

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

TONIE CURTIS COTTON,

Petitioner,

ORDER

v.

07-C-0287-C

STATE OF WISCONSIN,

Respondent.

Tonie Curtis Cotton, presently incarcerated at the Dodge Correctional Institution in Waupun, Wisconsin, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has paid the five dollar filing fee. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

According to the petition, petitioner was convicted on August 18, 2006 in the Circuit Court for Dane County of two counts of second degree sexual assault and one count of false imprisonment. Petitioner did not pursue a direct appeal of his conviction. Instead, he filed a motion for sentence modification in the circuit court which was denied on January 9, 2007. He then filed a motion for postconviction relief pursuant to Wis. Stat. § 974.06. That motion was denied on April 26, 2007. Petitioner did not appeal either the January 9 decision or the April 26 decision.

“A state prisoner . . . may obtain federal habeas review of his claim only if he has exhausted his state remedies and avoided procedurally defaulting his claim.” Thomas v. McCaughtry, 201 F.3d 995, 999 (7th Cir. 2000); see also 28 U.S.C. §2254(d). Claims are exhausted when they have been presented to the highest state court for a ruling on the merits of the claims or when state remedies no longer remain available to the petitioner. Engle v. Isaac, 456 U.S. 107, 125 n. 28, 1570 n. 28 (1982); 28 U.S.C. § 2254(c) (“An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented”). When a petitioner raises claims that have not been exhausted in state court and state remedies remain available, the federal court must dismiss the petition without prejudice to allow the petitioner to return to state court. Rhines v. Weber, 544 U.S. 269, 274 (2005); Rose v. Lundy, 455 U.S. 509, 510 (1982). After exhausting his claims in state court, the petitioner may then re-present his claims to the federal court in a new habeas petition, assuming he does not run afoul of the statute of limitations. Rhines, 544 U.S. at 275.

However, when the petitioner has already pursued his state court remedies but failed to properly present his claims to the state courts along the way, “it is not the exhaustion doctrine that stands in the path to habeas relief . . . but rather the separate but related doctrine of procedural default.” Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004). The procedural default doctrine requires that state prisoners “not only become ineligible for state relief before raising their claims in federal court, but also that they give state courts a

sufficient opportunity to decide those claims before doing so.” O’Sullivan v. Boerckel, 526 U.S. 838, 854 (1999) (Stevens, J., dissenting). Under the procedural default doctrine, a federal court is precluded from reaching the merits of a habeas claim if the petitioner either 1) failed to present his claim to the state courts and it is clear that those courts would now hold the claim procedurally barred; or 2) presented his claim to the state courts but the state court dismissed the claim on a state procedural ground independent of the federal question and adequate to support the judgment. Perruquet, 390 F.3d at 514; Moore v. Bryant, 295 F.3d 771, 774 (7th Cir. 2002); Chambers v. McCaughtry, 264 F.3d 732, 737-38 (7th Cir. 2001). When a petitioner has procedurally defaulted his claims, the federal court denies the petition with prejudice, thereby foreclosing petitioner’s opportunity for federal review of the claims.

It is unclear from the petition whether petitioner still has state appellate remedies available to him. The last line of the petition appears to state something about the availability of state relief, but it is illegible. If petitioner still can appeal either the January 9 or April 26 decisions to the Wisconsin Court of Appeals, then his petition must be dismissed without prejudice for failure to exhaust his state court remedies. If petitioner’s deadline for appealing either decision has passed, then the petition must be dismissed with prejudice on grounds on procedural default, unless petitioner can demonstrate that some external circumstance beyond his control was the reason for his failure to file his appeals on time. Murray v. Carrier, 477 U.S. 478, 488 (1986). Alternatively, petitioner can avoid the

procedural default bar by showing that a fundamental miscarriage of justice will result if the federal court does not consider his claims. A fundamental miscarriage of justice is established by demonstrating that it is more likely than not that no reasonable juror would have convicted petitioner in light of any new evidence. Schlup v. Delo, 513 U.S. 298, 327 (1990).

I will defer action on the petition until petitioner provides the court with more information. In particular, petitioner should make clear whether he still may appeal either of the circuit court's decisions. If he has missed his appellate deadlines, he should explain in detail the circumstances that caused him to miss those deadlines. In addition, petitioner may present any facts he thinks are relevant to show that he satisfies the fundamental-miscarriage-of-justice exception to the procedural default rule.

ORDER

IT IS ORDERED THAT the court will take no action on the petition until petitioner provides the court will more information. In particular, petitioner should make clear whether he still may appeal either of the circuit court's decisions. If he has missed his appellate deadlines, he should explain in detail the circumstances that caused him to miss those deadlines. In addition, petitioner may present any facts he thinks are relevant to show that he satisfies the fundamental-miscarriage-of-justice exception to the procedural default rule.

Petitioner has until June 26, 2007, in which to submit this information to the court. If he fails to meet this deadline, his petition is likely to be dismissed for failure to prosecute it.

Entered this 6th day of June, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge