

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

JAMES DUDGEON,

Petitioner,

v.

JANE DIER-ZIMMEL, Superintendent,
Thompson Correctional Center,

Respondent.

OPINION AND ORDER

07-C-0200-C

James Dudgeon, an inmate at the Thompson Correctional Center in Deerfield, Wisconsin, petitioned the court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 9, 2007, alleging that he was denied procedural due process in his parole and extended supervision revocation proceedings. Before the court is the state's motion to dismiss the petition in its entirety under 28 U.S.C. § 2244(b) on the ground of procedural default. Because it is undisputed that petitioner procedurally defaulted his claims by failing to file a petition for a writ of certiorari in the state circuit court and because he has not shown that he has satisfied either exception to the default rule, the petition will be dismissed.

From the petition, attachments to the petition and respondent's motion to dismiss and state court records available electronically, I find the following facts.

FACTS

On or before March 9, 2004, petitioner was released from prison, placed on parole in Dane County case number 97 CF 678, placed on extended supervision in Dane County case number 01 CF 1931 and required to comply with the Wisconsin Department of Corrections' rules of supervision. Among other things, those rules prohibited petitioner from operating a business or investing in business opportunities. Petitioner was supervised by John Fiorello, a probation and parole officer employed by the department.

In early 2005, Fiorello had reason to believe that petitioner had held himself out as operating a business and had sought seed money for the purpose of investing in a golf course in Colorado. A revocation hearing was held on March 21, 2005 before Shannon Wittenberger, an administrative law judge for the Wisconsin Division of Hearings and Appeals. Petitioner was represented by Mitchell Cooper. On March 29, 2005, Wittenberger revoked petitioner's parole in case 97 CF 678 and his extended supervision in case 01 CF 1931. According to Wittenberger's written decision, petitioner admitted the various alleged conduct but denied that his conduct was in violation of his rules of supervision.

Cooper appealed the revocation decision on behalf of petitioner but did not raise due process challenges in the appeal. The Division of Hearings and Appeals affirmed Wittenberger's decision on April 22, 2005. Petitioner had 45 days from that decision (or until June 2005) in which to seek state court review by petitioning the state circuit court for a writ of certiorari. Wis. Stat. § 893.735 (prisoner's action seeking remedy available by

certiorari barred unless commenced within 45 days after cause of action accrues). Neither petitioner nor a representative on his behalf filed a certiorari petition.

Cooper continued to represent petitioner until July 24, 2005. John Tedesco from the State Public Defender's Office Appellate Division entered an appearance on behalf of petitioner on April 27, 2005 but subsequently withdrew on August 15, 2005, after petitioner requested new appellate counsel. Cynthia Fiene entered her appearance for petitioner on August 15, 2005. See Consolidated Court Automation Programs, WI Circuit Court Access for Dane County case numbers 97 CF 678 and 01 CF 1931 at <http://wcca.wicourts.gov> (visited July 24, 2007); petition, dkt. #1, Attachment 11.

The Circuit Court for Dane County sentenced petitioner pursuant to the revocation decision on May 12, 2005. On November 1, 2005, Fiene filed a motion for sentence modification, which the circuit court denied on February 2, 2006. Dkt. #7, Exhs. E and F. Fiene appealed that decision to the Wisconsin Court of Appeals, filing a no merit report that addressed potential sentencing challenges and the propriety of the revocation of petitioner's extended supervision and parole. See State of Wisconsin v. Dudgeon, No. 2006AP1466-CRNM, dkt. #7, Exh. F. The no merit report did not raise any issues relating to due process. Dkt. #7, Exh. D.

Petitioner filed his federal habeas petition on April 9, 2007. On April 26, 2007, the magistrate judge ordered the state to respond to the petition, or in the alternative, file a motion to dismiss, noting that petitioner might not have exhausted his state court remedies

and procedurally defaulted his claims. On May 17, 2007, the state court of appeals issued an order upholding petitioner's sentence. Dudgeon, No. 2006API466-CRNM, dkt. #7, Exh. F. The court explained that it did not have authority to review the revocation decision because petitioner never challenged that decision in the circuit court. Id. at 1 n.1, 3. The state responded to the petition by filing a motion to dismiss on May 29, 2007.

Petitioner asked Fiene on numerous occasions to challenge the revocation decision on procedural due process grounds but never received a response. Both Cooper and Fiene told petitioner that any further filings would serve no purpose.

OPINION

As an initial matter, petitioner challenges respondent's motion on the ground that it is untimely, arguing that the April 26 order required the state to respond within 30 days, or by May 26, 2007. Although petitioner is correct that respondent filed its motion more than 30 days after the entry of the order, see dkt. #3 at 7, May 26 was a Saturday and the following Monday, May 28, was Memorial Day, a federal holiday. Federal Rule of Civil Procedure 6(a) provides that when the last day of the designated time period falls on a Saturday, Sunday or legal holiday, "the period runs until the end of the next day which is not one of the aforementioned days." In this case, respondent filed her brief on May 29, 2007, the last day of the designated filing period for respondent's motion.

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. However, petitioner asserts that his lawyer is to blame for his failure to file a timely certiorari petition. He alleges that he repeatedly asked Fiene to file the necessary documents but Fiene never responded. Petitioner also alleges that both Fiene and Cooper told him that other filings would do no good.

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 before this court may consider petitioner's challenges to the revocation decision, he must demonstrate cause for the default and prejudice resulting therefrom, or in the alternative, must convince the court that a miscarriage of justice would result if his claims were not entertained on the merits. Id. To establish cause, petitioner must show that "some objective factor external to the defense" impeded his efforts to comply with the state's procedural rule. Murray v. Carrier, 477 U.S. 478, 488 (1986). Alternatively, to show a miscarriage of justice, petitioner must convince the court that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Id. at 496.

Petitioner's argument is questionable because Fiene was not even appointed as his lawyer until August 15, 2005, after the 45-day deadline had passed. During the 45-day filing period, Cooper and Tedesco were on record as petitioner's attorneys. In any event, petitioner has not satisfied either of the exceptions to the default rule. 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 require states to provide counsel to all probationers facing probation revocation). Accordingly, his lawyer's failure to file a certiorari petition cannot constitute cause.

Petitioner also alleges in his petition that he believed that it was unlikely that he would get relief from the state courts. Dkt. #1. Such a belief does not establish cause because it was not an external factor that impeded petitioner from filing a petition for

review. Cawley v. DeTella, 71 F.3d 691, 696 (7th Cir. 1995). Petitioner claims that he could not file a certiorari petition *pro se* because he “made numerous requests of the staff and administration regarding legal materials. . . But no assistance was provided and requests went unanswered.” Dkt. #1. Unfair as it may seem to petitioner, his *pro se* status and lack of familiarity with the intricacies of the law or court system do not constitute adequate grounds for cause. Barksdale v. Lane, 957 F.2d 379, 385-86 n.15 (7th Cir. 1992) (citing McKinnon v. Lockhart, 921 F.2d 830, 832-33 n.5 (8th Cir. 1990)); see also Vasquez v. Lockhart, 867 F.2d 1056, 1058 (8th Cir. 1988).

Finally, petitioner suggests that the miscarriage of justice exception applies to him. However, he has not adduced any facts to show that the alleged due process violations would have probably resulted in his being found innocent. As respondent notes, it is unclear whether petitioner could actually avail himself of this exception because he is challenging a revocation decision and not his actual conviction. See, e.g., Gravitt v. Veach, No. 06-3753, 2007 WL 1175735, at *2 (7th Cir. April 18, 2007) (holding habeas petitioner cannot satisfy “this narrow exception” because challenge was to sentence and not conviction); Dellinger v. Bowen, 301 F.3d 758, 767 (7th Cir. 2002) (refusing to apply miscarriage of justice standard where petitioner was challenging sentence and not underlying conviction). In any event, petitioner has not established that he is actually innocent of the conduct that led to the decision to revoke his parole and extended supervision. In fact, the written decisions from the Division of Hearings and Appeals indicate that petitioner did not challenge the factual

accuracy of most of Fiorello's allegations but merely disputed the conclusion that he was in violation of his rules of supervision. Accordingly, I find that petitioner has procedurally defaulted all of the claims in his habeas petition.

ORDER

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

Entered this 25th day of July, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge