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

THOMAS DRUSCH,

Petitioner, OPINION AND ORDER

v. 07-C-0041-C

BYRAN BARTOW, Director,
Wisconsin Resource Center, et. al,

Respondents.

Thomas Drusch, a person alleged to be a sexually violent person pursuant to Wisconsin's sexual predator statute, Wis. Stat. Chapter 980, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has been detained at the Wisconsin Resource Center in Winnebago, Wisconsin since March 2003, when the Circuit Court for La Crosse County issued a detention order based upon its finding that probable cause existed to believe that petitioner was a sexually violent person. Although the petition was tried to a jury in October 2004, the court declared a mistrial after the jury was unable to come to a decision. The second trial on the petition has not yet taken place.

Petitioner contends that because of a number of procedural missteps, the state court has no personal jurisdiction over him. As explained more fully below, petitioner has not yet exhausted all of the state court remedies that are available to him. Accordingly, the petition will be dismissed.

From the allegations of the petition and from the attached exhibits, I find that the petition fairly alleges the following.

ALLEGATIONS OF THE PETITION

On May 22, 1986, petitioner entered a guilty plea in the Circuit Court for La Crosse County for two counts of first degree sexual assault. The court imposed a sentence of six years' confinement on each count, to run concurrently to each other but consecutively to a prison sentence that petitioner was then serving on a prior sexual assault conviction. The court stayed the prison terms and placed petition on probation for a term of 10 years on each count. The court ordered the probation terms to run concurrently to each other but consecutively to the prison sentence that petitioner was already serving.

In March 2003, the state filed a civil commitment petition in the Circuit Court for La Crosse County pursuant to Wis. Stat. Chapter 980, Wisconsin's sexual predator statute, alleging that petitioner was a sexually violent person. The court determined that probable cause existed to believe petitioner was a sexually violent person as contemplated by the statute and ordered that petitioner be detained. A jury trial on the petition was held on October 12 and 13, 2004. After the jury was unable to come to a decision, the court declared a mistrial and later, scheduled a new trial. That second trial has never taken place, but it is scheduled for April 10, 2007. (A review of the docket sheet available electronically at http://wcca.wicourts.gov shows that the bulk of the delay has been the result of the court's

approval of various motions to withdraw filed by a succession of lawyers either retained by or appointed for petitioner.)

After the mistrial, the state never filed a new petition and the court never entered a new detention order or made a new probable cause finding. Petitioner has remained in custody since the initial order of detention entered in March 2003. On April 5, 2005, the Department of Corrections issued a certificate discharging petitioner from his 1986 conviction.

Petitioner filed a *pro se* petition for a writ of habeas corpus in the trial court. Petitioner alleged that the court lacked jurisdiction under Chapter 980 to detain him or to try him a second time because the state did not file a new petition or motion for retrial and did not come forth with any new evidence. The trial court denied the motion on December 11, 2006. According to the petition, petitioner has not appealed the trial court's order denying his petition to the state court of appeals because "No other State-level courts will provide the adequate remedy of law to obtain the relief sought."

OPINION

As an initial matter, I note that although petitioner has styled his petition as falling under 28 U.S.C. § 2254, it is better characterized as falling under 28 U.S.C. § 2241. Section 2254 affords a remedy to state prisoners who are in custody "pursuant to the judgment of a state court." It appears that petitioner is not confined pursuant to any state court

judgment but pursuant to the circuit court's March 2003 detention order. Petitioner's situation is analogous to that of a pretrial detainee in a criminal case. 28 U.S.C. § 2241 is the statute by which federal courts are authorized to provide a remedy to such detainees. Walker v. O'Brien, 216 F.3d 626, 633 (7th Cir. 2000) (noting that § 2241, not § 2254, applies to "forms of custody that are possible without a conviction," such as pre-conviction custody); Neville v. Cavanagh, 611 F.2d 673, 675 (7th Cir. 1979).

In the petition, petitioner presents the same claims he presented to the state circuit court in his habeas petition. The thrust of petitioner's claims is that the state's authority to detain him under the circuit court's March 2003 detention order expired with the mistrial. The petition presents a colorable claim that petitioner's continued detention is in violation of his rights guaranteed by the due process clause of the United States Constitution. Nevertheless, it must be dismissed. The judicial doctrine of exhaustion of state court remedies applies to habeas petitions covered by that statute, as a matter of comity, although the requirement to exhaust is not specified in §2241. Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 498-90 (1973); United States v. Castor, 937 F.2d 293, 296-97 (7th Cir. 1991); Baldwin v. Lewis, 442 F.2d 29, 32 (7th Cir. 1971). The exhaustion doctrine recognizes that state and federal courts are bound equally to apply and enforce federal law and that states are entitled to administer their criminal justice systems without federal court interference. Baldwin, 442 F.2d at 32. Therefore, "when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts

should have the first opportunity to review this claim and provide any necessary relief." O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999).

To exhaust his state court remedies, petitioner must "invok[e] one complete round of the State's established appellate review process." Id., at 854. In Wisconsin, this means that a state prisoner must raise his claims on appeal to the Wisconsin Court of Appeals and then, if he is unsuccessful, present them in a petition for review to the Wisconsin Supreme Court. Moore v. Casperson, 345 F.3d 474, 486 (7th Cir. 2003). Although petitioner insists that no state courts will provide him relief, the question pertinent to the exhaustion doctrine is not whether the state court would be inclined to rule in the petitioner's favor, but whether there is any available state procedure for determining the merits of petitioner's claim. White v. Peters, 990 F.2d 338, 342 (7th Cir. 1993). A petitioner "cannot simply opt out of the state review process because he is tired of it or frustrated by the results he is getting." Cawley v. DeTella, 71 F.3d 691, 695 (7th Cir. 1995).

When considering what state court remedies are available to petitioner, it is important to examine the nature of petitioner's claim. Petitioner does not appear to be alleging a violation of his right to a speedy trial or requesting relief in the form of an order directing the state court to try him promptly. Rather, petitioner is contending that the state lacks the authority to retry him at all and that his Chapter 980 case must therefore be dismissed. In making these contentions, petitioner is essentially raising an affirmative defense to the petition. However, the remedy of federal habeas corpus does not "permit the

derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court." Braden, 410 U.S. at 493. Petitioner has already filed a petition for a writ of habeas corpus in the trial court in which he presented his objections to the state's authority to try him a second time on the initial Chapter 980 petition. In the event petitioner loses at the second trial and is found by the jury to be a sexually violent person, one of the issues that petitioner can raise on appeal is the trial court's denial of petitioner's challenges to the court's jurisdiction. However, if this court were to decide the merits of petitioner's claims now, before the state appellate courts have had a chance to consider them, it would disrupt the state court proceedings and violate the interests served by the exhaustion doctrine.

Moreover, Wis. Stat. § 808.03(2), Wisconsin's discretionary appeal statute, provides a mechanism through which petitioner may present his jurisdictional claims to the state court of appeals before trial. See In re Commitment of Tremaine Y, 2005 WI App 56, 279 Wis. 2d 448, 694 N.W.2d 462 (reviewing, under § 808.03(2), denial of pretrial motion to dismiss § 980 petition); State v. Aufderhaar, 2004 WI App 208, 277 Wis. 2d 173, 689 N.W. 2d 674 (reviewing, under § 808.03(2), juvenile's challenges to personal jurisdiction), reversed on other grounds, 2005 WI 108, 2823 Wis. 2d 336, 700 N.W. 2d 4. Although the appellate court would not be *required* to hear petitioner's case under § 808.03(2), that does not excuse petitioner from pursuing this remedy.

In sum, because state procedures exist through which petitioner may present his federal claims to the state appellate courts, he cannot be excused from complying with the exhaustion requirement.

ORDER

IT IS ORDERED that the petition of Thomas Drusch for a writ of habeas corpus is DISMISSED WITHOUT PREJUDICE for his failure to exhaust his state court remedies.

Entered this 21st day of February, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge