IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

NATHAN GILLIS,

Petitioner, ORDER

v. 08-cv-0117-bbc

GREG GRAMS, Warden,
Columbia Correctional Institution,

Respondent.

Nathan Gillis, an inmate at the Columbia Correctional Institution in Portage, Wisconsin, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He 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. Rule 4 of the Rules Governing Section 2254 Cases allow a district court to dismiss a petition summarily if "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Petitioner also has requested that the court appoint him counsel. 28 U.S.C. § 1915(e)(1).

Petitioner pleaded no contest on December 16, 1993 in the Circuit Court for Dane County to two counts of second degree sexual assault and one count of kidnapping, false imprisonment and recklessly endangering safety in violation of Wis. Stat. §§ 940.30, 940.31

and 940.225(2). Petitioner also was charged with a habitual criminality penalty enhancer under Wis. Stat. § 939.62. On March 18, 1994, the circuit court withheld sentence on the kidnapping and false imprisonment charges and placed petitioner on probation (20 years for kidnapping and 6 years for false imprisonment) to run concurrently with a prison sentence totaling 12 years on his other convictions. The circuit court revoked petitioner's probation on May 4, 2006 and imposed a 12-year prison term to be served consecutively to his other sentences.

Petitioner challenges the 2006 sentencing decision, contending that he is entitled to federal habeas relief because 1) the circuit court incorrectly applied the penalty enhancer, making his sentence greater than the maximum allowed by law; 2) the circuit court denied him discovery material in preparation for the sentencing hearing (including police reports, medical records and photographs); 3) the circuit court wrongfully denied him sentencing credit for time previously served; and 4) the state violated the original plea agreement, which provided that petitioner would receive no more than 12 years in prison. It appears that petitioner has exhausted his state court remedies and filed his petition within the one-year limitations period.

Habeas relief under § 2254 is available only if the petitioner's sentence was imposed in violation of the Constitution or federal law. 28 U.S.C. § 2254(a). "Rules governing sentencing factors and the sentencing court's articulation of those factors are solely matters of state law." Ziegler v. Wallace, No. 07-C-475, 2007 WL 1575956, at *1 (E.D. Wis. May

30, 2007). Thus, to the extent the petitioner is claiming that the state court made an error of state law in imposing his sentence, his claims are not cognizable in this federal habeas proceeding. Id.; Lechner v. Frank, 341 F.3d 635, 642 (7th Cir. 2003) (citing Lewis v. Jeffers, 497 U.S. 764, 780 (1990)).

Petitioner fails to identify the constitutional bases for his claims. His first claim could be construed as alleging a violation of his fundamental right to due process under the Fourteenth Amendment, United States v. Tucker, 404 U.S. 443, 447 (1972) (defendants have due process right to be sentenced on basis of accurate information), or a violation of his Fifth Amendment right against double jeopardy. The double jeopardy clause protects a person from being punished twice for the same offense and prevents a sentencing court from imposing a greater punishment than the legislature intended. Jones v. Thomas, 491 U.S. 376, 380-81 (1989); Missouri v. Hunter, 459 U.S. 359, 366-68 (1983); North Carolina v. Pearce, 395 U.S. 711, 717 (1969), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794 (1989); McCloud v. Deppisch, 409 F.3d 869, 874 (7th Cir. 2005). In light of the fact that petitioner was sentenced to less than the maximum sentence imposed by Wisconsin law, I question the merit of his claim. See Wis. Stat. §§ 939.50(3)(c) (penalty for class C felony not to exceed 40 years imprisonment) and 940.31(1) (kidnapping is class C felony). However, it is not clear from the petition or its attachments whether the trial court applied the penalty enhancer incorrectly or erred in relying on it. A May 9, 2005 letter from the assistant district attorney to the trial court indicates that the habitual offender

penalty enhancer was dismissed at the time of the plea. Dkt. #2 at 10. However, the May 5, 2006 judgment of conviction states that petitioner pleaded guilty to "kidnapping [939.62 habitual criminality]." Id. at 15. Therefore, I will leave it to the state to respond.

Petitioner's second claim appears to allege a violation of his fundamental right to due process under the Fourteenth Amendment. Because it is not plain from the petition that petitioner is not entitled to relief, I will ask the state to respond.

Petitioner's remaining claims are frivolous and do not require a response from the state. First, although improper denial of a sentencing credit could constitute a violation of the double jeopardy clause, it is clear from the petition and attached documents that petitioner never served any time on the kidnapping conviction. The twelve years that he served in prison were related to his convictions for sexual assault and reckless endangerment. Second, petitioner criticizes the state for breaching the 1994 plea agreement by arguing for imprisonment during the 2006 sentencing hearing. However, that agreement became null and void once petitioner violated the terms of his probation. Even a broad reading of the due process clause would not require the state to stand mute during the later sentencing hearing.

In sum, petitioner's first two claims are sufficient to require a response from a state. However, petitioner's remaining two claims do not require a separate response because it plainly appears from the petition and its attachments that petitioner is not entitled to relief.

Turning to petitioner's motion for appointment of counsel, I note that petitioner has not submitted an affidavit of indigency. I will assume for purposes of argument that he is indigent. When deciding whether to appoint counsel to an indigent litigant, a district court must consider 1) the difficulty of the case in relation to the petitioner's ability to represent himself and 2) whether counsel might make a difference to the outcome. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). The question is "whether the difficulty of the case–factually and legally–exceeds the particular plaintiff's capacity as a layperson to coherently present it to the judge or jury himself." Pruitt v. Mote, 503 F.3d 647, 655 (7th Cir. 2007) (clarifying earlier articulated standard).

Considering these factors, I am denying petitioner's motion. Petitioner's claims are straightforward, both legally and factually. He has presented his claims in a coherent manner to the court. This court is quite familiar with the case law applicable to the constitutional issues raised by petitioner's claims and to the review applicable to § 2254 petitions. This court will apply the law to the facts of petitioner's case thoroughly and fairly to determine whether habeas relief is warranted, whether petitioner pens his own reply, has a jailhouse lawyer assist him or has the assistance of an attorney. If it later becomes apparent that the issues are more complex than anticipated or that petitioner does not have the necessary degree of competence, the court will reconsider the request. Pruitt, 503 F.3d at 656.

ORDER

IT IS ORDERED that:

1. Petitioner's request for appointment of counsel is DENIED without prejudice.

2. The clerk shall serve copies of the petition and this order by mail to Warden Grams and to the Wisconsin Attorney General.

3. The state shall file a response to the first two 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 the issue of cause and prejudice is relevant, the state must address it 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 14th day of March, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB
District Judge