

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SHELDON K. NASH,
Petitioner,

v.

CASE NO. 06-3158-SAC

DAVID R. MCKUNE,
et al.,
Respondents.

O R D E R

This is a petition for writ of habeas corpus, 28 U.S.C. 2254, filed by an inmate of the Lansing Correctional Facility, Lansing, Kansas (LCF). Petitioner also filed a Memorandum of Law in support of his Petition, and a "Motion for Certificate of Appealability." Petitioner has not paid the fee or submitted a motion for leave to proceed without prepayment of fees.

Mr. Nash seeks to challenge his 1995 convictions in Johnson County, Kansas, of felony murder and aggravated robbery. His convictions were affirmed on direct appeal by the Kansas Court of Appeals on May 7, 1997.

As grounds for his Petition, Mr. Nash claims the complaint/information in his case was defective and void because the language "person" and "armed with a dangerous weapon" were omitted. He claims these were "essential elements," and were omitted from the jury instructions as well. He alleges he did not raise this issue on direct appeal, but claims it was due to the ineffective assistance of his appellate counsel. He alleges

he raised this claim by post conviction motion in the trial court. He states he filed a Motion for Correction of an Illegal Sentence under K.S.A. 22-3504(1). He cites the case number as 98-CV-1043, and alleges the court decided it on April 28, 2006. He further alleges that he appealed the denial of this motion, and the Kansas Supreme Court denied the appeal on April 28, 2006. He attaches the order of the Kansas Supreme Court.

In his form pleading, Mr. Nash denies that he has filed any type of petition, application, or motion in a federal court regarding the conviction challenged in this Petition. However, court records indicate otherwise. Petitioner filed a prior habeas corpus petition under 28 U.S.C. 2254 in this court challenging his 1995 convictions, which was dismissed on the merits. Nash v. McKune, Case No. 99-3251-DES (July 13, 2000). Petitioner appealed the order denying his Petition and was denied a certificate of appealability in Case No. 01-3254 (10th Cir. September 5, 2002).

Under 28 U.S.C. 2244(b)(3)(A), a second or successive petition for habeas corpus may be filed in the district court only if the applicant first obtains an order from the appropriate federal court of appeals authorizing the federal district court to consider the petition. Id. Because this is a successive application for habeas corpus relief, and because there is no indication in the materials filed that petitioner has obtained

the necessary authorization from the United States Court of Appeals for the Tenth Circuit, the court concludes this matter must be transferred to the Court of Appeals for a determination whether this matter may proceed.

IT IS THEREFORE ORDERED this matter is transferred to the United States Court of Appeals for the Tenth Circuit.

Copies of this order shall be transmitted to the petitioner and to the Clerk of the United States Court of Appeals for the Tenth Circuit.

IT IS SO ORDERED.

Dated this 28th day of June, 2006, at Topeka, Kansas.

s/Sam A. Crow
U. S. Senior District Judge