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

ALVERNICE SELLERS,

Petitioner, OPINION AND ORDER

v. 06-C-0630-C

ROBERT HUMPHREYS, Warden,
Racine Correctional Institution,

Respondent.

Alvernice Sellers, an inmate at the Racine Correctional Institution, petitions the court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is in custody pursuant to a judgment of conviction entered November 27, 2001 by the Circuit Court for Dane County for possession of cocaine with intent to deliver, eluding a traffic officer and soliciting a child to commit a felony. Petitioner contends that he is in custody in violation of the Constitution or laws of the United States because his trial, appellate and post-remand lawyers were ineffective; the state withheld impeachment evidence from petitioner, in violation of its obligations under Brady v. Maryland, 373 U.S. 83, 87 (1963); and the trial court abused its discretion during trial and postconviction proceedings.

Before the court is respondent's motion to dismiss the petition on various grounds. Respondent contends that petitioner's Brady and ineffective assistance of trial counsel claims must be dismissed because petitioner procedurally defaulted those claims by failing to

properly exhaust his state court remedies. Respondent contends that petitioner's abuse-of-discretion claim must be dismissed because it fails to allege a deprivation of any constitutional right. Finally, respondent contends that petitioner's claims of ineffective assistance of appellate and post-remand counsel must be dismissed because petitioner has not exhausted his state court remedies with respect to those claims.

Respondent's motion will be granted. As will be explained below, I agree with respondent that petitioner procedurally defaulted his Brady and ineffective assistance of counsel claims by failing to file a petition for review in the Wisconsin Supreme Court after the court of appeals issued its decision on direct appeal in which it rejected those claims. Accordingly, those claims will be dismissed on grounds of procedural default. Petitioner's challenge to the trial court's exercise of its discretion will also be dismissed: at most, that claim states a violation of state law that is not cognizable in a federal petition for a writ of habeas corpus. Finally, because petitioner's claims of ineffective assistance of appellate and post-remand counsel are plainly without merit, those claims will be denied without reaching the question whether petitioner has exhausted his state court remedies.

One housekeeping matter requires mention before addressing the motion to dismiss. When petitioner filed his form petition, he filed one copy with documents attached to it and two copies that did not include the attachments. The petition that is docketed in the file and that was mailed to respondent does not include the attachments. However, the operative petition should be the petition containing the attachments. I will direct the clerk

to substitute the copy bearing the attachments for the petition currently docketed and to mail a copy to respondent with this order. For the purposes of this opinion and order, I have treated the petition bearing the attachments as if it is the operative petition.

From the parties' submissions, I find the following facts for the purpose of deciding the instant motion to dismiss.

FACTS

On or about June 24, 2000, the state filed a criminal complaint in the Circuit Court for Dane County charging petitioner with possession of cocaine with intent to deliver, eluding a traffic officer and soliciting a child to commit a felony. The charges were tried to a jury on November 17, 2001. One of the state's key witnesses was Jessica A., a juvenile. Petitioner was represented at trial by Frank Medina. The jury returned a verdict of guilty on all three counts.

Petitioner filed a notice of his intent to pursue postconviction relief. The state public defender's office appointed Toni Laitsch to represent petitioner during postconviction proceedings. On November 5, 2002, Laitsch filed a motion in the court of appeals requesting an extension of petitioner's deadline for filing a postconviction motion. Mot. for Ext., Nov. 5, 2002, attached to Pet., dkt. #1, at 11. In her motion, Laitsch averred that she and petitioner disagreed about the matters to be raised on appeal: Laitsch had identified a potentially meritorious issue for appeal concerning sentencing but petitioner also wanted to

raise issues of ineffective assistance of counsel that, in Laitsch's view, had no merit. Laitsch averred that she had told petitioner that she could not file a no merit brief because she had identified one meritorious issue for appeal and that the public defender's office would not appoint successor counsel. According to Laitsch, petitioner had advised her that he would pursue his appeal on his own or attempt to retain his own lawyer.

The court of appeals granted the motion for extension. On February 25, 2003, Laitsch filed a motion in the trial court for permission to withdraw as counsel for petitioner. On February 26, 2003, the trial court granted the motion, finding that petitioner had requested to proceed *pro se* and that he was competent to do so. Order for Withdrawal of Counsel, attached to Resp.'s Br. in Supp. of Mot. to Dismiss, dkt. #9, exh. K.

On May 2, 2003, petitioner filed a motion for a new trial, alleging that the prosecutor had failed to disclose evidence affecting the credibility of Jessica A. Petitioner argued that the state had failed to reveal that it had entered into a consent decree with Jessica A. for her role in the crimes for which petitioner was charged. In addition, petitioner alleged that Medina had been ineffective for 1) not seeking to introduce a copy of the consent decree into evidence; 2) stipulating at the preliminary hearing that the possession with intent to deliver charge was related transactionally to the charge for soliciting a minor; 3) failing to attempt to strike a certain juror; and 4) failing to object to jury instructions proposed by the prosecutor. Br. in Supp. of Mot. for New Trial, attached to Pet., dkt. #1, at 5. On June 10,

2003, after an evidentiary hearing at which Medina testified, the trial court denied petitioner's motion.

Petitioner filed a direct appeal to the state court of appeals. In addition to renewing the issues he raised in his postconviction motion, petitioner argued that his case should be remanded for resentencing pursuant to a recent decision by the Wisconsin Supreme Court, State v. Cole, 2003 WI 59, 262 Wis. 2d 167, 663 N.W. 2d 700, which held that the presumptive minimum term for unclassified felonies under the first phase of Wisconsin's truth-in-sentencing law included both initial confinement and extended supervision. Petitioner pointed out that under this formulation, the trial court's sentence exceeded the presumptive minimum term. In addition, petitioner raised several issues on appeal that he did not raise in the circuit court: 1) the state failed to disclose the criminal record of Jessica A.; 2) the state allowed Jessica A. to deceive the jury; 3) Medina was ineffective for failing to move for a continuance based on the state's failure to disclose all of the information requested in petitioner's discovery demand; 4) Medina was ineffective for failing to subpoena two character witnesses to testify about Jessica A.'s reputation for untruthfulness and about her drug addiction; and 5) Medina was ineffective during sentencing for asking the court to sentence petitioner to a maximum security prison.

Petitioner's first new claim was based upon a criminal complaint filed in the Circuit Court for Dane County dated March 3, 1999, charging petitioner and a female named Elizabeth Borchardt with various drug crimes. According to petitioner, Borchardt was

actually a false name given by Jessica A. Petitioner contended that the complaint was relevant impeachment evidence and that, in failing to disclose the evidence to the defense before trial, the state had failed to comply with the defense's discovery motion and had possibly violated Brady v. Maryland, 373 U.S. 83, 87 (1963). In his reply brief, petitioner argued that the document constituted newly discovered evidence, asserting that he had not obtained a copy of the complaint until after the postconviction motion hearing. Petitioner asked the court to remand his case to the trial court on the issue of newly discovered evidence. Def.-App. Reply Br., attached to Br. in Supp. of Writ of Habeas Corpus, dkt. #2.

On February 3, 2005, the court of appeals issued a decision on petitioner's direct appeal. The court did not consider the claims raised by petitioner that he had not raised in the trial court, including his claim that the state had failed to disclose the March 3, 1999 criminal complaint. As for the claims that petitioner had raised in the circuit court, the court of appeals determined that they were without merit. However, the court agreed with petitioner that his case had to be remanded for resentencing in light of Cole. State v. Sellers, 03-1951-CR (Ct. App. Feb. 3, 2005), attached to dkt. #9, at exh. B.

Petitioner did not petition the Wisconsin Supreme Court for review of the court of appeals' decision. Instead, on February 14, 2005, petitioner filed a *pro se* "Motion for Resentencing and Evidentiary Hearing on Newly Discovered Evidence" in the trial court. See dkt. #9, exh. C. Petitioner asked the court to rule on the issue of newly discovered evidence that petitioner had presented in his reply brief in the court of appeals as well as the

other issues the court of appeals had not ruled on. In the motion, petitioner asserted that he had not discovered the new evidence until after the initial postconviction motion hearing. On March 7, 2005, petitioner filed a motion to dismiss, alleging that his trial lawyer was ineffective, the prosecutor "possibly" suppressed evidence that was material and exculpatory and petitioner's former appellate lawyer "did not bring up any of the defendants possible rights violations." Id., exh. D.

The trial court held a resentencing hearing on April 12, 2005. Petitioner was represented at the hearing by Adam Korbitz, who was appointed by the state public defender's office. The court imposed new sentences in accordance with Cole. With respect to petitioner's *pro se* motions, the court determined that petitioner's claims were procedurally barred pursuant to State v. Escalona-Naranjo, 185 Wis. 2d 168, 517 N.W. 2d 157 (1994), because petitioner had not raised them in his first postconviction motion and he had not offered a "sufficient reason" for his failure to do so. Alternatively, the court found that the claims had no merit. See No-Merit Report, attached to dkt. #9, exh. G, at 4.

The state public defender's office appointed a new lawyer, Matthew DeVos, to represent petitioner on appeal from the resentencing. DeVos filed a no-merit report pursuant to Wis. Stat. Rule 809.32 and Anders v. California, 386 U.S. 738 (1967). Petitioner filed a response to the report in which he raised his various claims of ineffective assistance of trial counsel and prosecutorial misconduct and claimed that Laitsch had provided ineffective assistance during petitioner's first appeal.

In an opinion and order issued July 14, 2006, the appellate court agreed with DeVos that there were no valid objections that could be made to the new sentences imposed by the court. State v. Sellers, 2006AP176-CRNM (Ct. App. July 14, 2006), attached to dkt. #9, at exh. H. As for most of the other issues petitioner sought to raise, the court found that they had already been decided adversely to petitioner on direct appeal, either on the merits or by waiver. As a result, the law of the case doctrine precluded the court from reconsidering those claims. Id., at 2 (citing State v. Brady, 130 Wis. 2d 43, 447, 388 N.W. 2d 151 (1986), and State v. Witkowski, 163 Wis. 2d 985, 990, 473 N.W. 2d 512 (Ct. App. 1991)). With respect to petitioner's claim of ineffective assistance of appellate counsel, the court noted that no such claim could be brought because petitioner had discharged Laitsch at the postconviction stage and had represented himself on appeal. Id. Accordingly, the court found that the only issue properly before it was the sentencing issue. Id.

Petitioner filed a petition for discretionary review in the Wisconsin Supreme Court. The court denied the petition on October 10, 2006.

On November 2, 2006, petitioner filed the instant habeas petition. On November 6, 2006, the magistrate judge entered an order directing respondent to respond to the following claims:

> 1) the prosecutor committed misconduct by failing to disclose to the defense the criminal record of the state's primary witness, Jessica A., and by allowing Jessica A. to "deceive the jury;"
>
> 2) petitioner's trial lawyer was ineffective for: a) failing to move for a continuance or dismissal of the charges as a result of the state's failure to

provide the above discovery; b) failing to subpoena two witnesses who could have testified as to Jessica A.'s character for untruthfulness; and c) requesting at sentencing that petitioner be sent to a maximum security prison;

3) the trial court abused its discretion by failing to order the state to provide the requested discovery and by declining to rule on issues raised by petitioner in a post-conviction motion;

4) the lawyers who were appointed to represent petitioner on direct appeal and at resentencing were ineffective for failing to raise issues petitioner wanted raised; and

5) petitioner's trial lawyer was ineffective for: 1) not seeking to introduce a copy of the consent decree into evidence; 2) stipulating at the preliminary hearing that the possession with intent to deliver charge was related transactionally to the charge for soliciting a minor; 3) failing to attempt to strike a certain juror; 4) failing to object to jury instructions proposed by the prosecutor; 5) failing to impeach Jessica A. about how her testimony differed from the testimony of Officer Charles Weiss; and 6) stipulating that petitioner had a prior conviction and for failing to object to use of multiple penalty enhancers on count one.

OPINION

I. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AND PROSECUTORIAL MISCONDUCT/*BRADY* VIOLATION

Respondent contends that this court may not review any of petitioner's claims of ineffective assistance of trial counsel or prosecutorial misconduct because petitioner procedurally defaulted those claims. Petitioner's claims of ineffective assistance of counsel and prosecutorial misconduct can be broken down into two groups: 1) the claims that petitioner raised in his initial postconviction motion and that were decided on the merits by the Wisconsin Court of Appeals on February 3, 2005 (claim five of the habeas petition); and

2) the claims that the court of appeals declined to adjudicate on the ground that petitioner had not presented them in his initial postconviction motion, including petitioner's "newly discovered evidence" claim (claims one and two).

A habeas petitioner may procedurally default, or forfeit, his opportunity to have his federal claims decided by a federal court in two ways. First, a petitioner commits a procedural default if he fails to fairly present his federal claim to the state courts and his opportunity for doing so has passed. Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004); 28 U.S.C. § 2254(b)(1)(A). Second, a petitioner may procedurally default a federal claim if he presented his claim to the state courts but the state courts dismissed the claim on state law procedural grounds. Id.

In arguing that petitioner's claims of ineffective assistance of trial counsel and prosecutorial misconduct are barred by the procedural default doctrine, respondent relies on the first type of procedural default. Respondent contends that, by failing to petition the state supreme court for review of the court of appeals' February 3, 2005 decision, petitioner failed to fairly present his claims to the state courts. I agree. To properly exhaust his state court remedies and avoid procedurally defaulting his claims, a state 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). This means that state prisoners must seek discretionary review of their claims in the state's highest court "when that review is part of the ordinary appellate

review procedure in the State . . . ." Id. at 847. In Wisconsin, a prisoner seeking federal habeas review must first complete the state appellate review process by presenting his claims on direct appeal to the state court of appeals and then to the state supreme court in a petition for review. Moore v. Casperson, 345 F.3d 474, 486 (7th Cir. 2003).

Petitioner was partly successful on his initial appeal insofar as he obtained a remand for resentencing. However, in order to properly exhaust the claims on which he was *not* successful, he was required to file a petition for review asking the state supreme court to review the court of appeals' adverse rulings, including the appellate court's determination that petitioner had forfeited various claims of ineffective assistance of counsel and prosecutorial misconduct by failing to raise them in the trial court.

It is clear from petitioner's submissions that he is concerned mostly with obtaining federal review of the "new" claims he raised on appeal, set forth in claims one and two of the petition. In particular, petitioner is convinced that the March 3, 1999 criminal complaint concerning Jessica A.'s alleged use of the alias Elizabeth Borchardt, constitutes newly discovered evidence showing that the state committed a Brady violation. Petitioner insists that he gave the state courts a full opportunity to address this claim by providing a copy of the complaint to the state court of appeals on direct appeal, reasserting the claim in the trial court on remand and continuing to pursue the claim on appeal following resentencing. However, the exhaustion doctrine requires a petitioner to do more than merely present his claims to the state courts at some point during the state court proceedings. Rather, "[b]efore

asserting a habeas claim in federal court, a petitioner must not only fairly present his claims to the state courts, he must do so at the time, and in the way, required by the state." Badelle v. Correll, 452 F.3d 648, 664 (7th Cir. 2006) (citation omitted). Under state law, to properly challenge the court of appeals' determination on direct appeal that it would not consider petitioner's claim concerning Jessica A.'s criminal record, petitioner was obligated *at that time* to file a petition for review of that determination in the state supreme court. By failing to do so, he failed to complete one round of the state's established appellate review process. As a result, all of the claims that he raised on direct appeal are procedurally defaulted.

Petitioner's later attempt to pursue the Brady issue and others on appeal after resentencing was essentially a nullity. As the court of appeals pointed out in its decision after remand, issues concerning alleged discovery violations that petitioner had raised in his first appeal were beyond the scope of the remand and the second appeal, which were limited to whether petitioner's sentence was proper. Petitioner's failed attempt to expand the remand proceeding into other issues does not cure his earlier procedural default. Accord Lewis v. Sternes, 390 F.3d 1019, 1027 (7th Cir. 2004) (petitioner did not preserve claim for federal review where petitioner failed to raise federal claim on appeal from denial of original post-conviction motion; petitioner's attempt to raise claim on appeal from dismissal of successive post-conviction motion was beyond limited scope of that appeal).

A federal court may excuse a procedural default if the petitioner demonstrates either (1) cause for the default and actual prejudice from failing to raise the claim as required; or (2) that enforcing the default would lead to a "fundamental miscarriage of justice," Steward v. Gilmore, 80 F .3d 1205, 1211-12 (7th Cir. 1996). Petitioner has not attempted to make either showing. In any case, even if petitioner had not procedurally defaulted his claim, or if he could show that his default should be excused, I would deny the claim on the merits. A review of the complaint on which petitioner stakes his Brady claim shows that both Jessica A. (a/k/a/ Borchardt) *and petitioner* were charged in that complaint. According to the complaint, on February 26, 1999, Jessica A. told police that she lived with petitioner, who was her boyfriend, and that she helped him package quantities of crack cocaine that he purchased for resale. Criminal Complaint, attached to Pet.'s Response Br., dkt. #10. The complaint also stated that a search executed at the residence turned up large quantities of cocaine base and drug packaging materials.

State court records available electronically at http://wcca.wicourts.gov show that petitioner was arrested and had an initial appearance on that complaint on March 3, 1999. Petitioner would have been provided with a copy of the complaint at his initial appearance. He appeared in court several times after that date until the case was ultimately dismissed on November 18, 1999. (The charges against Jessica A./Borchardt were dismissed on March 25, 1999.) In other words, petitioner was aware long before his trial on the 2000 charges that Jessica A. had been charged with drug crimes in 1999 and had given a false name to police

in connection with that drug investigation. This knowledge defeats his Brady claim. "Brady requires disclosure only of exculpatory material known to the government but not to the defendant." United States v. Dawson, 425 F.3d 389, 393 (7th Cir. 2005) (citations omitted). Petitioner's ability to receive a fair trial was not violated by the state's failure to disclose things about Jessica A. that petitioner already knew.

In sum, by failing to file a petition for review of the Wisconsin Court of Appeals' February 3, 2005 decision, petitioner failed to properly exhaust his state court remedies with respect to the claims he raised in that appeal. Accordingly, all of those claims, set forth in claims one, two and five of the petition, are procedurally barred.

II. TRIAL COURT'S ALLEGED ABUSE OF DISCRETION

In claim three of the petition, petitioner contends that the trial court abused its discretion by failing to order the state to provide various discovery materials requested by the defense and for declining to address on remand petitioner's claims based upon the March 3, 1999 criminal complaint. Federal habeas relief is available only if a state prisoner can show that he is in custody in violation of a constitutional right. Martin v. Evans, 384 F.3d 848, 844 (7th Cir. 2004); 28 U.S.C. § 2254(a). The state court's alleged abuse of its discretion is a matter of state evidentiary law that does not provide a basis for federal habeas relief. Id. Petitioner has not attempted to argue how the state court's alleged abuse of its

discretion violated his constitutional rights. Accordingly, this claim will be dismissed for failure to state a constitutional violation.

III. INEFFECTIVE ASSISTANCE OF APPELLATE AND POST-REMAND COUNSEL

Finally, petitioner asserts that Laitsch, the first lawyer appointed to represent him on direct appeal, was ineffective for refusing to raise any issue besides ineffective assistance of counsel at sentencing, and that Korbitz, the lawyer who represented petitioner at the re-sentencing hearing, was ineffective for the same reason. Respondent contends that petitioner has not exhausted these claims. If respondent is correct and this court was to find that the claims are unexhausted, then the court would have to dismiss the entire petition without prejudice to petitioner's refiling it after he has exhausted his claims. Rose v. Lundy, 455 U.S. 509, 518-19 (1982). It is unclear whether respondent recognizes this: he has not cited Lundy, specified whether dismissal of the ineffective assistance of appellate/post-remand counsel claims should be with or without prejudice or indicated whether, if the claims are dismissed without prejudice, the petition ought to be stayed while petitioner exhausts his state court remedies. Rhines v. Weber, 544 U.S. 269, 275-277 (2005). The state's lawyers should have given more thought to these issues before filing the motion to dismiss.

Nevertheless, it is unnecessary to resolve the uncertainties swirling around the exhaustion question because petitioner's claims that Laitsch and Korbitz were ineffective are

plainly meritless. 28 U.S.C. § 2254(b)(2) ("An 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"). From petitioner's brief in support of his habeas petition, it appears that he is contending that Laitsch was ineffective for advising him that the only issue of merit was the sentencing issue and that she would not pursue any other issues on appeal. According to petitioner, Laitsch's advice was false and prejudicial because it led to his proceeding without counsel on appeal. This claim plainly has no merit. Although indigent defendants generally have a right to counsel on a first appeal as of right, "they do *not* have a right to counsel who pretend that frivolous arguments actually are meritorious." Speights v. Frank, 361 F.3d 962, 964 (7th Cir. 2004) (emphasis in original). See also Smith v. Robbins, 528 U.S. 259, 278 (2000) (right to counsel on appeal "does not include the right to counsel for bringing a frivolous appeal"). Furthermore, although an indigent Wisconsin defendant whose lawyer determines that no meritorious issues exist for appeal is entitled to have that lawyer file a "no merit" report under Wis. Stat. Rule 809.32, the filing of a no merit report is not required under either the federal constitution or Wisconsin law when, as in this case, the appellate lawyer identifies an arguably meritorious issue for appeal but disagrees with the defendant that other meritorious issues exist. State ex rel. Ford v. Holm, 2006 WI App 176, 722 N.W. 2d 609 (Ct. App. 2006), pet. for rev. denied, 2007 WI 16 (2006). Thus, Laitsch advised petitioner correctly that if he did not agree to challenge only the sentence and wanted to pursue other issues on appeal that

Laitsch had determined were frivolous, then petitioner would have to pursue the appeal on his own or retain a lawyer.

In the face of this advice, petitioner agreed that Laitsch could withdraw and that he would pursue his appeal on his own. Petitioner does not allege that his decision to discharge his appellate lawyer was coerced or was involuntary. Petitioner might not have liked the choices he was given, but that does not mean that the choices were unlawful. Speights, 361 F.3d at 964. As the state appellate court recognized, having agreed to discharge Laitsch and proceed on his own, petitioner lost his right to complain about Laitsch's assessment of the merits of his appeal. Faretta v. California, 422 U.S. 806, 834 n.46 (1975) (one who exercises right of self-representation cannot contend that he received ineffective assistance of counsel).

Petitioner's claim against Korbitz is equally without merit. Petitioner alleges that Korbitz was ineffective because he refused at the post-remand sentencing hearing to argue the additional issues of prosecutorial misconduct and ineffective assistance of trial counsel that petitioner wanted to raise. However, as discussed previously, those issues were beyond the scope of the remand hearing and were not properly before the court. Accordingly, Korbitz's refusal to raise those issues did not "f[a]ll below an objective standard of reasonableness," as it must have if petitioner is to prevail on a claim of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 688 (1984).

ORDER

IT IS ORDERED that:

1. The clerk of court shall substitute the copy of the form petition bearing attachments for the petition currently docketed and mail a copy of the petition bearing the attachments to respondent with a copy of this order.

2. The petition of Alvernice Sellers for a writ of habeas corpus is DISMISSED WITH PREJUDICE for the reasons stated in this opinion. The clerk of court is directed to enter judgment in favor of respondent and close this case.

Entered this 22nd day of February, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge