

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

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BRANDON GASTON,

Petitioner,

v.

LIZZIE TEGELS, Warden, Jackson  
Correctional Institution,

Respondent.  
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ORDER

15-cv-731-bbc

Brandon Gaston, an inmate at the Jackson 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 pursuant to Rule 4 of the Rules Governing Section 2254 Cases. Rule 4 requires the court to examine the petition and supporting exhibits and dismiss a petition if it “plainly appears” that petitioner is not entitled to relief. If the petition is not dismissed, then the court orders respondent to answer or otherwise respond to the petition.

Petitioner challenges his November 2012 conviction in the Circuit Court for Eau Claire County for second degree sexual assault, victim intimidation and bail jumping, for which he received a sentence of nine years’ confinement followed by seven years’ extended supervision. He contends that he was denied his constitutional right to a direct appeal and to the effective assistance of counsel on direct appeal when his appointed lawyer obtained

permission from the circuit court to withdraw on the basis of his representations that he had found no meritorious issues for appeal and that petitioner had authorized him to close his file without further action. Petitioner denies that he authorized this course of action and argues that the state courts erred in finding to the contrary.

It is well-settled that a defendant has a constitutional right to appeal his conviction and to the effective assistance of counsel on that appeal. Halbert v. Michigan, 545 U.S. 605, 610 (2005); Douglas v. California, 372 U.S. 353, 356–57 (1963). In Anders v. California, 386 U.S. 738, 744 (1967), the Supreme Court endorsed the “no merit” procedure as a means to protect these rights for indigent defendants while at the same time protecting a lawyer’s ethical obligations to the court. Under this procedure, an appointed lawyer who determines that there are no non-frivolous grounds for appeal may withdraw as counsel, but must accompany her withdrawal motion with a brief referring to anything in the record that might arguably support the appeal. Id. Like any right, however, the right to have counsel file an Anders brief may be waived provided the defendant is competent to waive the right and that he does so knowingly and intelligently. Godinez v. Moran, 509 U.S. 389, 400-01 (1993); Betts v. Litscher, 241 F.3d 594, 596 (7th Cir. 2001).

In this case, the state circuit court found on the basis of the sworn statements by petitioner’s lawyer that petitioner had waived his right to appeal. Petitioner insists that, contrary to his lawyer’s affidavit, he never agreed that counsel could close his file, and that the court granted the motion to withdraw without giving petitioner enough time to respond to it.

The petition and its attachments show that petitioner presented this claim to the Wisconsin Court of Appeals by filing a petition for a writ of habeas corpus. (According to the state court docket sheet, available at <https://wcca.wicourts.gov> (visited January 20, 2016), petitioner filed his state court habeas petition on or about May 22, 2014.) The state court of appeals denied the petition on August 5, 2014. The Wisconsin Supreme Court declined to grant review on November 17, 2014 and petitioner filed his federal habeas petition exactly one year later, on November 17, 2015.

Petitioner's claim that he did not validly waive his right to counsel on appeal is sufficient to state a constitutional claim. Further, it appears that petitioner exhausted his state court remedies. Whether the petition is timely, however, is not entirely clear. Although petitioner filed his habeas petition within one year of the state supreme court's order denying his petition for review, his conviction might have become final on an earlier date as a result of his failure to file an appeal. 28 U.S.C. § 2244(d)(1)(A) (one-year limitation period runs from date on which conviction became final by conclusion of direct review or expiration of time for seeking such review). I leave it to the state to raise that issue in its response if it so chooses.

## 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 Warden Tegels.

2. Within 30 days of the date of service of this order, respondent must file an answer to petitioner's claim that he did not knowingly and intelligently waive his right to appellate counsel. 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. If the state contends that the petition presents a mix of exhausted and unexhausted claims, then it must address in its supporting brief whether petitioner meets the criteria for a stay announced in Rhines v. Weber, 544 U.S. 269 (2005), in the event he opts to pursue his unexhausted claims in state court. 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 the 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 docket or 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 22d day of January, 2016.

BY THE COURT:

BARBARA B. CRABB  
District Judge