

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

WAYNE D. MURPHY,

Petitioner,

MEMORANDUM and ORDER

v.

06-C-740-S

WARDEN, OSHKOSH CORRECTIONAL
INSTITUTION,

Respondent.

Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Respondent filed a response on January 10, 2007. Petitioner filed his reply on January 30, 2007.

FACTS

On June 14, 1993 after pleading no contest petitioner was convicted in Dane County Circuit Court of two counts of felony bail jumping as a habitual criminal. On June 16, 1993 the Court withheld the sentences and placed Murphy on probation for twelve years on each count to be served concurrently. At that time petitioner was serving a prison sentence for one count of first degree sexual assault and one count of aggravated battery.

On January 2001 petitioner was released on parole from his prison sentence. In 2004 the Wisconsin Department of Corrections (DOC) revoked petitioner's probation and parole.

After the probation revocation hearing the Dane County Circuit Court sentenced petitioner to concurrent three year terms on the two bail jumping charges to be served consecutively to the fourteen months he was ordered to serve on his parole revocation. Petitioner appealed this sentence.

His counsel filed a brief arguing that the appeal had no merit. Petitioner responded that his sentence was based upon incorrect information about the availability of treatment, that the sentences were an abuse of discretion, that he was denied equal protection and that his original twelve year probation sentence exceeded the maximum allowable term.

On March 10, 2006 the Wisconsin Court of Appeals summarily affirmed the trial court's judgment rejecting petitioner's claim. The Court specifically concluded that petitioner had not shown that he was prejudiced by the inaccurate information provided at sentencing because the circuit court did not base its sentence primarily on the availability of treatment. The Court also found that petitioner could not challenge the length of his probation terms on the appeal of his post revocation sentences but also found that the probation term did not exceed the maximum. The Court also advised petitioner that he must challenge his probation revocation in a circuit court petition for a writ of certiorari.

Petitioner petitioned the Wisconsin Supreme Court for review raising only the claim that his original probation term was

excessive. The Wisconsin Supreme Court denied review on June 14, 2006.

MEMORANDUM

A federal court may grant relief on a petition for a writ of habeas corpus of a person in state custody only if the state court's adjudication of the claim was on the merits and:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

28 U.S.C. §§ 2254(d) (1) and (2).

Petitioner claims that his post-revocation sentence was based on inaccurate information concerning the availability of treatment. The Wisconsin Court of Appeals found that petitioner was not prejudiced because the circuit court did not base his sentences primarily on the availability of treatment. This decision by the Court of Appeals was neither contrary to clearly established federal law nor based on an unreasonable determination of the facts. Petitioner's petition for a writ of habeas corpus on this ground must be denied.

Petitioner claims that his probation revocation and his post revocation sentence constituted abuse of discretion. These claims are not constitutional issues and are not properly raised in a

federal petition for a writ of habeas corpus. Perruquet v. Briley, 390 F.3d 505, 511 (7th Cir. 2004).

Petitioner may also be claiming that the revocation of his probation was improper. To challenge his probation revocation petitioner must first file a petition for a writ of certiorari in state circuit court. He failed to do so within the time limit. §893.735(2), Wis. Stats. Accordingly, he has procedurally defaulted on this claim. See Bintz v. Bertrand, 403 F.3d 859, 863 (7th Cir. 2005).

Petitioner's petition for a writ of habeas corpus will be dismissed with prejudice. Petitioner 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. 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 with prejudice.

Entered this 5th day of February, 2007.

BY THE COURT:
S/

JOHN C. SHABAZ
District Judge