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

JAMAICA WILSON,

Petitioner, ORDER

v. 08-cv-285-bbc

MICHAEL THURMER, Warden,
Waupun Correctional Institution,

Respondent.

Petitioner Jamaica Wilson, an inmate at Waupun Correctional Institution, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases. On May 21, 2008, this court allowed petitioner until June 23, 2008 to supplement his petition with the alleged ground(s) for relief and supporting facts that show that his custody is unlawful. In response, he filed additional information regarding an ineffective assistance of trial counsel claim and moved for a stay in this court's proceedings while he exhausts a separate ineffectiveness of postconviction counsel claim. Dkt. 6.

In 2000, petitioner plead guilty in the Dane County Circuit Court to one count of first degree intentional homicide, for which he is serving a life sentence. Petitioner appears to be alleging that his plea was entered involuntarily and unknowingly. He complains that his trial lawyers were ineffective for 1) failing to inform him about the possibility that the court could have instructed the jury regarding lesser degrees of homicide, including felony murder, had he

gone to trial; 2) failing to make that argument in the motion to withdraw his plea; 3) failing to inform him that he had no alternative but to plead guilty; and 4) incorrectly informing him that his co-defendants were planning to enter guilty pleas. In addition, petitioner alleges that his postconviction lawyer was ineffective for failing to raise these ineffectiveness of trial counsel issues in postconviction proceedings.

On appeal, petitioner challenged the circuit court's denial of his presentence motion for a plea withdrawal, arguing that he did not admit all facts necessary to prove that he committed the crime charged. *State v. Wilson*, No. 2006 AP 537 CR (Ct. App. Dec. 21, 2006), Wisconsin Supreme Court and Court of Appeals Case Access, available at http://wcca.wicourts.gov (visited July 1, 2008). The Wisconsin Court of Appeals affirmed the circuit court, finding that a plea may be voluntarily, knowingly and understandably made even if a defendant is unwilling or unable to admit his participation in the alleged criminal acts. *Id.* at ¶ 11 (citing *United States v. Musa*, 946 F.2d 1297, 1302 (7th Cir. 1991)). The Wisconsin Supreme Court denied petitioner's petition for review on March 14, 2007. Therefore, it appears that petitioner exhausted his involuntary plea claim, which is sufficient to require a response from the state.

Petitioner asserts that his failure to present his claims of ineffective assistance of trial counsel was caused by his postconviction lawyer, who petitioner contends was also ineffective. It is true that ineffective assistance of counsel can establish cause for a procedural default. However, in *Edwards v. Carpenter*, 529 U.S. 446 (2000), the Supreme Court held that because

the assertion of ineffective assistance as a cause to excuse a procedural default in a § 2254 petition is, itself, a constitutional claim, the petitioner must have raised this claim first to the state court or he has procedurally defaulted it. *Id.* at 453. It appears that petitioner has never presented a claim of ineffective assistance of appellate counsel to the state courts.

The question is thus whether petitioner may still exhaust his ineffectiveness of assistance claims by presenting them to the state courts. 28 U.S.C. § 2254©) ("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"). Wisconsin's statute governing postconviction motions, Wis. Stat. § 974.06, allows defendants collaterally to attack their convictions on constitutional grounds after the time for seeking a direct appeal or other post-conviction remedy has expired. However, a petitioner is procedurally barred from raising a claim in a post-conviction motion that he could have raised on direct appeal unless he has a "sufficient reason" for not raising the issue on direct appeal. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 164 (1994); Wis. Stat. § 974.06(4). Ineffective assistance of post-conviction or appellate counsel may provide a sufficient reason. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 682, 556 N.W. 2d 136, 139 (Ct. App. 1996) (describing procedure for challenging effectiveness of postconviction counsel); *State v. Knight*, 168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992) (appellate counsel). Thus, there are still avenues of relief available to petitioner in the state courts through which he could present his claim that his postconviction lawyer was ineffective for failing to raise his additional

claims of ineffective assistance of trial counsel. The fact that the state courts are not likely to rule in petitioner's favor does not dispose of the exhaustion requirement. *See Cawley v. DeTella*, 71 F.3d 691, 695 (7th Cir. 1995); *White v. Peters*, 990 F.2d 338, 342 (7th Cir. 1993).

When a petition, like this one, presents a mix of exhausted and unexhausted claims, *Rose v. Lundy*, 455 U.S. 509, 510 (1982) instructs federal district courts to dismiss it without prejudice so the petitioner may pursue any available state court remedies. However, a relevant factor is the statute of limitations for filing a federal habeas petition. Under 28 U.S.C. § 2244(d)(1)(A), a petitioner has one year from the date his judgment became "final" in which to file a federal habeas petition. The Court of Appeals for the Seventh Circuit has held that the one-year statute of limitations does not begin to run under § 2244(d)(1)(A) until the expiration of the 90-day period in which the prisoner could have filed a petition for a writ of certiorari with the United States Supreme Court. *Anderson v. Litscher*, 281 F.3d 672, 674-675 (7th Cir. 2002). Petitioner had ninety days following the entry of judgment by the Supreme Court of Wisconsin on March 14, 2007 to file a petition for certiorari in the United States Supreme Court. Because petitioner did not file such a petition, his conviction became "final" on June 12, 2007 and his federal statute of limitations began to run on June 13, 2007. He filed the instant petition on May 15, 2008, about one month prior to the expiration of his federal habeas filing deadline.

Because the time during which the petition has been pending in this court does not toll the one-year statute of limitations, petitioner does not have any time remaining on his habeas clock. *Newell v. Hanks*, 283 F.3d 827, 834 (7th Cir. 2002); *Jones v. Berge*, 101 F. Supp. 2d 1145,

1150 (E.D. Wis. 2000). Therefore, he would not have time to file a new habeas petition in this court while he exhausts his appeals in the state court. Accordingly, I am inclined to stay the instant habeas application while petitioner exhausts his state court remedies. *See Freeman v. Page*, 208 F.3d 572, 576-77 (7th Cir. 2000) (noting that dismissal not proper when it could jeopardize timeliness of collateral attack; federal action should be stayed until state court decides what to do); *Tinker v. Hanks*, 172 F.3d 990, 991 (7th Cir. 1999) (same), cert. granted, judgment vacated on other grounds, 531 U.S. 987 (2000), judgment reinstated on remand, 255 F.3d 444 (7th Cir. 2001); *Post v. Gilmore*, 111 F.3d 556, 557 (7th Cir. 1997). However, because the record before the court is sparse and there may be other issues relevant to the court's decision on whether to dismiss the petition or grant petitioner's motion to stay, I will allow the state an opportunity to respond.

ORDER

IT IS ORDERED THAT:

1. Pursuant to an informal service agreement between the Attorney General and the court, the Attorney General is being notified to seek service on Warden Thurmer.

2. The state shall file a response to 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 any of 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 in its supporting brief the issue of cause, prejudice and staying this action while petitioner exhausts his state court remedies. 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.

3. 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.

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

Entered this 1st day of July, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge