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

ANDREW MATTHEW OBRIECHT,

Petitioner, OPINION AND ORDER

v. 06-C-0253-C

BYRAN BARTOW, Director,
Wisconsin Resource Center,

Respondent.

This is a habeas corpus petition brought under 28 U.S.C. § 2254. Petitioner Andrew Obriecht contends that he is in custody in violation of the laws or Constitution of the United States because 1) his trial lawyer rendered ineffective assistance of counsel during initial state court proceedings, which resulted in petitioner entering an involuntary plea to a charge of battery and being placed on probation; and 2) petitioner's lawyer was ineffective for failing during post-revocation proceedings to present the trial court with mitigation evidence suggesting that petitioner might have been acting in self defense when he committed the battery. In an opinion and order entered September 12, 2006, I granted respondent's motion to dismiss with respect petitioner's first claim, stayed ruling on the second claim and invited respondent to amend his motion to dismiss to raise a defense to the second claim based on the fair presentment corollary to the exhaustion doctrine. Respondent has accepted that invitation and has filed an amended motion to dismiss.

Respondent contends that petitioner's second claim is procedurally defaulted because petitioner failed to fairly present that claim to the state supreme court in his petition for review and because no avenues now exist in state court by which petitioner could present the claim.

Because I agree that petitioner has procedurally defaulted his second claim by failing to fairly present it to the state supreme court, I will grant the motion.

FACTS

Most of the relevant facts are set forth in the September 12, 2006 order and are incorporated herein by reference. To recap, after petitioner entered a plea of no contest to one count of misdemeanor battery, the Circuit Court for Dane County adjudged petitioner guilty, withheld sentence, and placed him on probation for a term of three years. Petitioner's probation was later revoked, and he returned to the circuit court for sentencing. The court sentenced petitioner to the maximum available term of one year in prison, to be served consecutively to a sentence petitioner was already serving.

After numerous delays, petitioner eventually filed a *pro se* postconviction motion in the trial court, which was denied. (A copy of that motion is not in the record.) Petitioner then appealed to the state appellate court. In his brief, petitioner asserted that he should be allowed to withdraw his plea to the battery charge because the lawyer who represented him during those proceedings was ineffective and because the plea proceedings were procedurally

flawed. In addition, petitioner argued that he was entitled to a new sentencing hearing because relevant facts concerning the charge were not revealed at the time of sentencing by defense counsel. Those "facts," petitioner alleged, were set forth in an investigation that was performed at counsel's request by Gregg Investigations and showed that petitioner acted in self defense. Appellant's Br. and App., dkt. #6, at 40-41. Petitioner attached the reports from the investigation to his appellate brief. Id. at 105-112.

In an order issued October 27, 2005, the court of appeals affirmed the circuit court's order denying the motion for postconviction relief, as well as the judgment of conviction and sentence. The court determined that the only issues properly before it were those related to the sentence imposed following probation revocation and that petitioner had "present[ed] no argument that the circuit court erred in imposing the sentence that it did after revocation." State v. Obriecht, 2005 WI App 254, ¶ 5, 288 Wis. 2d 461, 706 N.W. 2d 702 (unpublished opinion), attached to Mot. to Dismiss, dkt. # 10, exh. B.

Petitioner asked the Wisconsin Supreme Court to review the court of appeals' decision. In his petition for review, Obriecht argued that the appellate court's determination that he had not raised any challenges to his post-revocation sentence was "extraordinarily erroneous," pointing out that he had argued in the third section of his appellate brief that his sentence was illegal, in part, because counsel had failed to inform the circuit court of information that was highly relevant to sentencing. Pet. for Rev., attached to dkt. #16, exh. D, at 2. The state supreme court denied the petition for review.

OPINION

As explained in the September 12 order, the "fair presentment" corollary to the federal exhaustion doctrine requires a petitioner to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). For the state courts to have a "full and fair" opportunity to resolve a federal claim, the petitioner must "fairly present" it at all levels of state court review, which means that he must "place[] both the operative facts and the controlling legal principles before the state courts." Chambers v. McCaughtry, 264 F.3d 732, 737 (7th Cir. 2001). To determine whether a petitioner has accomplished this, courts in the Seventh Circuit consider whether petitioner's argument to the state court: 1) relied on pertinent federal cases employing constitutional analysis; 2) relied on state cases applying constitutional analysis to a similar factual situation; 3) asserted the claim in terms so particular as to call to mind a specific constitutional right; or 4) alleged a pattern of facts that is well within the mainstream of constitutional litigation. Verdin v. O'Leary, 972 F.2d 1467, 1473-74 (7th Cir. 1992). This is not a rigid formulation but an approach designed to determine whether the petitioner identified the substance of the federal claim clearly enough for the state court to have adjudicated it. Id. at 1474.

Apparently conceding that petitioner fairly presented his claim related to his lawyer's conduct during the post-revocation proceedings to the state circuit court and court of appeals, respondent rests his fair presentment argument on petitioner's petition for review

in the state supreme court. Respondent argues that petitioner's assertion in his petition for review that his lawyer had "failed to inform the circuit court of information which was highly relevant to sentencing" without explaining what those facts were was too vague and indistinct to satisfy the fair presentment requirement. Although respondent recognizes that petitioner referred the state supreme court to his appellate brief, respondent seems to take the position that petitioner could not preserve the issue for federal collateral review merely by "referring back" to his appellate brief.

If this is in fact respondent's position, it is puzzling why he has not cited Lockheart v. Hulick, 443 F.3d 927, 929 (7th Cir. 2006), a case involving this very issue. In Lockheart, the court found that the petitioner did not fairly present his judicial bias argument to the Illinois supreme court merely by purporting to incorporate by reference other documents, including his appellate brief, in his petition for leave to appeal. Referring to the Supreme Court's decision in Baldwin v. Reese, 541 U.S. 27 (2004), the court explained:

> Baldwin held that, if the state's Supreme Court must read the decision of its appellant court in order to learn what the petitioner is arguing, then the issue has not been preserved for federal decision; a petition must *contain* each contention, and not just point to some other document where it might be located. Lockheart did just what Baldwin says is inadequate.

Id. (emphasis in original). The court pointed out that the outcome would be different if Illinois had a rule that allowed litigants to present arguments by incorporation, but no such rule existed. Id.

Lockheart dooms petitioner's remaining claim. Like Illinois, Wisconsin has no state rule allowing a litigant to present by incorporation arguments in support of a petition for review. To the contrary, Wis. Stat. § 809.62(2)(e) states: "All contentions in support of the petition must be set forth in the petition." Petitioner concedes that he failed in his petition for review to describe the facts that he says his lawyer should have presented at sentencing. Although it may be true, as petitioner argues, that the petition was nonetheless sufficient to call to mind the due process right to be sentenced on the basis of accurate information or the right to be represented by effective counsel at sentencing, without the "operative facts" the state supreme court judges could not have grasped "both [the claim's] substance and its foundation in federal law." Lockheart, 443 F.3d at 929.[1]

It appears that petitioner was focused on showing that the appellate court was wrong when it found that he had not raised on appeal any issues regarding the propriety of his post revocation sentence. To that end, it was appropriate for petitioner to take the approach he did and to point out where he had raised the issue in his appellate brief. However, to preserve the issue for *federal* review, petitioner had to show the Wisconsin Supreme Court not only that the state appellate court had misread his brief, but he also had to explain his contention with enough detail to allow the supreme court to understand the nature and basis

[1] Petitioner also argues that he fairly presented to the state supreme court his claim that the trial court violated petitioner's rights to due process when the court failed to state reasons for its sentence. However, that claim was dismissed with prejudice in a prior order of this court. Order, June 7, 2006, dkt. #7, at 6,7.

of the federal claim. The only way the state supreme court would have understood that petitioner was raising a federal constitutional claim in relation to his lawyer's conduct during post-revocation proceedings would have been to review petitioner's appellate brief. Under Baldwin and Lockheart, this means that petitioner has not satisfied the fair presentment requirement.

Petitioner has not disagreed with the state's assertion that no further state court procedure is available by which he may now present his claim to 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"). When a petitioner fails to fairly present a claim to the state courts and has no further state court avenues by which to raise that claim in the state courts, he has procedurally defaulted his claim, meaning that the federal court may not review the claim unless petitioner makes the requisite showing of cause and prejudice or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice. Chambers, 264 F.3d at 737. Petitioner has not attempted to make either showing. Accordingly, petitioner's second claim is procedurally defaulted.

ORDER

IT IS ORDERED that respondent's amended motion to dismiss the petition is GRANTED. Petitioner's claim of ineffective assistance of counsel during the post-revocation

proceedings is DISMISSED WITH PREJUDICE. All claims having been resolved in favor of respondent, the clerk of court is directed to enter judgment in favor of respondent and close this case.

Entered this 6th day of November, 2006.

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