

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

CLARENCE E. REED,

Petitioner,

v.

JUDY SMITH, Warden,

Respondent.

ORDER

11-cv-345-bbc

After pleading guilty to delivering cocaine and possessing a firearm as a felon, petitioner Clarence Reed was convicted and sentenced to ten years in prison. In this petition for a writ of habeas corpus under 28 U.S.C. § 2254, petitioner is raising three claims: (1) the government breached its plea agreement regarding its sentencing recommendation; (2) trial counsel provided ineffective assistance by failing to object to the breach of the plea agreement; and (3) appellate counsel provided ineffective assistance by failing to raise that issue on appeal. He has paid the \$5 filing fee.

Under Rule 4 of the Rules Governing Section 2254 Cases, I must dismiss the petition if it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief. Because none of petitioner's claims have any legal merit, I am dismissing

his petition.

One potential problem with the petition is that it seems that petitioner did not properly exhaust his state court remedies. Before a federal court may consider the merits of a state habeas petitioner's claims, the petitioner must exhaust the remedies available to him in the state courts. 28 U.S.C. § 2254(b)(1)(A); O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004). When the petitioner has already pursued his state court remedies but failed to properly present his claims to the state courts along the way, "it is not the exhaustion doctrine that stands in the path to habeas relief . . . but rather the separate but related doctrine of procedural default." Perruquet, 390 F.3d at 514. The procedural default doctrine requires that state prisoners not only must prove that they are not eligible "for state relief before raising their claims in federal court, but also that they give state courts a sufficient opportunity to decide those claims before doing so." O'Sullivan, 526 U.S. at 854 (Stevens, J., dissenting).

Under the procedural default doctrine, a federal court is precluded from reaching the merits of a habeas claim if the petitioner either (1) failed to present his claim to the state courts and it is clear that those courts would now hold the claim procedurally barred; or (2) presented his claim to the state courts but the state court dismissed the claim on a state procedural ground independent of the federal question and adequate to support the judgment. Perruquet, 390 F.3d at 514 ; Moore v. Bryant, 295 F.3d 771, 774 (7th Cir.

2002); Chambers v. McCaughtry, 264 F.3d 732, 737-38 (7th Cir. 2001). If a petitioner has procedurally defaulted a claim, a federal court cannot reach the merits of that claim unless the petitioner demonstrates (1) cause for the default and actual prejudice from failing to raise the claim as required or (2) that enforcing the default would lead to a "fundamental miscarriage of justice." Steward v. Gilmore, 80 F.3d 1205, 1211-12 (7th Cir. 1996) (quoting Wainwright v. Sykes, 433 U.S. 72, 87 (1977)).

In this case, the petition may be procedurally deficient in two ways. First, it seems that petitioner did not fairly present any of his claims to the Wisconsin Supreme Court. He attaches an order from the supreme court denying his motion for an extension of time to file a petition for review and treating his motion as a timely filed petition. In the same order, the court gave petitioner a deadline for filing a statement in support of the petition. Dkt. #1-2, at 2. The court stated that "[i]f the statement is not filed by that time, the petition will be summarily dismissed." Although petitioner does not include any further orders from the supreme court, the Wisconsin Supreme Court and Court of Appeals Case Access website shows that the court summarily dismissed the petition on August 11, 2010. <http://wscca.wicourts.gov>. Petitioner does not give any reason for his failure to comply with the court's deadline.

Second, petitioner does not suggest that he presented his claim for ineffective assistance of appellate counsel to any state court, such as in a petition under State v. Knight,

168 Wis. 2d 509, 520, 484 N.W.2d 540, 544 (1992) (in order to bring claim of ineffective assistance of appellate counsel, defendant must petition appellate court that heard appeal for writ of habeas corpus). Thus, he has not exhausted his state court remedies as to that claim.

However, even if I assume that petitioner successfully completed the exhaustion process, all of his claims fail because they are legally frivolous. With respect to his claim for breach of the plea agreement, he says that the “original plea agreement” was that the state would recommend that his sentence “would run consecutively to any other sentence” but that the state actually recommended that “any sentence be consecutive.” What is the difference between these two things? Petitioner does not say. The Wisconsin Court of Appeals could discern no difference and neither can I. In any event, the court of appeals stated in its opinion that the state did not ask the circuit court to impose *any* sentences consecutively. Dkt. #1-1, at 5. Petitioner does not challenge the court’s recitation of the facts, so there is no support for the claim that the state breached its plea agreement with petitioner by requesting a harsher sentence than promised. Because petitioner’s other claims are contingent on the first one, those claims are frivolous as well.

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to a 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 a close one. For the reasons stated, reasonable jurists would not debate whether petitioner fairly presented his claim to the Wisconsin courts.

ORDER

IT IS ORDERED that petitioner Clarence Reed's petition for a writ of habeas corpus is DENIED for petitioner's failure to show that he is in custody in violation of federal law. Petitioner is DENIED a certificate of appealability. He may seek a certificate from the court

of appeals under Fed. R. App. P. 22.

Entered this 11th day of July, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge