

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

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COURTNEY COBBS,

Petitioner,

ORDER

v.

08-cv-704-bbc

WILLIAM POLLARD, Warden,  
Green Bay Correctional Institution,

Respondent.

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On December 24, 2008, this court entered an order dismissing petitioner Courtney Cobbs's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, finding that his claim was barred by the doctrine set forth in Stone v. Powell, 428 U.S. 465, 493-95 (1976). Dkt. #3. On January 15, 2009, the court granted petitioner an extension of time within which to file a motion under Rule 59. Dkt. #7. Now before the court is petitioner's motion for reconsideration and to amend and correct the dismissal order under Rule 59(e). Dkt. #8.

In the petition, petitioner alleged that he is in custody in violation of his Fourth Amendment rights to a reasonable search and seizure. Petitioner asks this court to interpret his allegations liberally and allow him to amend the petition to include a claim that the state courts did not fully and fairly litigate his Fourth Amendment claims. He asserts that the state courts ignored evidence in deciding the suppression motion (including the testimony

of two police officers), relied on evidence that was not in the record and incorrectly applied Fourth Amendment law. Petitioner's revised allegations state a valid claim for federal habeas relief and are sufficient to warrant a response from the state. Therefore, I will reinstate the petition and permit petitioner to amend it to include a claim that the state courts did not fully and fairly litigate his Fourth Amendment claims. However, I note that in order to succeed on this claim, petitioner will have to overcome a high hurdle. Stone precludes habeas review of Fourth Amendment claims unless petitioner can show that the state hearing was a sham or the judge was bribed, sleepwalking or in some way subverted the hearing process. Cabrera v. Hinsley, 324 F.3d 527, 531 (7th Cir. 2003).

In the motion, petitioner also states that he raised a Fourteenth Amendment claim in his petition, alleging that the stop and search of his vehicle was motivated by his race. A further review of the petition does show that petitioner mentioned the Fourteenth Amendment in passing in the "supporting facts" section. The equal protection clause of the Fourteenth Amendment prohibits the selective and intentionally discriminatory enforcement of the law based on considerations such as race. Whren v. United States, 517 U.S. 806, 813 (1996); Chavez v. Illinois State Police, 251 F.3d 612, 635 (7th Cir. 2001). Although petitioner did not clearly allege this claim in his petition, I will allow him to amend his petition to include it.

In his motion for reconsideration, petitioner asserts for the first time that his trial and appellate counsel were ineffective for failing to raise his Fourteenth Amendment claim in the

state courts. However, a review of the Wisconsin court of appeals decision in this case indicates that the court did address petitioner's allegation that the police officers were motivated by race in stopping his vehicle. State v. Cobbs, Nos. 2007 AP 380 and 440 (Ct. App. Jan. 15, 2008), dkt. #1, exh. #1 at 4. Although the state appellate court did not refer to the Fourteenth Amendment, it applied the standard in Whren. Id.; see also Mitchell v. Esparza, 540 U.S. 12, 16 (2003) (per curiam) (state court decision not contrary to federal law simply because court did not cite correct precedent). Because there appears to be no basis for petitioner's ineffective assistance of counsel claims, he will not be allowed to proceed on them. However, in the event that petitioner is found to have procedurally defaulted his Fourteenth Amendment claim, I will allow him to argue that his trial and appellate attorneys were ineffective.

In sum, I will vacate the dismissal order and allow petitioner to amend his petition to include a claim that the state courts did not fully and fairly litigate his Fourth Amendment claim and a claim that the police stopped and searched plaintiff's vehicle in violation of the Fourteenth Amendment. The state is ordered to respond to these two claims in the amended petition.

#### ORDER

IT IS ORDERED that:

1. Petitioner Courtney Cobbs's motion is GRANTED.

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

3. The state shall file a response to the petition not later than 45 days from the date of service of the petition, showing cause, if any, why this writ should not issue.

If the state contends that the petition is subject to dismissal on grounds such as the statute of limitations, as an unauthorized successive petition, lack of exhaustion or procedural default, then it is authorized to file a motion to dismiss, a supporting brief and any documents relevant to the motion within 45 days of this order. If the state contends that the petition presents a mix of exhausted and unexhausted claims, then it must address in its supporting brief whether petitioner meets the criteria announced in Rhines v. Weber, 544 U.S. 269 (2005), for a stay in the event he opts to pursue his unexhausted claims in state court. Petitioner shall have 30 days following service of any dismissal 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 the court denies the motion to dismiss in whole or in part, then it will set a deadline within which the state must file an answer and supporting brief addressing any claims that have not been dismissed. Petitioner will be given the opportunity to reply to the state's submissions.

If the state does not file a motion to dismiss, then within its 45-day deadline it shall file an answer addressing the allegations in the petition in accordance with Rule 5 of the

Rules Governing Section 2254. The answer must be accompanied by a brief containing a substantive legal response to petitioner's claims. In addition, the state must file the documents required by Rule 5(c) and (d). If the necessary records and transcripts cannot be furnished within 45 days, the state must advise the court when such papers will be filed. Petitioner shall have 30 days from the service of the state's response within which to file a substantive reply.

4. 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 4<sup>th</sup> day of February, 2009.

BY THE COURT:

/s/

BARBARA B. CRABB  
District Judge