

In an unpublished decision issued September 21, 2004, the court of appeals rejected petitioner's arguments and affirmed the trial court's order. The court held that, assuming the department had actually changed its policy regarding parole, that change did not amount to a new factor justifying modification of petitioner's sentence because the trial court's statements at sentencing did not indicate that it intended that petitioner be released after serving only nine years of a 36-year sentence of incarceration. The court also found no merit to petitioner's *ex post facto* claim because the policy change did not extend petitioner's 36-year sentence. Finally, the court found that petitioner had not been prejudiced by his lawyer's alleged defective performance because his claims had no merit. The Wisconsin Supreme Court denied petitioner's petition for review on November 17, 2004.

While his appeal was pending, petitioner filed another motion for sentence modification in the circuit court, alleging that his sentence was void insofar as the trial court had imposed a sentence in excess of that prescribed by the sentencing guidelines, in violation

of Blakely v. Washington, 124 S. Ct. 531 (2004), and Brown v. Ohio, 432 U.S. 161 (1977). The trial court denied the motion, and petitioner appealed. That appeal is now pending in the state appellate court.

OPINION

In his habeas application, petitioner raises the following claims: 1) the trial court denied his right to due process when it refused to reduce his sentence on the basis of the department's change in parole policy; 2) the department's change in policy constitutes an unconstitutional *ex post facto* law because it has deprived petitioner of the right to early release on discretionary parole or mandatory release; and 3) the trial court deprived petitioner of his right to a jury trial and the protection against double jeopardy when it increased his sentence beyond the prescribed guideline range on the basis of "aggravating factors" that were not proved beyond a reasonable doubt to a jury, in violation of Blakely v. Washington, 124 S. Ct. 531 (2004) and Brown v. Ohio, 432 U.S. 161 (1977).

I. CLAIM THREE: BLAKELY, BROWN CLAIM

Ordinarily, a 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" before raising those issues in a federal petition for habeas corpus. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); 28 U.S.C. § 2254(b)(1)(A). Failure to comply with

this requirement, even with respect to only some of the claims in the petition, usually results in dismissal of the entire petition. See Rose v. Lundy, 455 U.S. 509, 510 (1982). Petitioner acknowledges that he has not exhausted his third claim. However, he argues that he should be excused from the exhaustion requirement because "there is an absence of available State corrective process" insofar as the state courts have held that an appellate court has no jurisdiction to review a challenge to the trial court's sentence on the ground that it does not fall within the range prescribed by the sentencing guidelines. See State v. Halbert, 147 Wis. 2d 123, 432 N.W. 2d 633 (Ct. App. 1988); 28 U.S.C. § 2254(b)(1)(B)(I).

It is not necessary to decide whether petitioner should be excused from the exhaustion requirement with respect to his third claim because that claim has no merit. 28 U.S.C. § 2254(b)(2) provides that "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." Petitioner contends that by increasing petitioner's sentence on the basis of an aggravating factor that was not found by a jury or admitted by petitioner, the circuit court violated his Sixth Amendment right to a trial by jury, as articulated by the Supreme Court in Blakely v. Washington, 124 S. Ct. 2531 (2004). However, even assuming the holding in Blakely is retroactive, it applies only to determinate sentencing schemes in which the state legislature has enacted into law the factors that a trial court must find in determining the appropriate sentence. Blakely, 124 S. Ct. at 2540 (indeterminate sentencing regimes permissible because "the facts do not pertain to whether the defendant

has a legal *right* to a lesser sentence--and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.") (emphasis in original). Although Wisconsin first enacted such a scheme in 1997, petitioner was sentenced in 1994 under the pre-existing indeterminate sentencing scheme. Under that scheme, although the trial court was required to *consider* the guidelines developed by the state sentencing commission, it was not required to adhere to those guidelines in imposing sentence so long as the sentence imposed did not exceed the statutory maximum prescribed by the legislature. See Halbert, 147 Wis. 2d at 131, 432 N.W. 2d at 636 (court of appeals lacked jurisdiction to review claim based upon trial court's failure to render a sentence within guidelines because guidelines lacked force of law). Because the rule announced in Blakely does not apply to indeterminate sentencing schemes like the one under which petitioner was sentenced, the trial court's departure from the recommended guideline range did not violate petitioner's Sixth Amendment right.

As part of this third claim, petitioner also contends that the trial court's deviation from the prescribed guideline range violated his constitutional right not to be placed in jeopardy twice for the same offense. Like his Blakely claim, this claim has no merit. Brown v. Ohio, 432 U.S. 161 (1977), the case cited by petitioner, stands only for the proposition that a conviction for two offenses containing the same elements is really a single conviction. The fact that the trial court might have relied upon uncharged conduct, namely, petitioner's major role in the offense, as a reason for imposing a higher sentence did not place petitioner

in jeopardy twice for the same offense. Accordingly, petitioner's third claim will be dismissed on the merits notwithstanding his failure to exhaust his state court remedies.

II. CLAIM ONE: DUE PROCESS VIOLATION

Petitioner's first claim must be dismissed because it fails to state a cognizable constitutional claim. His claim that the trial court violated his right to due process when it refused to reduce his sentence appears to be a claim that the court relied upon inaccurate information at sentencing because its sentence was based upon the court's belief that petitioner could be eligible for parole in nine years if he exercised good behavior in prison. However, the Supreme Court has held that a judge's incorrect assumption about the future course of parole proceedings is not an error of constitutional magnitude that is cognizable in an action for habeas corpus. United States v. Addonizio, 442 U.S. 178, 186-87 (1979). As the Court explained:

> The claimed error here--that the judge was incorrect in his assumptions about the future course of parole proceedings--does not meet any of the established standards of collateral attack. There is no claim of a constitutional violation; the sentence imposed was within the statutory limits; and the proceeding was not infected with any error of fact or law of the "fundamental" character that renders the entire proceeding irregular and invalid.

Id. at 186. Petitioner's claim is virtually indistinguishable from Addonizio's, who challenged the lawfulness of his sentence on the basis of a postsentencing change in parole policy by the United States Parole Commission that had made it more difficult for him to obtain release on parole than under the parole system in effect at the time of his sentencing. Id. at 182.

Thus, as in Addonizio, even if petitioner is correct that the trial court's statements at the sentencing indicated that it expected petitioner to be released on parole in nine years pursuant to the department's policy at the time, subsequent actions by the department that arguably frustrated the judge's intent "do not retroactively affect the validity of the final judgment itself." Id. at 190.

III. CLAIM TWO: EX POST FACTO VIOLATION

Finally, petitioner's second claim, that the alleged change in the department's parole policy violates the ex post facto clause, will also be dismissed. Although petitioner arguably asserts a viable constitutional claim, the claim appears to be one that must be brought under 42 U.S.C. § 1983, not 28 U.S.C. § 2254. 28 U.S.C. § 2254 provides a remedy for prisoners who are contesting the "fact or duration" of their custody. Preiser v. Rodriguez, 411 U.S. 475 (1973). Petitioner alleges that the policy will have the effect of keeping him in prison beyond his mandatory release date, but he does not allege that he has actually been denied mandatory release as a result of the policy. Wisconsin's mandatory release statute, Wis. Stat. § 302.11, entitles inmates to parole after serving two-thirds of their sentence. By my calculation, petitioner will not be eligible for mandatory release until approximately 2018. Thus, he cannot be contending that the duration of his custody has been extended as a result of the denial of mandatory release.

Petitioner also suggests that the alleged change in parole policy has affected his suitability for release on discretionary parole. Under Wisconsin's discretionary parole statute, Wis. Stat. § 304.06(1)(b), the parole commission "may parole an inmate" who has served at least 25 percent of his sentence. However, nowhere in his petition does petitioner allege that the Department of Corrections has relied upon the alleged change in parole policy as a basis to deny him release on discretionary parole. In fact, petitioner does not even allege that he has been reviewed and denied parole by the parole commission.

Thus, it appears that petitioner is challenging the procedures used for making parole decisions as opposed to contending that the parole commission has extended the duration of his custody by unlawfully denying him release on parole. The Court of Appeals for the Seventh Circuit has held that such claims must be brought under § 1983. Moran v. Sondalle, 218 F.3d 647, 650 (7th Cir. 2000); Clark v. Thompson, 960 F.2d 663, 664-65 (7th Cir. 1992); Walker v. Prisoner Review Bd., 694 F.2d 499, 501 (7th Cir. 1982). Accordingly, this claim will be denied without prejudice as improperly filed.

Petitioner should keep in mind that if he refiles his claim under § 1983 he will be subject to the requirements of the Prison Litigation Reform Act, including payment of the $150 filing fee. In addition, dismissal of a § 1983 suit will often count as a "strike" under 28 U.S.C. § 1915(g). Finally, petitioner should also consider that his ex post facto claim is of dubious merit. Even assuming petitioner can show first, that his claim is not moot because the new administration is adhering to the command of the former governor's letter,

and second, that the letter constitutes a law or regulation with the force of law sufficient to trigger ex post facto protections, see Prater v. U.S. Parole Commission, 802 F.2d 948, 953-54 (7th Cir. 1986) ("The rule against ex post facto laws applies to statutory changes and also . . . to changes in administrative regulations that represent an exercise of delegated legislative authority, as opposed to an interpretation of legislation by an agency authorized to execute, not make, laws"), he is unlikely to be able to show that the policy creates a "significant risk" of increasing his punishment so as to establish an ex post facto violation. See Garner v. Jones, 529 U.S. 244 (2000); California Department of Corrections v. Morales, 514 U.S. 499 (1995).

ORDER

IT IS ORDERED that the petition of Lamont Williams for a writ of habeas corpus is DISMISSED pursuant to Rule 4 of the Rules Governing Section 2254 Cases. Claims 1 and 3 are DISMISSED WITH PREJUDICE on the merits. Claim 2 is DISMISSED WITHOUT PREJUDICE as improperly filed under 28 U.S.C. § 2254.

Entered this 26th day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge