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

OBEA S. HAYES,

Petitioner, ORDER

v. 05-C-329-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 Obea Hayes, an inmate at the Stanley Correctional Institution, challenges his November 13, 2000, conviction in the Rock County Circuit Court for second degree sexual assault, substantial battery, criminal trespass and bail jumping. He 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.

Petitioner contends that he is in custody in violation of the laws and Constitution of the United States because: 1) the jury that heard his case was not impartial because one of the jurors knew the victim; 2) the prosecutor committed misconduct and deprived petitioner of a fair trial when he informed the jury that the victim had stayed at a battered women's shelter; and 3) the evidence adduced at trial was insufficient to support the conviction for second degree sexual assault. Petitioner presented the last of these three claims to the

Wisconsin Court of Appeals, which rejected his arguments and affirmed his conviction. The Wisconsin Supreme Court granted review, and on June 16, 2004, issued a published decision in which it agreed with the court of appeals and affirmed the conviction. State v. Hayes, 2004 WI 80, 273 Wis. 2d 1, 681 N.W. 2d 203. Petitioner did not file a petition for a writ of certiorari in the United States Supreme Court. He filed the instant federal habeas application on June 6, 2005. (However, petitioner did not submit his filing fee until June 10, 2005.)

Petitioner's conviction became final on September 14, 2004, when the 90-day period in which he could have filed a petition for a writ of certioriari in the United States Supreme Court expired. Anderson v. Litscher, 281 F.3d 672, 674-675 (7th Cir. 2002) (when petitioner does not file petition for writ of certiorari with United States Supreme Court, his conviction becomes final when 90-day period in which prisoner could have filed such a petition expires). Because petitioner filed his federal habeas petition within one year of that date, his petition is timely under 28 U.S.C. § 2244(d)(1)(A).

However, before seeking a writ of habeas corpus in federal court, a petitioner first must exhaust the remedies available to him in state court. 28 U.S.C. § 2254(b)(1)(A). "Exhaustion serves an interest in federal-state comity by giving state courts the first opportunity to address and correct potential violations of a prisoner's federal rights." Perruquet v. Briley, 390 F.3d 505, 513 (7th Cir. 2004) (citing Picard v. Connor, 404 U.S. 270, 275 (1971)). To exhaust state court remedies, a prisoner "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). Moreover, for that opportunity to be meaningful, the petitioner must "fairly present" to each appropriate state court his constitutional claims before seeking relief in federal court. Baldwin v. Reese, 541 U.S. 27, 30 (2004).

Although petitioner completed a "complete round" of the state's appellate review process by filing a petition for review in the Wisconsin Supreme Court, Moore v. Casperson, 345 F.3d 474, 485-486 (7th Cir. 2003), he failed to satisfy the "fair presentment" requirement with respect to his first two claims because he did not raise either of those challenges to his conviction in his petition for review. This means that petitioner has procedurally defaulted his first two claims unless state corrective processes exist whereby he could still present those claims to the state courts. Perruquet v. Briley, 390 F.3d 513, 514 (7th Cir. 2004). This court may not consider a procedurally defaulted claim unless petitioner demonstrates cause for the default and prejudice resulting therefrom, Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977), or, alternatively, convinces the court that a miscarriage of justice would result if his claim were not entertained on the merits. Murray v. Carrier, 477 U.S. 478, 495-96 (1986).

Petitioner asserts in his petition that he did not present his first two claims to the state courts because his "attorney went another way in issues." Pet., dkt. #1, at ¶ 23. Construing this assertion broadly, it appears that petitioner might be alleging that his

appellate lawyer provided him with ineffective assistance of counsel. However, because a claim of ineffective assistance of counsel is itself a constitutional claim, petitioner must first present that claim to the state courts or it too will be procedurally defaulted. Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000).

The question is thus whether petitioner still has avenues of relief that he can pursue in the state courts. 28 U.S.C. § 2254(c) ("An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented"). A Wisconsin prisoner who contends that his appellate lawyer was ineffective for failing to raise meritorious issues on appeal may present that claim to the state court of appeals by filing a petition for a writ of habeas corpus. State v. Knight, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992). If the basis for the ineffective assistance of appellate counsel claim is that counsel failed to take actions that should have occurred before the trial court -- the filing of a postconviction motion, for example -- then the prisoner must present that claim to the trial court by filing a postconviction motion under Wis. Stat. § 974.06. State ex rel. Rothering v. McCaughtry, 205 Wis. 2d 675, 682, 556 N.W. 2d 136, 139 (Ct. App. 1996). Thus, there still are avenues of relief available to petitioner through which he could present a potential claim that his postconviction/appellate lawyer was ineffective, and in turn, his first two challenges to his conviction. Accordingly, petitioner's first two claims are unexhausted.

Rose v. Lundy, 455 U.S. 509 (1982), instructs federal district courts to dismiss a petition like this one that presents a mix of exhausted and unexhausted claims. Id. at 510. Alternatively, the petitioner may choose to amend his petition by deleting the unexhausted claims and then proceed solely on the exhausted claims. Id., at 520. Before dismissing the petition, I will give petitioner the opportunity to decide whether he prefers to abandon his unexhausted claims of partial jury, prosecutorial misconduct and ineffective assistance of appellate counsel and proceed solely on the insufficiency-of-evidence claim that has been exhausted.

In deciding which course of action to pursue, petitioner should consider the following: If he decides to give up his unexhausted claims and present only the one that he has already exhausted, it is unlikely that this court would allow him to raise the unexhausted claims in a subsequent federal habeas petition. Rose, 455 U.S. at 521 ("[A] prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions") (citing 28 U.S.C. § 2254 Rule 9(b), authorizing dismissal for abuse of the writ). On the other hand, if petitioner chooses to have this court dismiss his petition so that he may pursue his unexhausted claims in state court, he should keep in mind that he will not get a new one-year clock for filing a federal habeas petition. As of now, only 62 days of the one-year limitations period remain, most of the time having elapsed between the time the Wisconsin Supreme Court decided his case on June 16, 2004 and the time he filed his habeas petition in this court on June 6, 2005. (The

clock has continued to run while the petition has been pending in this court. Duncan v. Walker, 533 U.S. 167, 181-82 (2001) (filing of federal habeas petition does not toll statute of limitations).) Although a properly filed application for postconviction relief in state court would toll the statute of limitations for the time period during which the application is pending, 28 U.S.C. § 2244(d)(2), petitioner should consider whether 62 days affords him enough time to take the steps necessary to exhaust his claims without jeopardizing the timeliness of a future federal habeas petition. See Pliler v. Ford, 542 U.S. 225 (2004) (combined effect of Rose and AEDPA's limitations period is that if petitioner comes to federal court with mixed petition toward end of limitations period, dismissal of mixed petition could result in loss of all claims because limitations period could expire during time he returns to state court to exhaust unexhausted claims).

ORDER

IT IS ORDERED that:

Petitioner has until June 24, 2005 within which to advise the court whether he wishes to pursue his unexhausted claims in state court or whether he prefers to amend his petition to delete the unexhausted claims and proceed solely on the exhausted claim. If he chooses the former, or if he does not report his choice by the deadline, then his petition will be dismissed without prejudice for his failure to exhaust his state court remedies, pursuant to

Rose v. Lundy. If he chooses the latter, then the state will be ordered to respond to the exhausted claim identified in this order.

Entered this 13th day of June, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge