

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

MARCUS C. ROBINSON,

Petitioner,

ORDER

v.

17-cv-204-wmc

BRIAN FOSTER, Warden,
Waupun Correctional Institution,

Respondent.

Marcus Robinson has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and has paid the \$5 filing fee. Petitioner was convicted in Dane County Court on September 12, 2013, on one count of second degree sexual assault of an unconscious victim and sentenced to 30 years of incarceration followed by extended supervision. He is currently incarcerated at Waupun Correctional Institution.¹

The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases. Rule 4 provides that when conducting this review,

[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

¹ On January 24, 2018, petitioner advised the court that he was being transferred to the Wisconsin Resource Center, but correspondence from the court to petitioner at that address was returned as undeliverable. (Dkt. #6, 7.) If petitioner is no longer at the Waupun Correctional Institution, he should promptly notify the court of his new address.

During an initial review of habeas petitions, the court looks to see whether the petitioner has set forth cognizable constitutional or federal law claims, exhausted available state remedies, and whether the petition is timely.

Petitioner challenges his conviction on the following four grounds: (1) his trial lawyer rendered constitutionally ineffective performance when she failed to impeach the victim with statements given during her sexual assault nurse exam (“SANE”) that contradicted her testimony that she was unconscious when the assault occurred; (2) the “real controversy was not fully tried” because of counsel’s omission; (3) trial counsel’s failure to impeach the victim contradicted counsel’s opening statement in which she stated that the case was about credibility; and (4) trial counsel’s failure to impeach the victim with the SANE evidence was an “insufficient implementation of defense strategy.” Petitioner previously raised each of these grounds in the state court by presenting them in a postconviction motion; after a hearing at which defense counsel testified, the court denied the motion. Petitioner then filed a timely appeal with the Wisconsin Court of Appeals, which issued an opinion on July 21, 2016, affirming the conviction. *State v. Robinson*, 371 Wis. 2d 565, 884 N.W. 2d 535 (Table), 2016 WI App 67, 2016 WL 3919252 (unpublished disposition). The Wisconsin Supreme Court subsequently denied petitioner’s petition for review on November 14, 2016.

Petitioner filed the instant petition on March 16, 2017, well within the one-year limitations period established by 28 U.S.C. § 2244(d), and he appears to have fully exhausted his claims by presenting them at all levels of state court review. Therefore, the

question is whether each ground states a cognizable constitutional or federal claim.

Petitioner's second ground for relief -- that "the real controversy was not fully tried" -- must be dismissed because it does not arise under the laws or Constitution of the United States. The requirement to try the "real controversy" comes from Wis. Stat. § 752.35, not the U.S. Constitution. Although § 752.35 provides grounds for appealing adverse judgments in Wisconsin courts, it does not provide a ground on which this court could hear a petition for habeas corpus. Habeas petitions are reserved for claims that the federal Constitution or a federal statute has been violated by the proceedings against the petitioner. 28 U.S.C. § 2254(a) ("[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.") His claim that the "real controversy was not fully tried" is not such a claim.

Petitioner's remaining claims are just three different ways of alleging the same thing: his trial lawyer was ineffective for failing to impeach the victim's credibility with respect to her statements to the SANE nurse. Correspondingly, plaintiff argues this failure bore directly on defense's theory that she was conscious. Ineffective assistance of counsel is certainly a constitutional ground for habeas relief under *Strickland v. Washington*, 466 U.S. 668 (1984). Because it is not plain from the petition that Robinson is not entitled to relief on this claim, respondent will be required to answer the petition.

ORDER

IT IS ORDERED that:

1. Petitioner's claim that the "real controversy was not fully tried" is DISMISSED for failure to state a cognizable federal claim. His remaining claims are consolidated to state a single claim of ineffective assistance of counsel for failure to impeach the victim with statements she provided during her SANE exam.

2. **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, Brian Foster, in his official capacity as warden of the Waupun Correctional Institution.

3. **Answer deadline.** Within 60 days of the date of service of this order, respondent must file an answer to the petition, as construed in this order, 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 a 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.** In the event that the respondent does not file a motion to dismiss as outlined above, the court will proceed to consider the merits. Petitioner has already filed a brief on the merits, dkt. 2, but he may file a supplemental brief if he chooses. The parties shall adhere to the following briefing schedule with respect to the merits of petitioner's claims:

- a. If petitioner wishes to file a supplemental brief in support of his petition, he must do so within 30 days after the respondent files an answer.
- b. Once petitioner submits his brief or his time to submit a brief expires,

respondent shall file a brief in response to the petition within 30 days.

c. Once respondent files a brief in opposition, petitioner shall have 20 days to file a reply if he wishes to do so.

Entered this 19th day of October, 2018.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge