

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

JAVIER BAUTISTA-SANCHEZ,

Petitioner,

ORDER

v.

06-C-652-S

PAMELA WALLACE,

Respondent.

Petitioner filed a petition for a writ of habeas corpus alleging that his state conviction is unconstitutional. Respondent moved to dismiss the petition for failure to exhaust state court remedies. This motion has been fully briefed and is ready for decision.

FACTS

On February 25, 2004 petitioner was convicted in Milwaukee County Circuit Court of two counts of possession with intent to deliver THC. He appealed his judgment of conviction arguing that his due process rights were violated when an officer destroyed the notes he had made contemporaneously with the consent search of petitioner's vehicle and home. The Wisconsin Court of Appeals affirmed petitioner's judgment of conviction on November 1, 2005. The Wisconsin Supreme Court denied petitioner's petition for review on January 20, 2006.

Petitioner then filed a petition for a writ of habeas corpus in the Wisconsin Court of Appeals claiming that his appellate counsel was ineffective. The Wisconsin Court of Appeals denied petitioner's petition on August 15, 2006. The Wisconsin Supreme Court denied petitioner's petition for review on October 10, 2006.

Petitioner presently has pending in the Wisconsin Court of Appeals an appeal from a circuit court order. He claims that his trial attorney was ineffective in failing to seek specific performance of the plea agreement.

Petitioner filed this petition for a writ of habeas corpus on November 13, 2006.

MEMORANDUM

Petitioner claims in this petition that his appellate counsel was ineffective and that his trial counsel was ineffective for failing to seek specific performance of the plea agreement. Petitioner has not exhausted his state court remedies on his claim that his trial counsel was ineffective.

Federal district courts are required by 28 U.S.C. § 2254 for reasons of comity to defer to state courts in proceedings for writs of habeas corpus. Petitioner did not exhaust his state court remedies on his grounds that his trial counsel failed to seek specific performance of his plea agreement. His appeal on this issue is currently pending in the Wisconsin Court of Appeals.

Although petitioner has exhausted his state court remedies on one of his two grounds, this Court may not consider a petition that contains both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. 509, 513-19 (1982). Accordingly, petitioner's petition for a writ of habeas corpus will be dismissed without prejudice to petitioner's refiling his petition after he has exhausted his state court remedies within the meaning of 28 U.S.C. § 2254.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his petition must be dismissed without prejudice for his failure to exhaust his state court remedies. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that petitioner's petition for a writ of habeas corpus is DISMISSED without prejudice for his failure to exhaust his state court remedies.

Entered this 9th day of January, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge