

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

KENNETH SARAUER,

Petitioner,

ORDER

v.

05-C-57-C

MATTHEW FRANK, Secretary, Wisconsin
Department of Corrections,

Respondent.

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner Kenneth Sarauer challenges his December 17, 2001 conviction in the Circuit Court of Vernon County for one count of substantial battery. On February 22, 2005, the magistrate judge entered an order to show cause in which he ordered the state to respond to 10 of the 11 claims raised in Sarauer's habeas petition. The claim to which the state was not ordered to respond was petitioner's claim that the trial court had denied petitioner's right to self-representation by requiring him to appear at sentencing with a lawyer. The magistrate judge found that that claim was moot because the state court of appeals had already granted petitioner relief on the claim by ordering that the case be remanded for re-sentencing at which petitioner was entitled to represent himself. State v. Sarauer, 2004 WI App 167, ¶ 11 (unpublished decision).

Presently before the court is a “report” filed by Sarauer on February 22, 2005 that I have construed as a motion for an order enjoining the Vernon County circuit court from re-sentencing him. In his motion, petitioner alleges that the Vernon County circuit court has scheduled his case for re-sentencing, pursuant to the court of appeals’ order, for February 28, 2005. Petitioner contends that it is improper for the circuit court to re-sentence him until petitioner has exhausted his remedies with respect to the pending habeas petition. Petitioner asserts that if this court decides that his conviction is unlawful, then it follows that any sentence imposed pursuant to that conviction will be unlawful as well.

Petitioner’s motion must be denied. First, petitioner incorrectly refers to this habeas action as part of the “appeals process.” A petition for habeas relief under 28 U.S.C. § 2254 is not part of the appeals process, but is what is known as a “collateral attack” on the state court judgment. Although it is related to and flows from the state court proceedings, it is an independent action separate therefrom. A federal court reviewing a habeas petition has the authority to order the respondent to release a petitioner if it concludes that the petitioner is in custody in violation of his constitutional rights, but it has no supervisory power over the state courts and is not in any way part of the state court “appeals process.”

Second, the trial court’s re-sentencing of petitioner will have no bearing on the claims in the petition. The only claim that related to sentencing was petitioner’s claim that he should not have been forced to appear with counsel. The court of appeals granted relief to petitioner on that claim by ordering the court to re-sentence petitioner at a hearing at which

he may represent himself, and the trial court is now simply carrying out its marching orders. Because petitioner has already received relief from the state court on his denial of self-representation claim, there is no further relief that he can obtain from this court with respect to that claim. It is true that in the event this court declares petitioner's underlying conviction to be unconstitutional, then any sentence imposed pursuant to that conviction will be invalid as well. However, that possibility is not a reason to prevent the trial court from re-sentencing petitioner now.

Third, in the event the trial court commits some *new* constitutional error at the February 28, 2005 re-sentencing, then that would give rise to an independent claim separate from those raised in the petition, which relate only to the constitutionality of petitioner's underlying conviction. Petitioner would be obligated to exhaust his state court remedies with respect to any new claim arising from re-sentencing before he could present it to this court in a habeas petition. There is no rule that would prevent petitioner from mounting a challenge to his re-sentencing in the state courts while at the same time waging a collateral attack on his underlying conviction in the federal courts.

In sum, there are no procedural or practical reasons to grant petitioner's request to enjoin the state trial court from re-sentencing him. Therefore, petitioner's motion must be denied.

ORDER

IT IS ORDERED that the motion of Kenneth Sarauer for an order enjoining the Circuit Court for Vernon County from re-sentencing him is DENIED.

Entered this 23rd day of February, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge