

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

HERBERT AMBROSE DARDEN,

Petitioner,

v.

TIMOTHY DOUMA,

Respondent.

OPINION and ORDER

13-cv-738-bbc

Petitioner Herbert Darden, a prisoner at the New Lisbon Correctional Institution, 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 June 19, 2007, following a jury trial, petitioner Herbert Darden was found guilty of attempted first-degree intentional homicide and armed robbery. On October 1, 2007, petitioner was sentenced to twenty years of confinement and fifteen years of extended

supervision on the attempted murder charge, to run concurrently with a sentence of fifteen years in prison with ten years of extended supervision on the armed robbery charge. Both sentences ran consecutively to a previous sentence petitioner was serving. Petitioner filed an appeal that was withdrawn after petitioner's counsel withdrew his "no merit" brief. Petitioner then pursued a post conviction motion, arguing that he had received ineffective assistance of counsel at trial because counsel failed to raise adequate objections to evidence that petitioner escaped while in police custody on the charges and failed to call two witnesses who could have undermined the testimony identifying petitioner. On April 4, 2011, following a Machner hearing, petitioner's post conviction motion was denied.

Petitioner appealed his judgment of conviction and denial of post conviction relief shortly thereafter, and the Wisconsin Court of Appeals affirmed the trial court in a May 3, 2012 order. The Wisconsin Supreme Court denied petitioner's petition for review on September 17, 2012. Petitioner filed the present petition for writ of habeas corpus on October 25, 2013.

OPINION

Petitioner raises two ineffective assistance of counsel claims in his petition: (1) trial counsel failed to object to "escape" evidence presented at trial; and (2) trial counsel failed to call two witnesses who could have undermined the testimony identifying petitioner as the guilty party. At this stage, petitioner's allegations are sufficient to raise potentially valid constitutional claims. In addition, it appears that petitioner has exhausted his state court

remedies and filed his petition within one year of his state conviction becoming final. 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 respondent Timothy Douma.

2. 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.

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. 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.

5. 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 2d day of December, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge