

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 17, 2020

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 20-1137

PETER GAKUBA,

Petitioner-Appellant,

v.

Appeal from the United States District
Court for the Northern District of
Illinois, Western Division.

TERRY GRISSOM,

Respondent-Appellee.

No. 17 C 50337

John Z. Lee,
Judge.

ORDER

On consideration of the petition for rehearing and for rehearing en banc filed by Petitioner-Appellant on November 2, 2020, no judge in active service has requested a vote on the petition for rehearing en banc, and the judges on the original panel have voted to deny rehearing.

Accordingly, the petition for rehearing is DENIED.

(A8)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 13, 2020
Decided October 22, 2020

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 20-1137

PETER GAKUBA,
Petitioner-Appellant,

Appeal from the United States District
Court for the Northern District of
Illinois, Western Division.

v.

No. 17 C 50337

TERRY GRISSOM,
Respondent-Appellee.

John Z. Lee,
Judge.

ORDER

Peter Gakuba has filed a notice of appeal from the denial of his many post-judgment motions, including his Federal Rule of Civil Procedure 60(b) motion requesting reconsideration of his 28 U.S.C. § 2254 petition. He has also filed a request for a certificate of appealability. We have reviewed the orders of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, we DENY the request for a certificate of appealability and DENY Gakuba's pending motions. We caution that further frivolous filings may justify monetary sanctions. *See Alexander v. United States*, 121 F.3d 312, 315 (7th Cir. 1997).

(A2)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS

Peter Gakuba,

Petitioner,

v.

Christine Brannon,

Respondent.

) Case No: 17 C 50337

) Judge Frederick J. Kapala

ORDER

Petitioner's motion to proceed in forma pauperis [3] is granted. Grounds five through seven are dismissed without prejudice. Respondent is directed to answer or otherwise respond to the remaining claims within 30 days. Petitioner's reply, if any, to be filed within 30 days of the response.

~~"MIXED PETITION" CONTRARY TO SPARKS v. DORETHY 2018 US LEXIS 32265 # 1-3 (7TH CIR. 2018)
CERTES ROSE v. WENDY 455 US 509 (1982); RHINES v. WEBER 544 US 269 (2005))~~

STATEMENT

Following a jury trial in the Seventeenth Judicial Circuit, Winnebago County, Illinois, petitioner, Peter Gakuba, was convicted of three counts of aggravated criminal sexual abuse and was sentenced to four years' imprisonment on each count with the sentences to run consecutively. On direct appeal, the Illinois Appellate Court, Second District, rejected the following seven arguments and affirmed petitioner's conviction and sentence: (1) the trial court erred in allowing Sergeant O'Brien to testify regarding petitioner's name and birth date; (2) the trial court erred in granting the State's motion to take a buccal sample of petitioner; (3) the evidence was insufficient to sustain his convictions; (4) that his Sixth Amendment right to self-representation was violated when his request to proceed to trial pro se was denied; (5) the trial court erred in denying his motions to disqualify the assistant state's attorney; (6) the trial court erred in denying his motions to disqualify two judges; and (7) the trial court erred in sentencing him to a term of imprisonment rather than probation and in imposing consecutive sentences. People v. Gakuba, 2017 IL App (2d) 150744-U, ¶ 47. Petitioner's petition for leave to appeal was denied. People v. Gakuba, No. 122289, 2017 WL 4386407 (Ill. Sept. 27, 2017).

Petitioner presents the same seven contentions as his grounds for relief under § 2254. Petitioner also states in his petition that he has pending before the Illinois Appellate Court an appeal of the trial court's dismissal of his post-conviction petition in which he has raised the ineffective assistance of trial counsel. See People v. Gakuba, No. 2-17-0744.

Rule 4 of the Rules Governing § 2254 Cases requires prompt examination by the court and provides, "[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

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EXHIBIT 1 pg 1/2

the petitioner." A claim must be presented as a federal constitutional claim in the state court proceedings in order to be exhausted. See Duncan v. Henry, 513 U.S. 364, 365-66 (1995). It is clear from the record that petitioner's § 2254 grounds five through seven were not presented to the Illinois courts as federal constitutional claims and, therefore, are not exhausted. See People v. Gakuba, 2017 IL App (2d) 150744-U.

In particular, with regard to ground five, the Illinois Appellate Court rejected petitioner's contention that the trial court erred in denying his motions to disqualify the assistant state's attorney because it abused its discretion under the standard delineated in Marshall v. County of Cook, 2016 IL App (1st) 142864, ¶ 22, and violated the Illinois Counties Code, 55 ILCS 5/4-2003. Gakuba, 2017 IL App (2d) 150744-U, ¶¶ 91-99. As for ground six, the Illinois Appellate Court rejected petitioner's contention that the trial court erred in denying his motions to substitute two judges pursuant to 725 ILCS 5/114-5. The Court held that the trial court's finding that there was no indicia of judicial prejudice against petitioner was not against the manifest weight of the evidence as that standard has been articulated by the Illinois Supreme Court in People ex rel. Baricevic v. Wharton, 136 Ill. 2d 423, 439 (1990), and People v. Patterson, 192 Ill. 2d 93, 131 (2000). Id. ¶ 102. With respect to ground seven, in rejecting petitioner's sentencing arguments, the Illinois Appellate Court held that the trial court did not abuse its discretion under Illinois law in choosing incarceration over probation, id. ¶ 115, or in imposing consecutive sentences under 730 ILCS 5/5-8-4(b), id. ¶ 117.

Thus, the record is clear that grounds five through seven were not presented as federal constitutional claims nor decided as such. Those grounds are dismissed without prejudice for failure to exhaust. Consequently, petitioner will be permitted to proceed on only grounds one through four.

→ "AILED PETITION" CONTRARY TO SPARKS v. PORETH 2018 US LEXIS 37265 ¶ 1-3 (7/2018) (cites ROSE v. LUNHOLM 455 US 509 (1982); RHINES v. WEBER 544 US 269 (2005)) ←

Date: 11/20/2017

ENTER:



FREDERICK J. KAPALA

District Judge