

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

CHARLES LAMAR,

Petitioner,

v.

WARDEN LIZZIE TEGELS,

Respondent.

ORDER

12-cv-697-wmc

Petitioner Charles Lamar, an inmate at the New Lisbon Correctional Institution, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the five dollar filing fee. The petition is before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 Proceedings in the United States District Courts.

Lamar challenges the conviction and sentence that he received in Milwaukee County Case No. 06CF1688. Lamar was charged in that case as a habitual offender in one count of felony aggravated battery and two counts of misdemeanor bail jumping. Lamar pleaded guilty to the aggravated battery charge and one count of misdemeanor bail jumping as a habitual offender. Judge Jeffrey A. Conen of the Milwaukee County Circuit Court accepted Lamar's guilty plea on September 15, 2006, and sentenced Lamar to 12 years of initial confinement and five years extended supervision on the aggravated battery count and one year of initial confinement followed by one year of extended supervision on the bail jumping count. The sentences were made concurrent with each other and Lamar was granted 177 days of credit for time served in jail during pretrial confinement. The second count of misdemeanor bail jumping was dismissed following Lamar's guilty plea.

After his transfer to state prison, Lamar filed a motion to withdraw his plea to the aggravated battery charge. Judge Conen granted that motion on August 29, 2007, and

reinstated the second misdemeanor bail jumping count that had been dismissed following his previous guilty plea. After negotiation, the State dropped the habitual offender enhancer. Lamar pleaded guilty anew to the aggravated battery charge and the reinstated bail jumping count. The case was then transferred to Milwaukee County Circuit Judge Clare Fiorenza for re-sentencing. On January 3, 2008, Judge Fiorenza imposed a sentence of 10 years' initial confinement and five years of extended supervision and 9 months' imprisonment on the bail jumping count. The sentences were made concurrent with each other but consecutive to the sentence imposed previously for misdemeanor bail jumping as a habitual offender. Lamar was given credit for 306 days of time served in jail during pretrial confinement. However, he was not granted credit for the 189 days that he served in prison under the first sentence for aggravated battery that was imposed by Judge Conen.

On July 23, 2008, Lamar filed a post-conviction motion under § 809.30(2)(h), requesting that credit for time previously served in prison (under the earlier sentence for aggravated battery as a habitual offender) be applied to his current sentence for aggravated battery. Lamar argued that he was entitled to this credit under Wis. Stat. § 973.04 and the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which prohibits multiple punishments for the same offense, among other things. The circuit court denied that motion on August 18, 2008.

Lamar filed an appeal from the circuit court's decision to deny additional credit for time served, raising the same arguments under Wis. Stat. § 973.04 and the Double Jeopardy Clause. Noting that the circuit court made the new sentence consecutive to the old one, namely, the non-vacated sentence for misdemeanor bail jumping as a habitual offender, the Court of Appeals

determined that Lamar was not entitled to any additional credit on his aggravated battery sentence and affirmed the judgment. *See State v. Lamar*, 2009 WI App 133, 321 Wis. 2d 334, 773 N.S.2d 446 (Aug. 11, 2009). The Wisconsin Supreme Court granted Lamar’s petition for review and, for similar reasons, affirmed the decision on June 29, 2011, over the dissenting opinion of Chief Justice Shirley Abrahamson. *See State v. Lamar*, 2011 WI 50, 334 Wis. 2d 536, 799 N.W.2d 758. Lamar did not pursue a petition for a writ of certiorari from the United States Supreme Court and his time to do so expired on September 27, 2011.

In a petition filed on September 25, 2012, Lamar now seeks relief under 28 U.S.C. § 2254. Lamar argues that, by refusing to grant him an additional 189 days of credit against his current sentence for aggravated battery, “the decisions of the Wisconsin Court of Appeals and Wisconsin Supreme Court were contrary to, or were an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court in *Ex parte Lange*, 85 U.S. 163 (1873) and *North Carolina v. Pearce*, 395 U.S. 711 (1969), *overruled in part on other grounds Alabama v. Smith*, 490 U.S. 794 (1989).”

It appears that petitioner has exhausted his state court remedies and that he has filed his petition within the applicable limitations period. Accordingly, the court will request an answer from the respondent.

ORDER

IT IS ORDERED THAT:

1. **Service of petition.** Pursuant to an informal service agreement between the Attorney General and the court, the Attorney General is being notified to seek service on the

respondent, Lizzie Tegels, in her official capacity as warden of the New Lisbon Correctional Institution.

2. **Answer deadline.** Within 60 days of the date of service of this order, respondent must file an answer to the petition, in compliance with Rule 5 of the Rules Governing Section 2254 Cases, showing cause, if any, why this writ should not issue.

3. **Motions to dismiss.** If the state contends that the petition is subject to dismissal on its face - - on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion or procedural default - - then it is authorized to file within 30 days of this order, a motion to dismiss, a supporting brief and any documents relevant to the motion. 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.

4. **Denial of motion to dismiss.** If the court denies such a motion to dismiss in whole or in part, then it will set deadlines for the state to file its answer and for the parties to brief the merits.

5. **Briefing on the merits.** If respondent does not file a motion to dismiss, then the parties shall adhere to the following briefing schedule regarding the merits of petitioner's claims:

- (a) Petitioner shall file a brief in support of his petition within 30 days after respondent files its answer. With respect to claim adjudicated on the merits in state court, petitioner must show either that (1) the state court contravened a controlling opinion of the United States Supreme Court; (2) the state court applied a controlling opinion of the United States Supreme Court in an unreasonable manner; or (3) the state court's decision rested upon an unreasonable determination of the facts. 28 U.S.C. § 2254(d).

- (b) Respondent shall file a brief in opposition within 30 days after petitioner files his initial brief.
- (c) Petitioner shall have 20 days after respondent files its brief in which to file a reply brief.

Entered this 16th day of October, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge