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

ROGELIO LOPEZ,

Petitioner,

v.

GREGORY GRAMS, Warden,
Columbia Correctional Institution,

Respondent.

ORDER

08-cv-408-slc

Rogelio Lopez, an inmate at the Columbia Correctional Institution, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his custody resulting from his January 29, 1999 conviction in the Kenosha County Circuit Court of first degree intentional homicide while armed with a dangerous weapon, for which he is serving a life sentence. Dkt. 1. He alleges that he is in custody in violation of his constitutional rights because 1) his trial counsel was ineffective for failing to call two witnesses at trial; 2) his trial counsel was ineffective for not stipulating to the admission of petitioner's blood alcohol level at the time of his arrest, depriving him of a basis for a lesser included offense; 3) his trial counsel was ineffective for not properly challenging his police statements that were taken violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966); and 4) he did not receive a fair trial because "there [were] several errors made by the trial court . . . when there was a witness to support" his version of the events. *Id.*

Because it was unclear whether petitioner properly presented his third and fourth claims to the state courts and because his fourth claim did not provide enough facts from which this court could conclude that his detention is illegal, I gave petitioner the opportunity to supplement

his petition. Order entered August 6, 2008, dkt. 3. After being granted two extensions, dkt. 5 and 7, petitioner filed a supplemental petition on October 29, 2008, dkt. 8.

From my review of the supplemental petition and the documents attached to it, it appears that petitioner raised his first two claims in the state courts. These claims are sufficient to require a response from the state. Petitioner's third claim is more problematic. With his supplemental petition, petitioner submitted a copy of the briefs that his postconviction attorney filed in the state trial and appellate courts. Petitioner raised Claim 3 in his postconviction motion in the trial court. Following a hearing, the trial court denied the motion. On appeal, petitioner did not argue that his trial counsel was ineffective for failing to not properly challenge the admission of his statements to the police (Claim 3). Instead, he alleged that the trial court erred in admitting the statements at trial. Although it appears petitioner procedurally defaulted his third claim, I will leave it to the state to respond. *See Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir. 2004).

For petitioner's sake, I note that the procedural default doctrine prevents a state prisoner from raising a claim on federal habeas review when he has failed to present the claim in the state courts and it is clear that those courts would now hold the claim procedurally barred. *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). Under Wisconsin law, a defendant is procedurally barred from raising a claim in a postconviction motion that he could have raised in his original motion, unless he has a "sufficient reason" for not doing so. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157, 164 (1994); Wis. Stat. § 974.06(4). Further, if a petitioner has procedurally defaulted a claim, a federal court cannot reach the merits of that claim unless the

petitioner demonstrates 1) cause for the default and actual prejudice from failing to raise the claim as required, or 2) that enforcing the default would lead to a fundamental miscarriage of justice. *Harris v. Reed*, 489 U.S. 255, 262 (1989); *Rodriguez v. Scillia*, 193 F.3d 913, 917 (7th Cir. 1999).

Ineffective assistance of postconviction or appellate counsel may provide a sufficient reason under state law for not raising a claim in the original postconviction motion, *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), and cause for a procedural default, *Edwards v. Carpenter*, 529 U.S. 446 (2000). Because in such a case a petitioner would still have an avenue of relief available in state court, the federal habeas claim would not be exhausted. *Edwards*, 529 U.S. at 453 (ineffective assistance as cause to excuse procedural default is in itself a constitutional claim that petitioner must raise first to state court). Under *Rose v. Lundy*, 455 U.S. 509, 510 (1982), this court must dismiss a petition that presents a mix of exhausted and unexhausted claims. Alternatively, the petitioner may choose to amend his petition and delete the unexhausted claims, proceeding solely on the exhausted claims. *Id.* at 520. District courts also have the discretion to stay a habeas corpus action while a petitioner exhausts his state court remedies if dismissing the petition could jeopardize the petitioner's opportunity to refile the habeas claims within the one-year statute of limitations period. *Rhines v. Weber*, 125 S. Ct. 1528, 1533-34 (2005). However, stays are granted only in limited circumstances. The district court must determine that there was "good cause" for the petitioner's failure to exhaust his claims first in state court and that the unexhausted claims are

not "plainly meritless." *Id*. Petitioner should keep the above in mind when replying to the state's response.

Finally, petitioner has failed to provide any facts supporting his fourth claim regarding the denial of a fair trial. The state appellate court decision shows that petitioner did allege on appeal that because the trial court and his trial counsel committed numerous errors, he was entitled to a new trial in the interests of justice. *State v. Lopez*, No. 2005 AP 1472 CR, at 7-8 (Ct. App. Dec. 27, 2006), dkt. 8. Cumulative errors, even if harmless individually, conceivably could prejudice a defendant as much as a single reversible error and therefore could violate the defendant's right to due process of law. *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001) (citing *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978); *United States v. Haddon*, 927 F.2d 942, 949-50 (7th Cir.1991)). To demonstrate cumulative error, petitioner must establish that at least two errors were committed in the course of the trial and when considered together along with the entire record, these errors so infected the jury's deliberation that they denied the petitioner a fundamentally fair trial. *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000) (citations omitted). Courts will consider only plain errors or errors which were preserved for appellate review. *Id.* at 825. In this case, petitioner properly alleged and preserved two ineffective assistance of trial counsel errors (Claims 1 and 2). Therefore, although lacking in detail, I find that his fourth claim is sufficient to require a response from the state, but only to the extent that the alleged errors are those properly presented in the petition.

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 Grams.

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 and addressing the issues identified in this order.

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 13th day of November, 2008.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge