

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

JAMES W. GOMEZ,

Petitioner,

v.

GERALD BERGE, Warden, Wisconsin
Secure Program Facility,

Respondent.

ORDER

04-C-0017-C

On August 18, 2004, the United States Magistrate Judge filed a report and recommendation in which he recommended denying petitioner James W. Gomez's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner James W. Gomez has filed objections to the magistrate judge's recommendations, the bulk of which are directed at the recommendation to deny his claim that the state court erred in refusing to allow him to continue to represent himself in his first degree murder trial after holding that he was competent to waive his right to counsel. He objects also to the recommendation to deny his claims that he was coerced into pleading guilty and that his sentence is excessive.

After reviewing petitioner's objections, the record and the report and

recommendation, I conclude that the magistrate judge reached the correct conclusion when he recommended denial of the petition. The self-representation question is a very close one, given the trial court's initial finding that petitioner was competent to waive counsel and represent himself. The leading Supreme Court opinion on the issue seems to suggest that the standard for competence to stand trial and the standard to waive counsel are identical, Godinez v. Moran, 509 U.S. 389 (1993), but the Court of Appeals for the Seventh Circuit has read Godinez as holding that it is not unconstitutional for the state of Wisconsin to impose a slightly higher standard for determining competency to represent oneself than for determining competency to stand trial. "[T]here is a difference between mental functioning, which is the ability to process information, and the information itself; more information may be required for an effective waiver of the right to counsel than for being able to follow the goings-on at one's trial." Brooks v. McCaughtry, 380 F.3d 1009, 1011-12 (7th Cir. 2004). "A judge who, having explained the consequences, finds that the defendant doesn't understand them is entitled to conclude that although competent to stand trial, the defendant has not made an effective waiver of his right to counsel and therefore may not represent himself." Id. at 1012-13.

Petitioner points out that the judge in his case found that he was competent in both respects, whereas in Brooks, the judge denied the defendant's request to represent himself after questioning him about his educational background and knowledge of the law. In both

cases, however, the trial judges based their determination of the validity of the defendants' waivers of counsel on their observations of the defendants' demonstrated incompetency to conduct their own defense. In Brooks, the court of appeals found that the defendant's inability to control himself and to conduct his own defense was evidence that his waiver of counsel was not knowing and intelligent.

Without ignoring Brooks, I cannot find that petitioner has proven that he was denied his right to self-representation under the Sixth Amendment. I might question whether the trial judge made his decision to impose counsel on petitioner because he objected to petitioner's failure to follow the usual rules of discovery, calling of endless numbers of witnesses and seeming lack of a viable strategy rather than finding that petitioner did not understand the disadvantages of self-representation or suffered from a specific disability that prevented him from presenting a valid defense. State v. Gomez, 2002 WL 31416307, 2002 WI App 292 (Ct. App. Oct. 29, 2002). However, the state court of appeals concluded that the trial court had found that these same actions showed that petitioner did not understand the disadvantages of self-representation. The court of appeals was satisfied that petitioner "did not simply lack technical legal knowledge or that the court merely disagreed with [petitioner's] trial strategy." Id. at ¶ 24. I cannot say that the trial and appellate courts' determination of those facts is not unreasonable in light of the evidence presented in the trial court proceeding; therefore, I am bound by those determinations. 28 U.S.C. § 2254(d)(2).

Petitioner's objections to the magistrate judge's remaining recommendations are unpersuasive. I agree with the magistrate judge that the state courts acted properly in denying petitioner's claims that he was coerced into pleading guilty and that his sentence is excessive. I agree also with the recommendation to deny petitioner's claim of ineffective assistance of counsel because petitioner failed to exhaust his state court remedies with respect to that claim.

ORDER

IT IS ORDERED that the magistrate judge's recommendation is ADOPTED in full. FURTHER, IT IS ORDERED that petitioner James W. Gomez's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED for petitioner's failure to show that he is in custody in violation of the Constitution or laws of the United States.

Entered this 22nd day of October, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge