

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

NATHAN GILLIS,

Petitioner,

v.

MICHAEL MEISNER,

Respondent.

OPINION and ORDER

13-cv-195-bbc

Petitioner Nathan Gillis, , a prisoner at the Wisconsin Secure Program Facility, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. He has paid the five dollar filing fee. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases. After completing this review, I will dismiss the petition as an unauthorized successive habeas corpus application.

From the petition and state court records available electronically, I find the following facts.

FACTS

On December 16, 1993, petitioner Nathan Gillis entered an Alford plea to two counts of sexual assault, a count of reckless endangerment, a count of kidnapping and a count of false imprisonment. Petitioner was detained at the Dane County jail from September 11, 1993 to March 26, 1994. Ultimately, the circuit court sentenced petitioner to five years of imprisonment on each of the sexual assault counts and two years of imprisonment on the reckless endangerment, consecutively. The court withheld sentence on the kidnapping

charges and placed petitioner on probation for 20 years. The court also withheld sentence on the false imprisonment count and placed petitioner on probation for six years. The probationary terms were to run concurrently with the prison sentences. Petitioner's conviction was affirmed in a no-merit appeal. Petitioner's ensuing post conviction motion was denied by the circuit court under State v. Escalona-Naranjo, 185 Wis. 2d 168, 517 N.W.2d 157 (1994).

On February 13, 2006, the Department of Corrections revoked petitioner's probation. At his sentencing hearing, petitioner argued that he should be awarded credit for 12 years he had served in prison for his other convictions while on probation for the kidnapping count. The circuit court rejected petitioner's argument and sentenced him to 12 years of imprisonment on that count.

Petitioner filed a post conviction motion challenging his sentence after revocation, again arguing that he should have received credit for the previous 12 years of incarceration. The circuit court denied the motion. Petitioner appealed, and the Wisconsin Court of Appeals affirmed the circuit court on October 3, 2007. Petitioner's petition for review by the Wisconsin Supreme Court was denied on January 22, 2008.

Petitioner then filed a petition for writ of habeas corpus in the circuit court, arguing for the 12 years of credit. The circuit court denied the petition. The court of appeals summarily affirmed the circuit court on November 20, 2012, and petitioner's petition for review was denied by the Wisconsin Supreme Court on March 12, 2013.

OPINION

I understand petitioner to be raising the following claims in his petition:

(1) he should have been given credit for the 12 years he was previously incarcerated for other counts when he was later revoked on the kidnapping count (in his request for relief he asks for credit for only three-and-one-half years but does not explain where this number comes from; and (2) he should be given credit for the 197 days he spent in the Dane County jail from 1993 to 1994 (petitioner asks for 188 days but 197 appears to be the accurate count).

The problems with this petition are multifold. First, under 28 U.S.C. § 2244(b)(3)(A), a petitioner may not file a second or successive application for habeas relief in the district court unless he first seeks and obtains an order from the appropriate court of appeals authorizing the district court to consider the application. This court previously rejected petitioner's argument regarding sentence credit for his 12 years of incarceration in Gillis v. Grams, case no. 08-cv-117-bbc (W.D. Wis. Mar. 14, 2008) ("although improper denial of a sentencing credit could constitute a violation of the double jeopardy clause, it is clear from the petition and attached documents that petitioner never served any time on the kidnapping conviction. The twelve years that he served in prison were related to his convictions for sexual assault and reckless endangerment."). Petitioner does not assert that he has obtained permission to file a successive petition and a search of the court of appeals' electronic records does not show that the court has granted him such permission. Therefore, I must dismiss the petition as to this claim. Nunez v. United States, 96 F.3d 990, 991 (7th

Cir. 1996) ("A district court must dismiss a second or successive petition, without awaiting any response from the government, unless the court of appeals has given approval for its filing.").

As for his claim that he should be credited for time he served in the Dane County jail, petitioner does not present any argument that he should be allowed to raise this claim that he did not raise in his successive habeas petition under 28 U.S.C. § 2244(b)(2), and there is no reason to think the exceptions in that provision apply. Thus this claim must be dismissed as well. Moreover, I note that this claim (as well as his first claim) is almost certainly untimely. It has been seven years since petitioner was revoked and five years since his first post conviction motion was denied by the Wisconsin courts. Finally, nothing in petitioner's attached materials suggests that he has even raised this claim in the Wisconsin courts, which means it is likely that he procedurally defaulted it.

In addition, I note that petitioner has filed a series of other motions, including one for assistance in recruiting counsel to assist him with the case. Because the case is being dismissed, the motions will be denied as moot.

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 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). Where denial of relief is based on procedural grounds, the petitioner also must show that jurists of reason "would find it debatable whether the district court was correct in

its procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). Because it is plain that petitioner is trying to bring a successive petition, reasonable jurists would not likely disagree that review is barred for lack of prior authorization under 28 U.S.C. § 2244(b). Therefore, no certificate of appealability will issue.

ORDER

IT IS ORDERED that

1. Petitioner Nathan Gillis’s petition for writ of habeas corpus, dkt. #1, is DISMISSED without prejudice for lack of subject matter jurisdiction as an unauthorized second or successive habeas corpus application.

2. Petitioner’s remaining motions, dkt. ##2, 3, 6, are DENIED as moot.

3. Petitioner is DENIED a certificate of appealability. If petitioner wishes, he may seek a certificate from the court of appeals under Fed. R. App. 22.

Entered this 15th day of May, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge