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

ANDREW TORSTENSON,

Petitioner,

OPINION AND ORDER

v.

06-C-0720-C

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, DIVISION OF COMMUNITY CORRECTIONS,

Respondent.

On December 18, 2006, this court ordered petitioner Andrew Torstenson to answer several questions before the court would decide whether to order the state to respond to petitioner's December 11, 2006 petition for a writ of habeas corpus. Specifically, the court asked petitioner to indicate whether he had sought state court review of the department's decision to revoke his parole and if not, to explain why.

Petitioner has now responded to the December 18 order. As explained below, his responses make clear that he has procedurally defaulted his federal challenges to the department's parole revocation decision by failing to pursue his state court remedies. Accordingly, the petition will be dismissed.

ALLEGATIONS OF FACT

Petitioner was released on parole in Walworth County case number 92 CF 261 on September 17, 2002. On May 19, 2006, the Wisconsin Department of Corrections issued a decision revoking petitioner's parole. That decision was affirmed by the Division of Hearings and Appeals on June 9, 2006. Petitioner had 45 days from that decision, or until July 24, 2006, in which to seek state court review of that decision by petitioning the state circuit court for a writ of certiorari. Petitioner did not file a certiorari petition.

Petitioner did not file a certiorari petition because his lawyer refused to file one, telling petitioner that he would have to file it himself. Petitioner was in custody in the Walworth County Jail from June 9, 2006 until early August 2006, when he was transferred to the Dodge Correctional Institution.

OPINION

Before seeking a writ of habeas corpus in federal court, a petitioner must first exhaust any state court remedies that are available to him in state court. 28 U.S.C. § 2254(b)(1)(A). Petitioner has conceded that he did not file a state court petition for certiorari review of the administrative decision revoking his parole and that his 45-day deadline for doing so under Wis. Stat. § 893.735 has passed.

As the magistrate judge explained in his December 18, 2006 order, when a petitioner fails to fairly present to the state courts the claim on which he seeks relief in federal court

and the opportunity to present that claim in state court has passed, the petitioner has procedurally defaulted his claim. Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004). This means that in order for this court to consider petitioner's challenges to the revocation decision, petitioner must demonstrate cause for the default and prejudice resulting therefrom, or in the alternative, must convince the court that miscarriage of justice would result if his claims were not entertained on the merits. Id.

Petitioner has not satisfied either of these exceptions. Although petitioner asserts that his lawyer is to blame for his failure to file a certiorari petition on time, an attorney's error at a particular proceeding can constitute "cause" for a federal default only if the petitioner had a constitutional right to counsel at that proceeding. Coleman v. Thompson, 501 U.S. 722, 757 (1991) ("Because [the petitioner] had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of [his] claims in state court cannot constitute cause to excuse the default in federal habeas."). Petitioner had no right to counsel to file a timely petition for certiorari review of a parole revocation administrative decision. State ex rel. Griffin v. Smith, 2004 WI 36, 270 Wis. 2d 235, 677 N.W. 2d 259 (Wisconsin parolees have no right under either federal constitution or state law to have lawyer file timely petition for certiorari review of revocation decision). Accord Ross v. Moffitt, 417 U.S. 600, 610-611 (1974) (no right to counsel on discretionary appeals); Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (due process clause does not requires states to provide counsel to all probationers facing probation revocation). Accordingly, his lawyer's refusal to file a

certiorari petition cannot constitute cause. Notably, petitioner does not assert that his attorney said she would file a certiorari petition but failed to do so. See Griffin, 2004 WI at ¶ 38 (parolees entitled to equitable relief when they timely ask counsel to file for certiorari, counsel promises to do so, and as result of counsel's failure to timely file, parolees were denied certiorari review). Rather, he asserts that his lawyer refused to file a petition and told petitioner that he would have to file it himself.

According to petitioner, "[t]here was no way to obtain the petition in Walworth County Jail," which is where he was in custody during the 45-day time period in which he had to file his certiorari petition. However, petitioner does not explain why he could not have filed a certiorari petition from the Walworth County jail. Petitioner's conclusory statement that there was "no way" he could have done so fails to establish that his default was caused by some external impediment beyond his control. Murray v. Carrier, 477 U.S. 478, 488 (1986) (to establish "cause," petitioner must show that "some objective factor external to the defense" impeded petitioner's efforts to comply with state's procedural rule). I note that a petitioner's *pro se* status does not constitute adequate grounds for cause. Barksdale v. Lane, 957 F.2d 379, 385-86 (7th Cir. 1992).

Finally, petitioner has not shown that a fundamental miscarriage of justice will result if the court does not consider the merits of his petition. It is unclear from petitioner's submissions exactly why the department revoked his parole. As the magistrate judge noted, it appears that petitioner was revoked for having admitted during a sex offender treatment

program that he had been seeking out potential sexual assault victims in parks. Petitioner has not submitted any evidence to show that he did not actually make such an admission. He asserts only that, if he had actually been lurking around parks near children, a concerned citizen would have phoned the police. Petitioner's unfounded and speculative assertion is not evidence. Moreover, it does not convince me that he is actually innocent of the conduct that led to the department's decision to revoke his parole.

ORDER

IT IS ORDERED that the petition of Andrew Torstenson for a writ of habeas corpus under 28 U.S.C. § 2254 is DISMISSED WITH PREJUDICE on grounds of procedural default.

Entered this 3rd day of January, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge