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

ANTONIO P. BROWN,

Petitioner,

v.

GARY MCCAUGHTRY, Warden.
Waupun Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

04-C-459-C

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Petitioner Antonio P. Brown, confined at the Waupun Correctional Institution, challenges his April 2002 conviction in the Circuit Court for Milwaukee County for two counts of armed robbery as party to the crime. Petitioner contends that he is in custody in violation of the Fifth Amendment to the United States Constitution because the evidence adduced at trial was insufficient to prove his guilt beyond a reasonable doubt. Petitioner has exhausted his state court remedies with respect to this claim and filed his habeas petition within the one-year statute of limitations. For the reasons stated below, I am recommending that this court deny relief on the merits and dismiss the petition.

As an initial procedural matter, I note that petitioner filed his petition in the wrong district. Under 28 U.S.C. § 2241(d), a habeas petition may be filed either in the federal district court for the district where the inmate is in custody or in the district where sits the

state court whose judgment the inmate is challenging. In this case, both the Waupun Correctional Institution and the Circuit Court for Milwaukee County are located in the Eastern District of Wisconsin. Nonetheless, petitioner's blunder does not deprive this court of jurisdiction to consider his petition. In *Moore v. Olson*, 368 F.3d 757, 759 (7th Cir. 2004), the Court of Appeals for the Seventh Circuit explained that neither § 2241(a) or (d) places limits on a federal district court's subject matter jurisdiction; rather, those subsections operate merely to establish venue for collateral litigation. Because the petition raises a federal question, subject matter jurisdiction is present.

Under § 2241(d), this court could transfer the petition to the Eastern District of Wisconsin for hearing and determination, but this merely would delay the inevitable. As explained below, petitioner cannot meet his heavy burden to show that the Wisconsin Court of Appeals adjudicated his claim in a manner that was contrary to or involved an unreasonable application of clearly established Supreme Court precedent, nor can he show that the state court unreasonable determined the facts in light of the evidence presented to the state courts. Further, the state has not objected to this court hearing the petition. Accordingly, I am recommending that this court consider the petition on its merits.

Facts

The following facts are drawn from the record submitted to this court:

On September 16, 2001, Wauwatosa residents Stacie Mattson and Sandra Aull each were the victim of separate armed robberies. At about 8:45 p.m. that evening, Mattson was

walking from her garage to her residence when she was approached by two young African-American men, one of whom pointed a gun at her and demanded her purse. After Mattson complied, the two young men ran off. Later, Mattson could not positively identify either perpetrator from a photo array.

Just five minutes later, at about 8:50 p.m., Aull was accosted as she was walking up the driveway to her boyfriend's residence. Aull heard footsteps behind her and turned around to find a young African-American male who grabbed at her purse strap, pointed a gun in her face and demanded that she give her purse to him. After a struggle, the purse strap broke and the robber ran with the purse to a white Oldsmobile. Later, Aull could not positively identify the suspects.

Responding to a tip, police tracked the white Oldsmobile to its owner, Kenneth Shaw. Shaw and another individual, Jermaine Cooper, were arrested for the robberies. Each told police that he had participated in the robberies and that petitioner had been with them. Shaw and Cooper eventually pled guilty to armed robbery and agreed to testify against petitioner in exchange for the state recommending lighter sentences.

At petitioner's trial, Shaw testified that he, Cooper and petitioner had robbed Mattson and Aull in order to obtain money to go to a club. Shaw said that Cooper and petitioner had robbed Mattson, while he and Cooper had robbed Aull. Shaw testified that during the second robbery, petitioner was in the car searching Mattson's purse and counting the money he found in it. According to Shaw, the three men split the money evenly from the robberies.

Cooper testified at trial that only he and Shaw, but not petitioner, were involved in the robberies. Cooper admitted that he previously had told police that petitioner actually had been involved. Detective Daniel Collins, who had taken a statement from Cooper after he was arrested, read that statement to the jury. In it, Cooper identified petitioner as having participated in Mattson's robbery and having watched from the car as Shaw robbed Aull.

At trial three of petitioner's relatives provided a quasi-alibi that involved Petitioner returning from an out-of-state wedding the afternoon of the robberies and then going straight to bed.

The jury found petitioner guilty of both counts.

Petitioner appealed, contending that the testimony given by Shaw and Detective Collins was incredible as a matter of law because both witnesses were motivated to spread the blame for the crimes and because their testimony was inconsistent with statements by the victims and the alibi testimony. Petitioner also noted that Shaw had a motive to curry favor with the state.

The court of appeals rejected petitioner's arguments and affirmed the conviction. It reasoned that because the evidence supplied by Cooper and Shaw was not inherently incredible, it would be inappropriate for the court to overturn the jury's credibility determination. On August 13, 2003, the Wisconsin Supreme Court denied petitioner's petition for review.

Analysis

The Anti-Terrorism and Effective Death Penalty Act of 1996 provides that a writ may issue only if the petitioner establishes that the state court adjudication of his case was

> (1) contrary to, or involved an unreasonable application of, clearly-established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) & (2)

A Fifth Amendment challenge to the sufficiency of the evidence requires application of law to facts, making § 2254(d)(1) the proper section under which to analyze petitioner's claim.

The first question for this court is whether the court of appeals identified and applied the applicable Supreme Court law governing a sufficiency-of-the-evidence claim. The answer is "Yes." In reviewing petitioner's claim, the court asked whether his conviction was "so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." The case from which it drew this question, *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W. 2d 752 (1990), relied on *In re Winship*, 397 U.S. 358, 364 (1970), in which the United States Supreme Court held that in order to satisfy the due process clause, a state must prove beyond a reasonable doubt every fact necessary to constitute the crime. The appellate review standard cited by the court of appeals is consistent with *Jackson v. Virginia*, 443 U.S. 307 (2003), wherein the Supreme Court held that a petitioner is "entitled to habeas corpus relief if it is found that upon the record

evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324.

The second question before this court is whether the state court of appeals "reasonably" applied this standard to the facts of petitioner's case. Again the answer is "Yes." True, there were discrepancies between Shaw's testimony and Cooper's pretrial version of who was where during the robberies, but their stories were consistent regarding the pivotal facts that petitioner was with them that night and willingly participated in the robberies. It was the jury's prerogative to disregard Cooper's backpedaling at trial and to believe instead his pretrial statement to Detective Collins in which he inculpated petitioner. Also, the fact that Shaw had a motive to testify favorably to the prosecution did not make his testimony inherently incredible.

As the court of appeals recognized, determining the credibility of the witnesses and the weight of the evidence were the province of the jury. Having heard competing versions of events, it was not irrational for the jury to conclude that Shaw and Cooper's statements that petitioner was one of the robbers were more credible than that the contrary evidence submitted by petitioner. Having so concluded, it was not irrational for the jury to conclude that this evidence proved petitioner's complicity in the robberies beyond as reasonable doubt. Maybe some other jury might have determined otherwise, but petitioner did not get that jury, and it was not unreasonable for the state court of appeals to uphold the verdict actually returned.

The mere possibility of an alternate outcome is irrelevant. Under § 2254(d) "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). In a case like this that involves a flexible constitutional standard, a state court determination is not unreasonable if the court "takes the rule seriously and produces an answer within the range of defensible positions." *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000). The state court of appeals did that here. Accordingly, petitioner is not entitled to federal habeas relief.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the petition of Antonio P. Brown for a writ of habeas corpus be dismissed with prejudice.

Dated this 23rd day of September, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge