

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

TONY B. OLIVER,

Petitioner,

ORDER

v.

03-C-433-C

DAN BENIK, Warden, Stanley Correctional
Institution,

Respondent.

Petitioner Tony B. Oliver seeks leave to proceed in forma pauperis on appeal from this court's judgment dismissing his petition for a writ of habeas corpus under 28 U.S.C. § 2254. In an order entered January 8, 2004, this court adopted the magistrate judge's report and recommendation and found that none of Oliver's claims provided a basis for granting habeas relief. This court found that habeas relief was foreclosed by § 2254(d) because the Wisconsin Court of Appeals had adjudicated the merits of petitioner's claims reasonably when it found that the trial court had properly denied petitioner's motion for a continuance for the purpose of retaining new counsel and that petitioner's counsel was not ineffective at trial. Because petitioner has not specified which of the issues he would like to raise on appeal, I presume that he is challenging the entirety of this court's decision.

Because petitioner seeks leave to proceed in forma pauperis on appeal, this court must determine whether petitioner is taking his appeal in good faith. See 28 U.S.C. § 1915(a)(3).

Then, pursuant to 28 U.S.C. § 2253(c)(1)(A) and Fed. R. App. P. 22, this court must determine whether to issue a certificate of appealability to petitioner.

To find that an appeal is in good faith, a court need only find that a reasonable person could suppose the appeal has some merit. Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000). However, a petitioner seeking a certificate of appealability must show more than "the absence of frivolity" or the existence of mere "good faith" on his or her part. Barefoot v. Estelle, 463 U.S. 880, 893 (1983). A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Id.; see also 28 U.S.C. § 2253(c)(2). In order to make this showing, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot, 463 U.S. at 893, n.4). Although the certificate of appealability determination is a threshold inquiry that is distinct from the underlying merits of the petition, it does require an overview of the claims in the habeas petition and a "general assessment" of their merits. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Whether a petitioner's constitutional claims are debatable must take into account the limitations imposed by the Antiterrorism and Effective Death Penalty Act. See id. (appellate court considering whether to issue certificate of appealability must "look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason.").

Although I conclude that petitioner's appeal is taken in good faith, I cannot certify that he has made the showing necessary for a certificate of appealability. Reasonable jurists would not debate that the objections that petitioner contends his lawyer should have made at trial would have made no difference to the outcome, much less that the state courts applied clearly established federal law reasonably when they concluded that counsel's performance was not deficient. Similarly, given the wide latitude that trial courts possess with respect to matters involving continuances, reasonable jurists would not debate whether the state court of appeals reasonably rejected petitioner's challenge to the denial of the continuance, particularly where petitioner has not presented evidence to support his claim that his relationship with his lawyer had broken down irreconcilably.

In sum, having conducted a general assessment of the merits of petitioner's claims, I conclude that the issues presented are not adequate to merit appellate review. Accordingly, even though I cannot certify that petitioner is taking his appeal in bad faith, I must decline to grant a certificate of appealability.

ORDER

Petitioner Tony B. Oliver's request for leave to proceed in forma pauperis on appeal

is GRANTED. His request for a certificate of appealability under 28 U.S.C. § 2253 is DENIED.

Dated this 1st day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge