

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

SYLVESTER THOMAS,

ORDER

Petitioner,

12-cv-143-bbc

v.

DEBORAH MCCULLOCH, Director,
Sand Ridge Secure Treatment Center,

Respondent.

Sylvester Thomas, a patient at the Sand Ridge Secure Treatment Center, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, contending that his confinement as a sexually violent person under Wisconsin law violates the United States Constitution. He has paid the \$5 filing fee. The petition is before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases.

As an initial matter, I note that petitioner is subject to an order issued by the Court of Appeals for the Seventh Circuit that prohibits him from filing any new civil litigation in the federal courts of this circuit until he pays a \$1,000 fine. Thomas v. Van Hollen, case no. 10-cv-3144 (Nov. 9, 2010). However, the order does not apply to “genuine motions for release from custody under 28 U.S.C. § 2254.” Id.

Petitioner has included no facts in his petition and does not explain why he believes

his confinement violates the Constitution. However, petitioner has filed at least three habeas petitions in the Eastern District of Wisconsin related to his civil confinement that provide background for the present petition. In addition, I have been able to obtain current information about petitioner's status from public records maintained by the Wisconsin Circuit Court Access program at <http://wcca.wicourts.gov>.

Petitioner was convicted on April 13, 1992 of third-degree sexual assault. His prison term ended on October 2007, and the state immediately petitioned to civilly commit him as a sexually violent person under Wis. Stat. ch. 980. The Circuit Court for Milwaukee County opened case number 2007-CI-11 for the civil commitment proceedings. While the civil commitment proceedings were underway, petitioner filed three separate petitions for writs of habeas corpus in federal court, contending that his civil commitment was illegal. Thomas v. Bartow, 09-cv-640 (E.D. Wis. June 30, 2009); Thomas v. Bartow, 10-cv-613 (E.D. Wis. Jul, 21, 2010); Thomas v. Wisconsin, 11-cv-185 (E.D. Wis. Feb. 17, 2011). All three petitions were dismissed. In the most recent decision on petitioner's claim regarding the legality of his commitment, Judge Stadtmueller provided an extensive discussion of petitioner's state court commitment case, noting that petitioner had been through several attorneys and that the trial had been delayed for various reasons. Thomas v. Bartow, 10-cv-613, dkt. #22 (Aug. 11, 2011). As of August 11, 2011, petitioner was still awaiting trial in state court. Thus, Judge Stadtmueller dismissed the petition, concluding that petitioner had not yet exhausted his state court remedies. Id. The court of appeals affirmed the dismissal,

noting that because the Wisconsin courts had not decided the issue of petitioner's commitment, the "district court correctly dismissed [petitioner's] petition on the ground that he has failed to exhaust state remedies." Thomas v. Bartow, case no. 11-cv-2956 (7th Cir. Dec. 15, 2011).

A review of the electronic docket from petitioner's commitment case indicates that little has changed since Judge Stadtmueller's August 2011 order. Rather, it appears that the case has been transferred to a different state court judge and there have been interlocutory appeals and other delays. The case is scheduled for a jury trial on July 30, 2012. Thus, the Wisconsin courts have yet to make a final determination on whether petitioner is a sexually violent person. Petitioner must wait until the jury trial is concluded and he has exhausted his remedies in state court before he can seek habeas corpus relief in federal court. Therefore, I am dismissing his petition without prejudice for failure to exhaust his administrative remedies.

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. Reasonable jurists would not disagree that petitioner has not yet exhausted his state court remedies. Thus, petitioner has failed to make a substantial showing of the denial of a constitutional right.

ORDER

IT IS ORDERED that the petition of Sylvester Thomas for a writ of habeas corpus under 28 U.S.C. § 2254 is DISMISSED without prejudice for petitioner’s failure to exhaust his state court remedies. 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 18th day of April, 2012.

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