

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

EARL D. PHIFFER,

OPINION and ORDER

Petitioner,

10-cv-400-slc¹

v.

GREGORY GRAMS, Warden,
Columbia Correctional Institution,

Respondent.

Earl D. Phiffer, an inmate at the Columbia Correctional Institution, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He is challenging the sentence he received on March 13, 2008 in the Circuit Court for Rock County, Wisconsin, for one count each of obstructing an officer, fleeing an officer and second-degree recklessly endangering safety. State v. Phiffer, 2003CF133. In previous orders, I dismissed petitioner's claims that the trial court lacked probable cause to bind him over for trial and that the prosecutor was vindictive. I directed the state to respond to petitioner's claim that the sentencing court violated his equal protection rights by failing to credit his sentence with

¹ For the purpose of issuing this order, I am assuming jurisdiction over this case.

time spent in jail pretrial, pre-conviction and post-conviction. The state has filed a response, which petitioner has moved to strike as untimely and false. (I will deny petitioner's motion to strike the response, dkt. #33, because respondent filed the response within the extended deadline set by the court. In addition, I will deny petitioner's motion for ruling on the petition, dkt. #32, as unnecessary.)

I conclude that petitioner's equal protection claim has no merit. The record shows that petitioner was not eligible for bail release in case number 2003CF133 during the time period for which he seeks credit. Moreover, the time was credited toward another sentence. Accordingly, I will deny the petition.

From the state court opinions and documents attached to the parties' submissions, I find the following facts.

RECORD FACTS

A. Case Numbers 2001CF2177, 2001CM1605 and 2002CM959

On July 1, 2002, petitioner was sentenced to ten years for the crime of child abuse in case number 2001CF2177 in the Circuit Court for Rock County. The sentence was stayed and a five-year term of probation was imposed. On the same day, the circuit court withheld sentences in two other cases and imposed a three-year probation term on petitioner for the crime of battery (2001CM1605) and a three-year probation term for several other crimes

(2002CM959).

B. Case Number 2002CF3370

On November 12, 2002, petitioner was arrested and charged with second-degree child sexual assault in case number 2002CF3370. He appeared in the Circuit Court for Rock County on November 14, 2002, at which time cash bond was set. He was released on a signature bond on December 3, 2002. On August 18 and 19, 2003, he was tried and found guilty of the charge of second-degree child sexual assault. The entry for August 19 notes that bond in the case was revoked and that “Def[endant] will be returned to Dodge Correctional Institution.” Dkt. #31-2. On November 17, 2003, petitioner was sentenced to eight years’ imprisonment with no sentence credit.

In 2009, petitioner asked the circuit court to grant him credit on his sentence for the time he spent in custody from the time of his arrest in the case on November 12, 2002 until he was released on signature bond on December 3, 2002, a period of 21 days. In addition, he asked for credit from January 10, 2003 to November 17, 2003, the day he was sentenced. In an “Order on Motion for Sentence Credit,” dated June 30, 2009, the circuit court granted petitioner the 21 days of credit but rejected his request for the additional credit for the period from January 10, 2003 to November 17, 2003. Dkt. #31-3. In the letter, the court referred to a letter from the prosecutor explaining that petitioner’s actions in another case

caused his return to custody on January 10, 2003. (The other case is case number 2003CF133, the case at issue in this petition.) Petitioner appealed from the denial of a postconviction motion in 2002CF3370; that appeal is before the Wisconsin court of appeals. It is not clear from the record whether petitioner is challenging the denial of sentencing credit on appeal.

C. Case Number 2003CF133

Petitioner was arrested and incarcerated on January 10, 2003, on charges of fleeing an officer, and case number 2003CF133 was opened against him. On January 13, 2003, he appeared in the Circuit Court for Rock County in the case. A cash bond was set at that appearance and was increased eight days later. Petitioner remained in custody until January 8, 2008, when he was tried and found guilty by a jury of second-degree reckless endangerment, obstructing an officer and fleeing an officer. He was sentenced on those counts on March 13, 2008. He did not receive any sentence credit for pretrial or other presentencing incarceration in case number 2003CF133.

D. Probation Revocations and Sentence Credit

Petitioner's arrest on January 10, 2003 provided the legal basis for revocation of his probation in the three earlier Rock County cases. Thus, on May 7, 2003, petitioner's

probation was revoked in cases 2001CF2177, 2001CM1605 and 2002CM959, and the ten-year sentence imposed in 2001CF2177 took effect. In 2001CF2177, the circuit court gave petitioner credit on his sentence for 68 days of presentence time, as well as time served during the period “from 1-10-03 until his receipt at the [Dodge Correctional Institution],” which occurred on May 20, 2003. Dkt. #31-8. Also, the circuit court sentenced petitioner to several concurrent two-year prison terms in cases 2001CM1605 and 2001CM959.

E. Post-conviction Motion and Direct Appeal

Petitioner appealed from his conviction and sentence in the case at issue, number 2003CF133. In January 2009, the circuit court denied his request for more than five years of credit against his sentence, stating only that “the facts in this case do not support defendant’s claim that he was being held for over 5 years on solely the charges in this [case] before being sentenced.” Dkt. #15, Ex. D, at 3. Petitioner pursued the claim on his direct appeal from his conviction, where it was rejected by the Wisconsin Court of Appeals in its January 28, 2010 unpublished opinion. Dkt. #15, Ex. H, ¶¶ 20-21. The court held without further explanation that petitioner “did not meet his burden of establishing that he was entitled to sentence credit.” *Id.* at ¶ 21. On May 13, 2010, the Wisconsin Supreme Court denied petitioner’s request for review.

OPINION

Petitioner contends that he was detained in jail prior to his trial and conviction in case 2003CF133 because he could not afford to post bail and that the sentencing court failed to credit his sentence with this pre-conviction time. He contends that the court's denial of sentence credit violated his right to equal protection of the law because he will spend more time in custody than a person who could have afforded to post bail. In other words, petitioner contends that he was treated differently from similarly situated accused defendants solely because of his indigent status. He seeks more than five years of sentence credit in case number 2003CF133, calculated from the time of his arrest in January 2003 to the date of his sentencing in March 2008.

The Court of Appeals for the Seventh Circuit has held that “the equal-protection clause [of the Fourteenth Amendment] requires consideration by the sentencing judge of presentence custody resulting from inability to post bond.” Johnson v. Prast, 548 F.2d 699, 702 (7th Cir. 1977) (citing Faye v. Gray, 541 F.2d 665, 668-69 (7th Cir. 1976)). If pre-sentence custody is not credited or considered by a sentencing court, “the result is that an indigent is confined longer than a non-indigent receiving the same sentence.” Johnson, 548 F.2d at 702; see also Bearden v. Georgia, 461 U.S. 660, 671-72 (1983).

To prevail on his equal protection claim in this habeas corpus proceeding, petitioner must show that the Wisconsin courts' rejection of his sentence credit claim was (1) “contrary

to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). “[T]his standard is difficult to meet,” and requires state prisoners to “show that the state court’s ruling on the claim being presented was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” Harrington v. Richter, 131 S. Ct. 770, 786-87 (2011). This standard applies regardless whether the state court adjudication of the claim included a detailed explanation of reasons or was a summary disposition. Id. at 784.

In this case, the Wisconsin Court of Appeals rejected petitioner’s request for sentence credit toward his sentence in 2003CF133, ruling without detailed explanation that petitioner had failed to demonstrate his entitlement to the credit. Dkt. #15-8. This was an appropriate adjudication, was not contrary to Supreme Court authority, did not involve an unreasonable application of federal law and was not based upon an unreasonable determination of the facts. To the contrary, the record shows that petitioner was not being held in custody from January 10, 2003 to March 13, 2008 because he was unable to post bail; rather, he was in custody either because he was awaiting probation revocation in cases numbered 2001CF2177, 2001CM1605 and 2002CM959, or because he was actually

imprisoned serving a sentence for child abuse in case 2001CF2177 and second-degree sexual assault in case 2002CF2177. Thus, he was not forced to serve a longer sentence in 2003CF133 because of his indigency. Moreover, the Circuit Court for Rock County gave him credit on an earlier sentence in case number 2001CF2177. for the time period from January 10, 2003 to November 17, 2003, before he was serving any sentence in 2003CF133. Thus, petitioner's equal protection claim has no factual or legal basis. Accordingly, the state court's decision that petitioner failed to show that he was entitled to sentence credit in 2003CF133 was not unreasonable.

C. Certificate of Appealability

The only question remaining is whether to grant a certificate of appealability to petitioner. Under Rule 11 of the Rules Governing Section 2254 Cases, I must issue or deny a certificate of appealability when entering a final order adverse to petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not close. No reasonable jurists would debate that petitioner failed to show that the state court denied him equal protection of the law by refusing his request for sentence credit.

ORDER

IT IS ORDERED that

1. Petitioner Earl Phiffer's motion to strike, dkt. #33, and motion for a ruling on the petition for a writ of habeas corpus, dkt. #32, are DENIED.

2. The petition of Earl Phiffer for a writ of habeas corpus under 28 U.S.C. § 2254 is DENIED and petitioner is DENIED a certificate of appealability. Petitioner may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 15th day of February, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge