

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

RICHARD TURNER,

ORDER

Petitioner,

11-cv-50-bbc

v.

JEFFREY PUGH, Warden,
Stanley Correctional Institution,¹

Respondent.

Richard Turner, an inmate at the Stanley Correctional Institution, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the \$5 filing fee. In the petition, he challenges the sentence he received for his July 27, 2007 conviction in the Circuit Court for Rusk County for second-degree sexual assault to a child under the age of 16. Petitioner contends that the judge relied on false information in sentencing him. Specifically, during sentencing the judge stated that petitioner had admitted “pimping” the victim to his friends. Petitioner denies that he admitted to being a pimp and contends that

¹ Petitioner named the State of Wisconsin as respondent to the petition. However, in a habeas action filed by a state prisoner, the proper respondent is the state officer having custody of the prisoner. Rule 2 of the Rules Governing Section 2254 Cases. That person is the warden of the Stanley Correctional Institution, Jeffrey Pugh. I have revised the caption accordingly.

the judge relied on that false information to increase petitioner's sentence.

A defendant's right to due process may be violated if the court relies on "misinformation of a constitutional magnitude" when imposing a sentence. United States v. Tucker, 404 U.S. 443, 447 (1972). At this stage, the allegations in petitioner's petition are sufficient to state a valid constitutional claim for denial of his right to due process. In addition, it appears that petitioner has exhausted his state court remedies and filed his petition within the one-year limitations period. Therefore, I will direct the state to respond to the petition.

ORDER

IT IS ORDERED that

1. Pursuant to 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 Pugh.

2. Within 30 days of the date of service of this order, respondent must file an answer to petitioner Richard Turner's claim that the sentencing judge relied on false information in sentencing him. 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. Because petitioner's claim was adjudicated on the merits in a state court proceeding, State v. Turner, 320 Wis. 2d 484, 769 N.W.2d 878 (May 27, 2009) (unpublished), 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: Although petitioner already has submitted a brief in support of his petition, it does not address the standard of review set out in § 2254(d) explicitly. Thus, he should submit a supplemental brief. If he fails to do so, then he risks having his claim 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 10th day of February, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge