

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

RONALD P. LANE,

Petitioner,

ORDER

v.

3:07-cv-00679-bbc

MICHAEL THURMER,
Waupun Correctional Institution,

Respondent.

Ronald P. Lane, an inmate at the Waupun Correctional Institution, has filed an application 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.

The subject of the petition is petitioner's October 25, 2004 conviction in the Circuit Court for Vernon County for burglary, theft, criminal damage to property, attempted burglary and attempted theft. Petitioner contends that his custody resulting from that conviction is in violation of the laws or Constitution of the United States because: 1) the police stopped his vehicle and then 2) arrested him without probable cause or reasonable suspicion to suspect that he had committed a crime, in violation of his Fourth Amendment rights; 3) police unlawfully seized and then searched petitioner's vehicle, in violation of petitioner's Fourth Amendment rights; 4) petitioner's trial lawyer provided ineffective

assistance of counsel when he failed to file a motion to suppress evidence derived from this illegal stop, detention, search and seizure; 5) petitioner's appellate lawyer was ineffective for filing a no merit report and for misstating facts in that report; and 6) the evidence adduced at trial was insufficient to sustain petitioner's convictions for attempted burglary and attempted theft.

Petitioner does not contend that he was denied a full and fair opportunity to litigate his Fourth Amendment claims in state court. Accordingly, claims one through three of the petition are barred by Stone v. Powell, 428 U.S. 465 (1976), in which the Court held that direct consideration of Fourth Amendment claims is not available on federal habeas review so long as the state allowed petitioner a full and fair opportunity to litigate those claims. However, petitioner is not barred from pursuing his claim, based on the Sixth Amendment, that his trial lawyer provided ineffective assistance of counsel when he failed to file a suppression motion. Kimmelman v. Morrison, 477 U.S. 365, 383 (1986) (Stone's bar not applicable to Sixth Amendment ineffective-assistance-of-counsel claims founded primarily on incompetent representation with respect to Fourth Amendment issue). His claims of ineffective assistance of appellate counsel and insufficiency of the evidence are also properly raised in his petition, although a question exists whether petitioner fairly presented his ineffective assistance of appellate counsel claim in his response to counsel's no-merit report. I leave it to the state to address that question in its response to the petition.

ORDER

1. Claims 1, 2 and 3 of the petition are DISMISSED WITH PREJUDICE pursuant to the rule announced in Stone v. Powell, 428 U.S. 465 (1976).
2. The clerk shall serve copies of the petition and this order by mail to Warden Thurmer and to the Wisconsin Attorney General.
3. The state shall file a response to claims 4, 5 and 6 of the petition not later than 30 days from the date of service of the petition, showing cause, if any, why this writ should not issue.

If the state contends that petitioner's claims are subject to dismissal with prejudice on grounds such as procedural default or the statute of limitations or without prejudice on grounds of failure to exhaust, then it should file a motion to dismiss and all supporting documents within its 30-day deadline. If relevant, the state must address the issue of cause and prejudice in its supporting brief. Petitioner shall have 20 days following service of any such motion within which to file and serve his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

If at this time the state wishes to argue petitioner's claims on their merits, either directly or as a fallback position in conjunction with any motion to dismiss, then within its 30-day deadline the state must file and serve not only its substantive legal response to

petitioner's claims, but also all documents, records and transcripts that commemorate the findings of fact or legal conclusions reached by the state courts at any level relevant to petitioner's claims. The state also must file and serve any additional portions of the record that are material to deciding whether the legal conclusions reached by state courts on these claims was unreasonable in light of the facts presented. 28 U.S.C. § 2254(d)(2). If the necessary records and transcripts cannot be furnished within 30 days, the state must advise the court when such papers will be filed. Petitioner shall have 20 days from the service of the state's response within which to file a substantive reply.

If the state chooses to file only a motion to dismiss within its 30-day deadline, it does not waive its right to file a substantive response later, if its motion is denied in whole or in part. In that situation, the court would set up a new calendar for submissions from both sides.

4. Once the state has filed its answer or other response, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not docket or consider any submission that has not been served upon the state. Petitioner

should include on each of his submissions a notation indicating that he served a copy of that document upon the state.

5. The federal mailbox rule applies to all submissions in this case.

Entered this 18th day of December, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge