

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

PAUL BATHE,

Petitioner,

ORDER

v.

05-C-541-C

DAN BENIK, WARDEN, STANLEY
CORRECTIONAL INSTITUTION,

Respondent.

Paul Bathe, an inmate at the Stanley Correctional Institution, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the five dollar filing fee. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

According to the petition, petitioner was convicted on August 25, 1994 in the Circuit Court for Kenosha County of attempted intentional first degree homicide, conspiracy to commit robbery while armed and burglary while armed. The court imposed maximum sentences of 25 years, 20 years and 20 years, respectively, with each sentence to run consecutively. Petitioner took an unsuccessful direct appeal from his conviction. According to electronic records, his state court appeal became final on February 18, 1997, when the Wisconsin Supreme Court denied his petition for review.

On May 7, 2004, petitioner filed a motion in the trial court for sentence modification pursuant to Wis. Stat. § 973.19. The trial court rejected the motion, finding that it asserted the same claims that petitioner had presented in prior motions to the court. The court of appeals affirmed the trial court, noting that petitioner had raised many of the same challenges to his sentence on direct appeal that he raised in his motion for sentence modification. The Wisconsin Supreme Court denied petitioner's petition for review on July 28, 2005.

In his federal habeas petition, petitioner makes the following two claims: 1) his sentence violates the Eighth Amendment's prohibition on cruel and unusual punishment because the sentence is disproportionate to his crimes and the trial court failed to explain why it was imposing consecutive sentences; and 2) the trial court failed to consider all relevant information when considering petitioner's motion to modify his sentence.

To be entitled to federal habeas relief, petitioner must show that he is in custody in violation of the laws or Constitution of the United States. 28 U.S.C. § 2254(a). Petitioner's first claim adequately alleges a constitutional violation. See Henry v. Page, 223 F.3d 477, 482 (7th Cir. 2000) (Eighth Amendment requires some degree of proportionality in sentencing) (citing Solem v. Helm, 463 U.S. 277, 290-92 (1983)). However, his second claim does not. Whether to modify petitioner's sentence was a matter wholly within the trial court's discretion. Its failure to modify the sentence it originally imposed does not implicate any of petitioner's constitutional rights. Accordingly, that claim will be dismissed.

Of course, if petitioner prevails on his first claim, he will be entitled to sentence modification in any event. However, the likelihood that this court will reach the merits of petitioner's first claim is extremely slim. First, it appears that petitioner missed the one-year deadline for filing a federal habeas petition, as prescribed by 28 U.S.C. § 2244(d). Second, the state appellate court's finding that petitioner had waived his postconviction sentencing challenge by failing to raise it on direct appeal or in earlier postconviction motions constitutes a procedural default that bars this court from hearing the merits of petitioner's claim unless petitioner can satisfy one of two narrow exceptions. I anticipate that the state will raise one or both of these defenses to petitioner's claim in response to the petition.

ORDER

IT IS ORDERED that:

1. Petitioner's claim that the trial court failed to consider all relevant information in denying his motion to modify his sentence (Claim Two) is **DISMISSED WITH PREJUDICE**.
2. The state is ordered to respond to Claim One. The clerk shall serve copies of the petition and this order by mail to Warden Benik and to the Wisconsin Attorney General.
3. The state shall file a response to petitioner's claim not later than 30 days from the date of service of the petition, showing cause, if any, why this writ should not issue.

If the state contends that petitioner's claim is subject to dismissal with prejudice on

grounds such as procedural default or the statute of limitations, it should file a motion to dismiss and all supporting documents within its 30-day deadline. The state must address the issue of cause and prejudice in its supporting brief. Petitioner shall have 20 days following service of any such motion within which to file and serve his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

If at this time the state wishes to argue petitioner's claim on its merits, either directly or as a fallback position in conjunction with any motion to dismiss, then within its 30-day deadline the state must file and serve not only its substantive legal response to petitioner's claim, but also all documents, records and transcripts that commemorate the findings of fact or legal conclusions reached by the state courts at any level relevant to petitioner's claim. The state also must file and serve any additional portions of the record that are material to deciding whether the legal conclusions reached by state courts on these claims was unreasonable in light of the facts presented. See 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within 30 days, the state must advise the court when such papers will be filed. Petitioner shall have 20 days from the service of the state's response within which to file a substantive reply.

If the state chooses to file only a motion to dismiss within its 30-day deadline, it does not waive its right to file a substantive response later, if its motion is denied in whole or in

part. In that situation, the court would set up a new calendar for submissions from both sides.

5. Once the state has filed its answer or other response, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not docket or consider any submission that has not been served upon the state. Petitioner should include on each of his submissions a notation indicating that he served a copy of that document upon the state.

6. The federal mailbox rule applies to all submissions in this case.

Entered this 29th day of September, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge