

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BENNY R. SMITH,

Petitioner,

v.

CASE NO. 06-3137-SAC

SEDGWICK COUNTY DISTRICT COURT,

Respondent.

O R D E R

This matter is before the court on a petition for habeas corpus filed pursuant to 28 U.S.C. § 2254. By an order entered on January 17, 2007, the court granted petitioner to and including February 16, 2007, to submit a petition on a form to be provided to him by the clerk of the court. Petitioner was advised that the failure to timely file that petition might result in the dismissal of this matter without prejudice.

On January 25, 2007, petitioner filed a notice of interlocutory appeal. By an order entered on January 30, 2007, the court declined to certify the interlocutory appeal and notified petitioner that no stay would be issued in this matter. Petitioner was reminded to submit the form petition as directed by February 16, but he has not done so.

On February 26, 2007, the U.S. Court of Appeals for the Tenth Circuit dismissed the interlocutory appeal.

The court has examined the record and concludes the petition may be dismissed without prejudice. Petitioner has failed to submit the petition on the form, as required by the rules of this court, see D. Kan. R. 9.1(a), and he has made no showing of cause and prejudice¹ concerning the claims identified as unexhausted in the court's order of January 17, 2007.

While the dismissal of this matter without prejudice does not prevent the petitioner from filing a petition under § 2254, the court reminds petitioner of the one-year limitation period for filing such a petition. See 28 U.S.C. § 2244(d). The pendency of a federal petition does not toll that limitation period. See Duncan v. Walker, 533 U.S. 167, 181-82 (2001) ("an application for federal habeas corpus review is not an 'application for State post-conviction or other collateral review' within the meaning of 28 U.S.C. § 2244(d)(2)" and "therefore did not toll the limitation period during the pendency of respondent's first federal habeas petition.")

IT IS, THEREFORE, BY THE COURT ORDERED the petition for habeas corpus is dismissed without prejudice due to petitioner's failure to comply with the January 17, 2007, order of the court.

A copy of this order shall be transmitted to the petitioner.

¹See Coleman v. Thompson, 501 U.S. 722, 749-50 (1991).

IT IS SO ORDERED.

DATED: This 1st day of March, 2007, at Topeka, Kansas.

S/ Sam A. Crow
SAM A. CROW
U.S. Senior District Judge