

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

MATTHEW PERRY, SR.,

Petitioner,

ORDER

v.

07-C-380-C

WISCONSIN DEPARTMENT OF
CORRECTIONS,

Respondent.

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Matthew Perry, Sr., an inmate at the Chippewa Valley Correctional Treatment Facility¹, challenges his March 2005 judgment of conviction in the Circuit Court for Oneida County for possession with intent to deliver marijuana and conspiracy to manufacture or deliver cocaine. Petitioner alleges that his conviction is unlawful because it resulted from the ineffective assistance of counsel, who failed to challenge petitioner's arrest and confession and gave petitioner bad advice about the sentence he would likely receive if he pled guilty. In addition, petitioner alleges, the lawyer who was appointed to represent him in postconviction/appellate proceedings was ineffective for advising petitioner that if he

¹According to the petition, which petitioner filed in the Eastern District of Wisconsin on June 29, 2007, petitioner was to be released to extended supervision on July 3, 2007.

dismissed his postconviction motion raising the aforementioned claims in exchange for early release, he could still bring a civil action to challenge his allegedly unlawful incarceration.

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). O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). Petitioner has never presented any of his claims to any state court, having withdrawn his state court postconviction motion before the court ruled on it. Although petitioner alleges that his failure to pursue his state court remedies was caused by his postconviction lawyer's bad advice, that claim is itself a constitutional claim that must be presented to the state courts before it may form the basis for federal relief. Edwards v. Carpenter, 529 U.S. 446, 451 (2000) (ineffective assistance adequate to establish cause for procedural default of some other constitutional claim is itself independent constitutional claim that must be first raised in state court).

A Wisconsin defendant who contends that he was denied his right to the effective assistance of counsel on appeal has two avenues of relief available to him, depending upon the type of error alleged. Where the defendant contends that his lawyer erred by failing to raise on appeal claims of trial error that were preserved in the appellate record without the necessity of a postconviction motion, the defendant may file a petition for a writ of habeas corpus in the state court of appeals. State ex rel. Rothering v. McCaughtry, 205 Wis. 2d 675, 683-84, 556 N.W. 2d 136, 140 (Ct. App. 1996); State v. Knight, 168 Wis. 2d 509, 522, 484 N.W. 2d 540, 545 (1992). If, however, the lawyer's alleged error was failing to

preserve issues for appeal that required the filing of a postconviction motion in the trial court, the defendant must present that claim to the trial court by filing either a petition for habeas corpus or a postconviction motion under Wis. Stat. § 974.06. Rothering, 205 Wis. 2d at 681, 556 N.W. 2d at 139. In this case, it appears that petitioner would proceed under Rothering, insofar as the performance by his postconviction lawyer that he challenges involves errors allegedly committed in the trial court. Id., at 67, 556 N.W. 2d at 137.

Petitioner does not allege that he has filed a Rothering motion or raised by any other state court motion a claim of ineffective assistance of postconviction/appellate counsel. Accordingly, the petition must be dismissed without prejudice for petitioner's failure to exhaust his state court remedies.

ORDER

Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, IT IS ORDERED that the petition is DISMISSED WITHOUT PREJUDICE for petitioner's failure to exhaust his state court remedies.

Entered this 24th day of July, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge