IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

RICHARD HOEFT,

Petitioner, ORDER

v. 08-cv-537-bbc

JOHN CLARK, Warden,
Flambeau Correctional Center,

Respondent.

Petitioner Richard Hoeft, an inmate at the Flambeau Correctional Center, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the $5 filing fee. The petition is before the court for preliminary review pursuant to 28 U.S.C. § 2254.

The subject of the petition is petitioner's 2004 conviction in the Circuit Court for Ashland County for three counts of burglary. In grounds one, two and three of the petition, petitioner asserts that the trial court violated his constitutional rights under the Fourth Amendment when it denied his motion to suppress his confessions. Specifically, petitioner alleges that the police did not give him the proper Miranda warnings and his statements were involuntary because the interrogation was too long and his statements were given in exchange for promises and threats. In grounds four through 15, petitioner contends that his

trial counsel was ineffective because he failed to do any work on his case, performed no investigation, did not subpoena witnesses, failed to interview the state's witnesses, did not view the crime scenes, failed to file any motions, never compared petitioner's shoeprints with those found at the scenes, did not read the police reports, did not impeach a police officer who allegedly gave false testimony, recommended that petitioner plead no contest when there was insufficient evidence to convict him and recommending that he plead no contest to count one when the facts did not support a conviction for burglary.

As an initial matter, I note that in addition to his custodian, the warden of the Flambeau Correctional Center, petitioner named Attorney General J.B. Van Hollen and Parole Agent Toni Singsime as respondents to the petition. In a habeas action filed by a state prisoner, the proper respondent is the state officer having custody of the prisoner. Rule 2 of the Rules Governing Section 2254 Cases. That person is the warden of the Flambeau Correctional Center, John Clark. I have revised the caption to show Clark as petitioner's custodian and the only respondent and will direct the clerk of court to do the same.

To be entitled to a writ of habeas corpus, a state prisoner must show that he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief, the district court must dismiss the petition. Rule 4 of the Rules Governing Section 2254 Cases. Under Rule 4, the district court may dismiss a petition summarily, without reviewing the record at all, if it determines that the petition

"raises a legal theory that is indisputably without merit." Small v. Endicott, 998 F.2d 411, 414 (7th Cir. 1993).

Petitioner's first three claims fail to state a valid claim for habeas relief. In Stone v. Powell, 428 U.S. 465, 493-95 (1976), the Supreme Court reasoned that because the exclusionary rule is a social device for deterring official wrongdoing, not a personal right of defendants, a person imprisoned following a trial that relies in part on unlawfully obtained evidence is not *in custody* in violation of the Constitution even though the evidence might have been obtained unlawfully. Thus, federal courts will not consider Fourth Amendment claims on habeas corpus review in cases where the state has provided the petitioner with "an opportunity for full and fair litigation" of the Fourth Amendment claim. Id. In his federal habeas petition, petitioner has not alleged that he was deprived of the opportunity to present his Fourth Amendment claim to the state courts or that the state courts did not adjudicate his claim in an unbiased manner. At most, petitioner contends that the state courts erred in denying his suppression motion. Accordingly, petitioner's Fourth Amendment claims will be dismissed.

I turn now to petitioner's ineffective assistance of counsel claims. In a postconviction motion and on direct appeal, petitioner alleged that his trial counsel was ineffective for lack of preparation. On February 6, 2007, the Wisconsin Court of Appeals denied his claim, finding that he failed to show that but for his counsel's errors, he would not have pleaded no contest and would have insisted on going to trial. State v. Hoeft, No. 2006 AP 671 (Ct.

App. Feb. 6, 2007), dkt. #1 at 30. Subsequently, petitioner filed another postconviction motion, alleging that his trial counsel was ineffective for 1) recommending that he plead no contest when there was insufficient evidence to sustain a conviction at trial; 2) recommending that he plead no contest to count one when the facts did not support a conviction for burglary; and 3) failing to impeach a police officer at a hearing when the officer was giving false testimony. State v. Hoeft, No. 2007 AP 2605 (Ct. App. May 20, 2008), dkt. #1 at 33-36. The court of appeals denied the claims, finding that it previously had rejected any claim that his attorney had failed to research the law and that petitioner failed to set forth sufficient reason for not raising his claims in his previous appeal. Id. (citing Wis. Stat. § 974.06; State v. Escalona-Naranjo, 185 Wis. 2d 168, 517 N.W.2d 157 (1994)).

It appears that petitioner may have procedurally defaulted some of his ineffective assistance of counsel claims. Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004) (procedural default bars federal court from granting relief unless petitioner demonstrates cause or that miscarriage of justice would result). Because petitioner alleges that he is actually innocent, he may be seeking to avail himself of the miscarriage of justice exception in the event procedural default is found. However, I will leave these issues for the state to address in its response to claims four through 15.

ORDER

IT IS ORDERED that:

1. The clerk of court is directed to change the caption to reflect that John Clark, Warden, Flambeau Correctional Center is the sole respondent.

2. Claims one, two and three of the petition are DISMISSED WITH PREJUDICE pursuant to the rule announced in Stone v. Powell, 428 U.S. 465 (1976).

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

4. The state shall file a response to the remaining claims in 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.

5. 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.

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

Entered this 15th day of September, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge