IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

EARL D. PHIFFER,

Petitioner,

v.

GREGORY GRAMS, Warden,
Columbia Correctional Institution,

Respondent.

OPINION and ORDER

10-cv-400-slc[1]

- -

Earl D. Phiffer, an inmate at the Columbia Correctional Institution is challenging his March 17, 2008 judgment of conviction in the Circuit Court for Rock County for one count each of obstructing an officer, fleeing an officer and second-degree recklessly endangering safety. In a petition for habeas relief, petitioner raised three grounds: (1) the trial court lacked probable cause to bind him over for trial; (2) the sentencing court violated his equal protection rights by failing to credit his sentence with time spent in jail pretrial, pre-conviction and after conviction; and (3) the prosecutor acted vindictively when he amended the criminal complaint after petitioner had pleaded guilty. In an order dated August 23,

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

2010, I dismissed petitioner's claim that the state court lacked probable cause to detain him until trial, concluding that this claim was not of constitution dimensions and could not be brought in a petition for writ of habeas corpus. With respect to petitioner's other two claims, petitioner did not include enough facts in his petition for the court to determine whether he may be entitled to relief. I gave petitioner an opportunity to file an amended petition with additional facts to support his claims regarding sentence credit and vindictive prosecution. Petitioner has filed an amended petition.

The amended petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases. Under Rule 4, I must dismiss the amended petition if it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief. The petition must cross "some threshold of plausibility" before the state will be required to answer. Harris v. McAdory, 334 F.3d 665, 669 (7th Cir. 2003); Dellenbach v. Hanks, 76 F.3d 820, 822 (7th Cir. 1996).

As an initial matter, petitioner alleges the same claim that his conviction is invalid because the trial court lacked probable cause to detain him prior to his trial. However, as I explained to petitioner in the previous order, claims regarding pretrial detention are not cognizable in federal habeas petitions. Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (holding that an "illegal arrest or detention does not void a subsequent conviction" and "a conviction will not be vacated on the ground that the defendant was detained pending trial without a

determination of probable cause."). I will not consider this claim further.

After reviewing the amended petition, I conclude that petitioner has not stated a constitutional claim with respect to his allegation that the trial court allowed the prosecutor to amend the criminal complaint after he had pleaded not guilty. Thus, I will dismiss this claim. However, the allegations in petitioner's amended petition regarding sentence credit are sufficient to state a valid constitutional claim. In addition, it appears that petitioner has exhausted his state court remedies and filed his petition within the one-year limitations period. Accordingly, I will order respondent to respond to petitioner's claim regarding sentence credit.

DISCUSSION

A. Prosecutor's Decision to Amend Criminal Complaint

Petitioner states that after he pleaded "not guilty," the prosecutor amended the criminal complaint to include charges that were unrelated to the original complaint. In petitioner's original petition, he contended that this amounted to "vindictive prosecution" and violated his right to due process under the Fourteenth Amendment. In the August 23, 2010 order, I told petitioner that in order to state a claim for prosecutorial vindictiveness, he needed to provide facts showing that the prosecutor's decision to amend the criminal complaint was motivated by animus. Dkt. #6, at 8-9 (citing United States v. Jarrett, 447

F.3d 520, 525 (7th Cir. 2006); United States v. Spears, 159 F.3d 1081, 1086 (7th Cir. 1998)).

In his amended petition, petitioner does not assert prosecutorial vindictiveness and provides no allegations related to the prosecutor's motivation in amending the complaint. Instead, petitioner cites to Wis. Stat. § 973.12, which prohibits prosecutors from amending criminal complaints to include "repeater" status after the defendant has been arraigned and the court accepts a plea. See also State v. Robles, 157 Wis. 2d 55, 458 N.W.2d 818 (1990). Petitioner contends that in his case, the prosecutor amended the complaint to include charges of second degree reckless endangement as a repeater and felony bail jumping as a repeater after petitioner pleaded guilty, thus violating Wis. Stat. § 973.12 and petitioner's right to due process.

Petitioner's argument has two problems. First, a violation of a Wisconsin statute does not automatically amount to a violation of petitioner's federal constitutional rights. Thus, even if the prosecutor amended the complaint in violation of Wis. Stat. § 973.12, petitioner cannot state a claim for violation of his constitutional due process rights based solely on such violation. As I explained to petitioner previously, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring . . ., generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). The exception to this

general rule is that the due process clause prohibits prosecutions that are motivated by prosecutorial vindictiveness, something that petitioner has not even attempted to establish.

The second problem with petitioner's claim is that the record shows that the prosecutor amended the complaint *before* petitioner was arraigned and before his not guilty plea was accepted by the court. Although petitioner states that he pleaded "not guilty" to the original charges during "jail intake" on January 13, 2003, petitioner's plea was not accepted by the court until January 21, 2003, after the prosecutor amended the charges. Phiffer, 2010 WL 307926, at *8, n.2. Accordingly, petitioner has no constitutional claim arising from the prosecutor's amendment of the criminal complaint.

C. Jail Time Credit

Petitioner alleges that he was detained in jail prior to his trial and conviction 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 based on his indigent status.

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.

In the August 23, 2010 order, I directed petitioner to amend his petition and include information about the specific time period for which he seeks sentence credit, whether he was in custody for any other conviction at that time, whether his time in custody pretrial was credited to a different sentence and why he believes his sentence is inaccurate. Petitioner alleges that he was arrested and incarcerated on January 10, 2003, on charges of fleeing an officer, and case number 2003CF133 was opened against him. He was not sentenced in that case until March 13, 2008. However, on November 17, 2003, petitioner was sentenced in another case, 2002CF3370, for second degree sexual assault of a child. Presumably, after petitioner was sentenced on November 17, 2003 in case number 2002CF3370, he began serving that sentence. Thus, petitioner's time in custody between November 2003, when he was sentenced in 2002CF3370, and March 13, 2008, when he was sentenced in case number 2003CF133, was likely credited toward his sentence for second degree sexual assault of a child. However, it is not clear whether the time petitioner spent in custody from January 10, 2003 to November 17, 2003 was credited toward any sentence. Petitioner alleges that he

never received credit for this time. Although I am skeptical that petitioner never received credit toward *any* sentence for this time, as he alleges, I will give him the benefit of the doubt and order the state to respond to petitioner's claim that he was denied sentence credit.

ORDER

IT IS ORDERED that

1. Under an informal service agreement between the Attorney General for the State of Wisconsin and the court, copies of the petition and this order are being sent today to the Attorney General for service on Warden Grams.

2. Within 30 days of the date of service of this order, respondent must file an answer to petitioner Earl D. Phiffer's claim that the sentencing court refused to consider or credit petitioner's sentence for time in custody pre-conviction and pre-sentence, in violation of petitioner's right to equal protection under the Fourteenth Amendment. The answer must comply with Rule 5 of the Rules Governing Section 2254 Cases and must show cause, if any, why this writ should not issue. Respondent need only submit transcripts and records from the state court proceedings that are relevant to petitioner's sentencing claim.

3. **Dispositive motions**. If the state contends that the petition is subject to dismissal on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion or procedural default, it is authorized to file a motion to dismiss, a

supporting brief and any documents relevant to the motion, within 30 days of this order, either with or in lieu of an answer. Petitioner shall have 20 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, it will set a deadline within which the state must file an answer, if necessary, and establish a briefing schedule regarding any claims that have not been dismissed.

4. **When no dispositive motion is filed.** If respondent does not file a dispositive motion, then the parties shall adhere to the following briefing schedule regarding the merits of petitioner's claims:

- Petitioner shall file a brief in support of the petition within 30 days of the date of service of respondent's answer. Petitioner bears the burden to show that his conviction or sentence violates the federal Constitution, United States Supreme Court case law, federal law or a treaty of the United States. With respect to any claims that were adjudicated on the merits in a state court proceeding, petitioner bears the burden to show that the state court's adjudication of the claim:

    1. resulted in a decision that was 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). Petitioner should keep in mind that in a habeas proceeding, a federal court is required to accept the state court's determination of factual issues as correct, unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

NOTE WELL: If petitioner already has submitted a memorandum or brief in support of his petition that addresses the standard of review set out above, then he does not need to file another brief. However, if petitioner's initial brief did not address the standard of review set out in § 2254(d), then he should submit a supplemental brief. If he fails to do so, then he risks having some or all of his claims dismissed for his failure to meet his burden of proof.

- Respondent shall file a brief in opposition within 30 days of the date of service of petitioner's brief.

- Petitioner shall have 20 days after service of respondent's brief in which to file a reply brief.

Entered this 13th day of September, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge