

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

A'KINBO J.S. HASHIM
(f/k/a JOHN D. TIGGS, JR.),

OPINION and ORDER

Petitioner,

13-cv-65-bbc

v.

MICHAEL BAENEN,

Respondent.

Petitioner A'kinbo J.S. Hashim, a/k/a John D. Tiggs, a prisoner at the Green Bay Correctional Institution,¹ 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 direct the state to respond to the petition.

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

FACTS

On April 9, 1996, petitioner was sentenced to an indeterminate prison term of 112 months on one armed robbery charge and an imposed and stayed term of fifteen years,

¹ Petitioner named Wisconsin Department of Corrections Secretary Ed Wall and Administrator of the Division of Hearings and Appeals David H. Schwarz as respondents. 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 Green Bay Correctional Institution, Michael Baenen. I have revised the caption accordingly.

subject to fifteen years of probation, on a second armed robbery charge. On October 2, 2003, petitioner was sentenced to two years of initial confinement and three years of extended supervision on a charge of battery by a prisoner, to run consecutively to the armed robbery sentence. On July 22, 2008, after the sentence on the first armed robbery count had been discharged, the Division of Community Corrections recommended revocation of petitioner's term of probation on the second armed robbery count and his extended supervision on the battery count because of allegations that petitioner had mouth-to-penis contact with a teenage boy and had struck the boy with a leather belt.

Following a revocation hearing at which the teenager testified, the administrative law judge issued a decision in which he accepted the teenager's testimony as credible, found that the violations had occurred, rejected institution-based programming as an alternative to revocation and concluded that revocation for the entire remaining time on the battery case was necessary to protect the public, to address petitioner's rehabilitative needs and to avoid unduly depreciating the seriousness of the violations.

Petitioner appealed this decision, but it was affirmed on October 20, 2011 by the Wisconsin Court of Appeals. The Wisconsin Supreme Court denied petitioner's petition for review on April 13, 2012.

Also, plaintiff filed a petition for writ of habeas corpus in the Circuit Court for Waukesha County, alleging that he had received ineffective assistance of counsel in the revocation proceedings. After his petition was denied by the circuit court, the Wisconsin

Court of Appeals affirmed the decision on June 8, 2011, and the Wisconsin Supreme Court denied petitioner's petition for review on December 1, 2011.

OPINION

Hashim raises the following claims in his petition: (1) the department acted arbitrarily by refusing to accept his attempted waiver of the preliminary and final revocation hearings; (2) the department lost competency to proceed by not holding the preliminary hearing within 15 days; (3) the department failed to act according to law when it proceeded on the battery violation after the magistrate did not find probable cause for it at the preliminary hearing; (4) the department acted arbitrarily by failing to conduct an independent investigation; (5) the department failed to act according to law when it failed to record or transcribe the preliminary hearing or to provide either a DVD or transcript of petitioner's police interview that was relied upon at the preliminary hearing; (6) the administrative law judge acted arbitrarily or contrary to law when he refused to allow petitioner to represent himself at the final hearing; (7) the administrative law judge deprived petitioner of his right to impeach the seventeen-year-old victim by refusing to allow petitioner to present evidence about the victim's prior criminal convictions; (8) the administrative law judge denied petitioner the right to fully testify in his defense; (9) the administrative law judge acted contrary to law by soliciting additional evidence after the hearing; and (10) he received ineffective assistance of counsel in the revocation proceedings.

Petitioner has raised each of these claims in his appeals discussed above. Thus it appears that he has exhausted his state court remedies. In addition, petitioner appears to have filed his petition within the one-year limitations period. At this stage, I conclude that petitioner's allegations merit a response from the state.

Finally, I note that petitioner has filed a motion for leave to proceed in forma pauperis in this action, but he has already paid the five dollar filing fee for the action, so I will deny the motion as moot.

ORDER

IT IS ORDERED that

1. The motion for leave to proceed in forma pauperis in this action filed by petitioner A'kinbo J.S. Hashim, a/k/a John D. Tiggs, dkt. #3, is DENIED as moot.

2. 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 respondent Michael Baenen.

3. Within 30 days of the date of service of this order, respondent must file an answer to the petition. 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.

4. **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.

5. 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. With respect to any claims that were adjudicated on the merits in a state court proceeding, 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: If petitioner already has submitted a memorandum or brief in support of his petition that addresses the standard of review set out above, then he does not need to file another brief. However, if petitioner's initial brief did not address the standard of review set out in § 2254(d), then he should submit a supplemental brief. If he fails to do so, then he risks having some or all of his claims 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.

6. For the time being, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not consider any submission that has not been served upon the state. Petitioner should note on each of his submissions whether he has served a copy of that document upon the state.

Entered this 1st day of May, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge