IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

JONATHAN B. McCORD,

OPINION and ORDER

Petitioner,

10-cv-579-bbc

v.

ROBERT HUMPHREYS, Warden,
Kettle Moraine Correctional Institution,

Respondent.

- -

Jonathan B. McCord, an inmate at the Kettle Moraine Correctional Institution in Plymouth, Wisconsin, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. He is challenging a February 21, 2008 order for reconfinement after revocation of extended supervision in Dane County case 2001CF189. Petitioner raises four grounds for relief in his habeas petition: (1) the state was collaterally estopped under the Fifth Amendment's prohibition against double jeopardy from seeking reconfinement in defendant's burglary case because the case was terminated on August 17, 2007; (2) the statute of limitations barred the state from appealing the judge's August 17, 2007 order terminating the burglary case; (3) the judge lost subject matter jurisdiction over petitioner's burglary case when it

terminated the case on August 17, 2007; and (4) the state violated petitioner's right to equal protection under the Fourteenth Amendment when it failed to appeal the court's termination of the burglary case in a timely manner. Petitioner is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment of his filing fee.

The 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 petition if it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief. Petitions under § 2254 must "specify all the grounds for relief available to the petitioner" *and* "state the facts supporting each ground." Rule 2(c) of the Rules Governing Section 2254 Cases. 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).

After reviewing the petition, I conclude that petitioner has not shown that he is in custody in violation of federal law. All of his claims for relief allege either state law violations that cannot be heard in a federal habeas case or they fail to state a claim under federal law or the Constitution. Therefore, I will dismiss the petition.

Also before the court is petitioner's motion to supplement his petition, dkt. #10, and a motion to appoint counsel for him, dkt. #8. Petitioner's supplement contains factual

assertions and arguments regarding his claim that the statute of limitations barred the state from seeking his reconfinement. This claim is an issue of state law, not one of federal law. Because there is no need for supplemental information on this claim, petitioner's motion to supplement his petition will be denied. In addition, because I conclude that petitioner's petition lacks merit and must be dismissed, I will deny petitioner's motion for appointment of counsel.

From the petition and attached materials, I find the following facts.

FACTS

In 2001, petitioner Jonathan McCord was convicted of burglary and placed on probation by the Circuit Court for Dane County. Wisconsin v. McCord, 2001CF189. His probation was revoked a few months later, and in 2002 the court sentenced him to two years of initial confinement and three years of extended supervision. He served his initial confinement and was released to supervision in September 2003. His extended supervision was revoked in April 2004 and he was returned to court and sentenced. He was released again to supervision in 2005.

On July 12, 2007, petitioner's parole agent, Juan Guerro, filed a petition with the circuit court seeking reduction of petitioner's restitution obligation to a civil judgment. Guerro requested the court to "terminate [petitioner's] probation" and "have a civil

judgment entered against [petitioner] for the unpaid restitution." Guerro represented to the court that petitioner was placed on probation in 2002 for five years and that the probation would expire on August 18, 2007. (This information was incorrect because petitioner was not serving the five-year probation term that he received in 2002; rather, he was serving the period of extended supervision that had been imposed in 2004.) The circuit court entered an order reducing petitioner's restitution obligation to a civil judgment and terminating petitioner from probation.

Later, the Department of Corrections determined that petitioner had a substantial period of time remaining on the extended supervision term that had been imposed in 2004. The department revoked that extended supervision on September 19, 2007. The circuit court held a reconfinement hearing on February 21, 2008. At the hearing, the court vacated the August 2007 order, concluding that it was based on erroneous information. The court then ordered petitioner reconfined for the maximum time remaining on the sentence, which was one year, nine months and one day.

In Dane County case number 2001CF1582, petitioner was convicted of escape in 2002 and again received probation. The probation term was revoked in 2004 and the court sentenced petitioner to one year of initial confinement and four years of extended supervision. His supervision in this case was also revoked in September 2007. At the consolidated reconfinement hearing on February 21, 2008, the court ordered petitioner

reconfined in the escape case for two years out of the three years, eleven months and seventeen days available. The court ordered that petitioner serve the two reconfinement sentences consecutively.

Plaintiff appealed the court's reconfinement order. It was summarily affirmed by the Wisconsin Court of Appeals on December 2, 2009. The court of appeals rejected petitioner's contention that the August 2007 order for restitution discharged him from his burglary sentence. The court held that although the order contained an erroneous reference to petitioner's probationer status and its termination, the order did not terminate petitioner's sentence or extended supervision. The court of appeals also explained that even if the order could be construed as terminating petitioner's sentence, the trial court had properly vacated it under Wis. Stat. § 806.07(1)(a) because it was based on undisputedly mistaken information that petitioner was on probation rather than extended supervision at the time and that he was eligible for discharge.

On May 13, 2010, the Wisconsin Supreme Court denied petitioner's petition for review. Petitioner did not file a petition for certiorari in the United States Supreme Court.

OPINION

A federal court may grant a writ of habeas corpus only if the petitioner shows that he is in custody in violation of the laws or treaties or Constitution of the United States. 28

U.S.C. § 2254. Plaintiff raises four challenges to his custody.

First, plaintiff contends that the state violated his rights to be free from double jeopardy under the Fifth Amendment by revoking his extended supervision and seeking reconfinement on his burglary charge after the court terminated that charge. This claim has problems. As the Wisconsin court of appeals pointed out, it is not clear that the circuit court terminated petitioner's burglary case in its August 17, 2007 order. Although the judge noted that petitioner's probation was expiring the following day, the judge made no findings or orders regarding the expiration of petitioner's extended supervision, which he was serving at the time of the hearing. Even assuming, however, that the court decided on August 17 that petitioner had completed his sentence in the burglary case and later reinstated the sentence at the reconfinement hearing on February 21, 2008, the state did not violate petitioner's Fifth Amendment rights.

The double jeopardy clause protects a person from being punished twice for the same offense and prevents a sentencing court from imposing a punishment greater than the legislature intended. Jones v. Thomas, 491 U.S. 376, 380-81 (1989); Missouri v. Hunter, 459 U.S. 359, 365-66 (1983); United States v. Warneke, 199 F.3d 906, 907 (7th Cir. 1999) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). These concerns are not applicable here. Petitioner does not deny that the court's termination of his probation was based on a probation officer's misrepresentation. He does not deny that he actually had time

remaining on his burglary sentence. The reconfinement order merely ordered the petitioner to serve the sentence he had received already. The order corrected an error of the court, but did not amount to a double punishment for petitioner's burglary offense and did not result in a sentence greater than the legislature intended. Thus, petitioner was not subject to double jeopardy.

In his second ground for relief, petitioner contends that the state was barred by a state law statute of limitations from raising issues related to petitioner's burglary charge at the reconfinement hearing in February 2008. The statute of limitations is a state law issue. It is well-established that "federal habeas corpus relief does not lie for errors of state law." Estelle v. McGuire, 502 U.S. 62, 67 (1991) (quoting Lewis v. Jeffers, 497 U.S. 764, 780 (1990)). In other words, petitioner cannot assert a state law statute of limitation claim in a habeas petition. There is no merit to this ground for relief.

Petitioner's third ground for relief is that the circuit court lost subject matter jurisdiction when it terminated petitioner's burglary case on August 17, 2007 and therefore, lacked jurisdiction to vacate its August decision six months later under Wis. Stat. § 806.07(1)(a). Section 806.07(1)(a) allows a court to relieve a party from a judgment, order or stipulation based on "mistake, inadvertence, surprise, or excusable neglect."

Although petitioner has framed his challenge broadly as an issue of subject matter jurisdiction, petitioner is really challenging whether the state court had authority to invoke

§ 806.07(1)(a) and vacate a previous order. This is a matter of state law and procedure, does not implicate a federal right and may not be raised in a federal habeas petition. Estelle, 502 U.S. at 67-68 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); see also Wright v. Angelone, 151 F.3d 151, 158 (4th Cir. 1998) (challenge to state court's jurisdiction over criminal case falls under state law and is not cognizable under § 2254); Rhode v. Olk-Long, 84 F.3d 284, 287 (8th Cir. 1996) ("determination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary") (internal quotation marks and citation omitted); Poe v. Caspari, 39 F.3d 204, 207 (8th Cir. 1994) ("Th[e] determination of jurisdiction by the state courts is binding on [federal] court[s], and does not provide a basis for habeas review."); Wills v. Egeler, 532 F.2d 1058, 1059 (6th Cir. 1976) ("Determination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary."); Griffin v. Padula, 518 F. Supp. 2d 671, 677 (D.S.C. 2007) ("Whether a state court has subject matter jurisdiction over an offense is a question of state law."); United States ex rel. Holliday v. Sheriff of Du Page County, Illinois, 152 F. Supp. 2d 1004, 1013 (N.D. Ill. 2001) (lack of jurisdiction is state law issue not cognizable in federal habeas case). Therefore, petitioner's claim that the circuit court lacked jurisdiction to reconfine him is not cognizable under § 2254.

Finally, petitioner contends that the state violated his right to equal protection under

the Fourteenth Amendment by waiting six months to appeal the court's termination of petitioner's burglary case. It is not entirely clear what petitioner means when he says that the state waited six months to "appeal" the August 17 order. Although the court did not vacate the August order until February 21, 2008, the Department of Corrections revoked petitioner's extended supervision in September 2007, just one month after the court allegedly terminated petitioner's probation status. At any rate, petitioner does not explain how any action by the state violated his right to equal protection under the law.

The equal protection clause provides that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). Equal protection claims typically involve a government action or rule that draws a distinction using a suspect class, such as race, alienage or national origin, or that denies a fundamental right. Srail v. Village of Lisle, Illinois, 588 F.3d 940, 943 (7th Cir. 2009). To succeed ultimately on an equal protection claim, petitioner would have to demonstrate intentional or purposeful discrimination. Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982). Petitioner's equal protection claim is not related to his membership in a suspect class, the deprivation of a fundamental right or intentional or purposeful discrimination. That the court waited six months to vacate the termination order does not amount to a violation of petitioner's right to equal protection under the law.

In sum, the facts alleged by petitioner, even if true, fail to show that the order of

revocation and reconfinement entered by the circuit court is in violation of the Constitution or laws of the United States. Therefore, I will dismiss the petition for a writ of habeas corpus.

The only question remaining is whether to grant a certificate of appealability to petitioner. Under Rule 11 of the Rules Governing Section 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 me to ask the parties to submit arguments on whether a certificate should issue in this case, it is not necessary to do so in this case because the question is not a close one. Reasonable jurists would not debate that petitioner is entitled to habeas relief on the claims he presented in his petition because they are either state law claims or not claims at all. Accordingly, I am denying a certificate of appealability.

ORDER

IT IS ORDERED that

1. Petitioner Jonathan B. McCord's motion for appointment of counsel, dkt. #8, is DENIED.

2. Petitioner's motion to supplement his petition, dkt. #10, is DENIED.

3. Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED with prejudice for petitioner's failure to show that he is in custody in violation of the Constitution or laws of the United States.

4. Petitioner is DENIED a certificate of appealability. He may seek a certificate from the court of appeals under Fed. R. App. P. 22.

5. The clerk of court is directed to enter judgment for respondent Robert Humphreys and close this case.

Entered this 22d day of November, 2010.

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