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

MATTHEW TYLER,

Petitioner,

v.

GERALD BERGE, Warden, Wisconsin Secure Program Facility,

Respondent.

REPORT AND RECOMMENDATION

04-C-525-C

REPORT

Matthew Tyler, an inmate at the Wisconsin Secure Program Facility in Boscobel, Wisconsin, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his November 2000 conviction in the Circuit Court for Milwaukee County for one count of second degree sexual assault of a child. Petitioner contends that he is in custody in violation of the Constitution or laws of the United States because his guilty plea to the charge was involuntary. More specifically, petitioner contends that he was coerced by his attorney who failed to inform him of various defenses that were available and who pressured him into accepting a plea. He also contends that the trial court failed to conduct a proper plea colloquy.

In a decision issued July 3, 2003, the Wisconsin Court of Appeals considered petitioner's claims and denied them on their merits. *State v. Tyler,* 2003 WI App 188, 2003

WL 21511924, 266 Wis. 2d 1061, 668 N.W. 2d 563 (Table) (Ct. App. July 3, 2003) (unpublished). Because I conclude that the court of appeals adjudicated petitioner's claims in a manner that was neither unreasonable nor contrary to controlling Supreme Court precedent, I am recommending that this court deny the petition under 28 U.S.C. § 2254(d).

Tyler does not dispute the court's factual findings. Accordingly, the facts set out below are drawn largely from the court of appeals' opinion.

FACTS

In June 2000, the District Attorney for Milwaukee County filed a criminal complaint charging Tyler with one count of second-degree sexual assault of a child, pursuant to Wis. Stat. § 948.20(2). The complaint alleged that Tyler had fondled the genitals of a fifteen year old boy while helping the boy with a computer problem in the boy's home. Before trial, the prosecutor filed a motion to admit various instances of "other acts" evidence, dating back to 1979, in which Tyler had been reported to have had sexual contact or sexual conversations with adolescent boys and young men. Incidents involving two victims occurred in 1979 in Louisiana while Tyler was employed at a residential treatment facility. Two boys asserted, among other allegations, that Tyler fondled them. Other acts allegedly occurred while Tyler was employed as a "preacher" in Missouri in 1987 and 1988. Boys ranging from age 10 to 14 reported that Tyler had fondled their genital area, both over and under their clothing. Most of these incidents occurred after Tyler had taken the boys places,

such as out to eat pizza, roller-skating or swimming. The prosecutor also sought to admit evidence that in 1996, Tyler had been convicted of fourth-degree sexual assault for touching a 17-year-old boy's penis while Tyler was employed by the University of Wisconsin-Milwaukee.

After reviewing the evidence proffered by the prosecutor, the trial court ruled that all of the incidents were admissible for the purpose of showing that when Tyler touched the victim's genitals, he did so for the purpose of sexual gratification. The prosecutor indicated that he would not present evidence on all of the alleged prior acts, but would probably limit his witnesses to four or five.

After the court ruled on the prosecutor's motion, Tyler retained a second lawyer to explore challenging the court's ruling by means of an interlocutory appeal. Approximately two weeks before trial was scheduled to begin, Tyler's attorney requested the court to postpone the trial so that he could pursue the appeal. The trial court denied the motion. No interlocutory appeal was ever filed.

On the day of the final pretrial conference, over the course of four or five hours, Tyler's trial attorney persuaded Tyler that he should enter into a plea agreement rather than proceed to trial because damaging other acts evidence was going to be admitted at trial that was likely to result in a conviction. The prosecutor offered Tyler a deal whereby he would recommend four to five years of initial confinement followed by a lengthy period of

supervision if Tyler would enter a guilty plea to the crime charged. Tyler accepted the offer and entered a plea under the agreement.

At the plea hearing, the trial court informed Tyler that the prosecutor would have to prove every element of the offense if Tyler went to trial and asked Tyler if he understood that. Tyler said yes. The court asked Tyler if he had gone over the elements of the offense with his lawyer; Tyler said yes. The court asked Tyler if he understood the elements; Tyler said yes. The court indicated that by entering a plea, Tyler was giving up a number of constitutional rights that were contained in a Guilty Plea Questionnaire and Waiver of Rights Form that Tyler had signed; the court then reviewed those rights and confirmed that Tyler understood that he was waiving them. The plea questionnaire signed by Tyler indicates that Tyler reviewed the WIS JI–CRIMINAL 2104, which, along with its cross-references, defines the offense of second degree sexual assault of a child. The trial court asked Tyler twice if anyone had made any promises or threats to get him to plead guilty, to which Tyler replied no. Tyler and his lawyer agreed with the court that he was voluntarily, knowingly and intelligently waiving his rights.

The court subsequently sentenced Tyler to a term of seven years' incarceration followed by a 13-year term of supervision.

After sentencing, Tyler filed a postconviction motion to withdraw his plea. Tyler alleged that his plea had not been entered voluntarily because his will had been overborne from listening to his counsel describe his bleak circumstances and because he did not have

a full understanding of the charges against him. In addition, Tyler alleged that his plea was not intelligent because his lawyer had failed to advise him of the possibility of entering into what is known in Wisconsin as a *Wallerman*[1] stipulation, whereby Tyler could preclude the admission of the other acts evidence by stipulating that if he in fact touched the victim's genitals, he did so for the purpose of sexual gratification. Tyler alleged that had he known of the possibility of a *Wallerman* stipulation, he would have entered into one and proceeded to trial.

The trial court found that Tyler had failed to establish a prima facie case for his first two claims, finding those claims to be undermined by Tyler's representations at the plea hearing and on the plea questionnaire. The court held an evidentiary hearing on the ineffectiveness claim, after which it found that Tyler had not been advised by his trial attorney about the possibility of entering into a *Wallerman* stipulation and that if such a stipulation had been proposed to Tyler, he would have attempted to enter into one and proceed to trial. However, the court found that Tyler had suffered no prejudice because there was no evidence that any such proposed stipulation would have been accepted by the state or by the court. The court relied heavily on *State v. Veach*, 255 Wis. 2d 390, 648 N.W. 2d 447 (2002), a case decided after Tyler had entered his plea, wherein the Wisconsin Supreme Court overruled *Wallerman* to the extent it had held that the state and the court were required to accept a stipulation to an element of the crime if it met certain criteria.

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[1] *State v. Wallerman*, 203 Wis. 2d 158, 166-68, 552 N.W. 2d 129 (Ct. App. 1996).

On appeal, the Wisconsin Court of Appeals affirmed the trial court's denial of Tyler's motion. The court held that Tyler's claim was foreclosed by *Veach*, which had involved the same claim: that counsel had provided ineffective assistance by failing to inform Veach of the possibility of a *Wallerman* stipulation and failed to offer such a stipulation at Veach's sexual assault trial. The court explained:

> Tyler's ineffective assistance claim fails for the same reason Veach's similar claim failed. Although both Tyler and Veach might have been willing to enter into a *Wallerman* stipulation, there is no reason to think that the prosecution or the trial court would have agreed to such a stipulation. Both Tyler and Veach wrongly assume that both the prosecutor and the trial court would have been required to accept a *Wallerman* stipulation. *See Veach*, 255 Wis. 2d 390, ¶¶ 119-23. The prosecution in Tyler's case was entitled to prove its case "by evidence of its own choice [and] a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." *Id.*, ¶ 125 (quoting *Old Chief v. United States*, 519 U.S. 172, 186-87 (1997)). Indeed, a "*Wallerman* stipulation in a child sexual assault case is directly contrary to the greater latitude rule for the admission of other acts evidence in child sexual assault cases. The purpose of a *Wallerman* stipulation in [cases involving alleged child sexual assault] is to *preclude* the admission of other acts evidence. The purpose of the greater latitude rule in cases involving allegations of child sexual assault is to '*permit a more liberal admission* of other crimes evidence.'" *Veach*, 255 Wis. 2d 390, ¶ 122 (citations omitted).

State v. Tyler, 2003 WI App at ¶ 14. The court found that because the prosecution would not have been required to accept a *Wallerman* stipulation, it was "pure speculation" that counsel's failure to raise the topic had an effect on the outcome of the plea negotiation process. *Id*.

The court also rejected Tyler's argument that the court should not assess his ineffectiveness claim under *Veach* but under the law as it existed at the time he entered his

plea. At that time, the controlling law was *State v. DeKeyser*, 21 Wis. 2d 435, 585 N.W. 2d 668 (Ct. App. 1998), which held that an attorney's failure to know about and seek a *Wallerman* stipulation was deficient performance and prejudiced the outcome of the trial. The court of appeals reasoned that Tyler was in no better position than Veach had been, to whom the supreme court had denied the benefit of *DeKeyser*. *Id*. at ¶ 17. Furthermore, it noted, Tyler's claim was foreclosed by *Lockhart v. Fretwell*, 506 U.S. 364 (1993), which rejected the notion that an ineffective assistance claim was to be decided under the law existing at the time of trial and not under a subsequent correction of that law. *Id*. at ¶ 18.

Turning to Tyler's claim that he did not understand the nature of the charge against him, the court rejected Tyler's contention that the court's plea colloquy was defective because the court did not go through each of the elements with Tyler to ascertain whether he understood them. The court noted that there is no requirement in Wisconsin that a court accepting a defendant's plea must personally inform a defendant of the nature of the charges or that the court must ask detailed questions regarding the defendant's understanding. *Id*. at ¶ 24. To the contrary, noted the court, there was no fixed manner of complying with the requirement that a court ascertain a defendant's understanding of the nature of the charges against him or her. *Id*. Reviewing the transcript of the plea colloquy and noting that Tyler was a highly educated 45-year old with prior experience in the criminal justice system, the court found that the court's colloquy was adequate to establish that Tyler understood the nature of the charge. *Id*. at 26.

Finally, the court rejected Tyler's claim that his plea was involuntary because he was confused, pressured and distressed when he pled guilty. The court found that claim to be one-in-the-same with Tyler's claim that his lawyer failed to inform him of the option of a *Wallerman* stipulation and instead pressured Tyler into pleading guilty by telling him repeatedly that he faced a trial with highly damaging other acts evidence. Moreover, found the court, Tyler had not sufficiently developed a separate involuntariness argument in the trial court or on appeal. *Id*. at n.2.

The Wisconsin Supreme Court denied Tyler's petition for review on October 27, 2003.

ANALYSIS

Pursuant to 28 U.S.C. § 2254(d), this court must accord special deference to the conclusions reached by the Wisconsin state courts. Specifically, this court may not grant Tyler's application for a writ of habeas corpus unless the state court's adjudication of his claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was 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).

The relevant Supreme Court precedent that controls this case is well-settled: a defendant's plea of guilty is unconstitutional if it was not made voluntarily and intelligently. *See Boykin v. Alabama*, 395 U.S. 238, 242- 44 (1969). As Tyler recognizes, mere defects in the plea colloquy are insufficient to establish a due process violation; rather, voluntariness is determined by "considering all of the relevant circumstances surrounding" the guilty plea. *Brady v. United States*, 397 U.S. 742, 749 (1970). The state courts relied heavily on *State v. Bangert*, 131 Wis. 2d 246, 261, 594 N.W. 2d 759 (1986), which adopted these constitutional standards in the context of a state court guilty plea. The state courts applied the governing law correctly by examining the transcript from the plea hearing and other relevant circumstances to determine whether Tyler had pled guilty voluntarily and intelligently. After performing this examination, the Wisconsin courts concluded that Tyler's plea was valid. The only question before this court is whether the state courts "unreasonably" applied federal law in reaching their conclusion.

It is very difficult to establish that a state court unreasonably applied federal law. A state court decision can be reasonable even if it is wrong. *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (unreasonable application of federal law is different from incorrect application of federal law). "[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." *Id*. at 411. 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). *See also Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997) ("[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored."). The reasonableness inquiry focuses on the outcome and not the reasoning provided by the state court. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). A decision that is at least minimally consistent with the facts and circumstances of the case is not unreasonable. *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002).

Having reviewed the transcripts from the plea hearing and other proceedings, petitioner's submissions and the court of appeals' opinion, I find that it was not unreasonable for the Wisconsin courts to have concluded from the circumstances surrounding the plea that Tyler had made it knowingly and intelligently in spite of the fact that the court did not go through each of the elements of the charge with him during the plea colloquy. As the court of appeals noted, Tyler responded affirmatively when the court asked him if he had gone over the elements of the offense with his lawyer and whether he understood the elements. The court of appeals also noted that the record contained a plea questionnaire signed by Tyler that indicated that Tyler had reviewed the relevant jury instruction which, along with its cross-references, detailed all the elements of the charge. Finally, the court noted that Tyler was a highly-educated person who had previous

involvement with the criminal justice system. These were all proper considerations that amply support the court's conclusion that Tyler understood the charges and that his plea was voluntary.

As he did before the state courts, Tyler asserts that his answers to the court's questions during the plea colloquy are not reliable because he was not acting of his free will. He asserts that his plea was the product of stress and a sense of hopelessness, brought on by spending a period of four to five hours listening to his lawyer describe his "bleak circumstances." However, Tyler's assertions are belied by his responses during the plea colloquy. The purpose of the plea colloquy is to expose coercion or mistake. *United States v. Loutos*, 383 F.3d 615,619 (7th Cir. 2004). A defendant's representations during the colloquy are presumed to be truthful. *Id*. The trial court asked Tyler twice if anyone had made any promises or threats to get him to plead guilty, to which Tyler replied no. Tyler and his lawyer also agreed with the court that he was voluntarily, knowingly and intelligently waiving his rights. The mere fact that Tyler's lawyer attempted to convince him to take a plea rather than go to trial is insufficient to establish coercion. The state courts were justified in treating Tyler's statements during the plea colloquy as conclusive and in rejecting his claim that he was not exercising his free will when he entered his plea.

Moreover, the court of appeals found that Tyler's coercion claim was no different from his claim that his plea was involuntary because his lawyer gave him bad advice and failed to inform him that there was a way to prevent the other acts evidence from coming

in at trial. As noted in the facts section, the court rejected that claim, finding that Tyler could not show that he was prejudiced by his lawyer's omission. The court's analysis of Tyler's claim that his lawyer was ineffective for failing to raise the topic of a *Wallerman* stipulation is summarized in the facts section of this report.

Tyler concedes that the court of appeals applied the proper Supreme Court precedent by evaluating his ineffectiveness claim under the two-part test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (two-part standard for evaluating ineffective assistance of counsel claims applies to claims of ineffective assistance arising out of plea process). He argues that the trial court's finding that Tyler would have entered into a *Wallerman* stipulation and gone to trial if that option had been presented to him amounts to a finding that Tyler satisfied the prejudice prong of *Strickland*. Tyler argues that the state appellate court "ignored" the trial court's findings and evaluated the prejudice component under a "subjective test," contrary to *Strickland*.

Tyler is mistaken. The court of appeals did not disagree with the trial court's conclusion that, had Tyler known of the possibility of a *Wallerman* stipulation, he would have pursued that option instead of a plea. Rather, the court found that, *in spite of that fact*, Tyler's claim that he would not have entered the plea was still speculative because a *Wallerman* stipulation would have precluded the other acts evidence from coming in at trial only if both the state and the trial court had agreed to accept it. Under *Veach*, neither the prosecutor nor the trial court were required to accept a *Wallerman* stipulation and there was

no evidence that the state and the trial court would have agreed to a *Wallerman* stipulation. In the absence of such evidence, the state courts concluded that Tyler had failed to show that there was a reasonable probability that the outcome would have been different if his lawyer had discussed the possibility of a *Wallerman* stipulation with him. This conclusion was reasonable.

Tyler also argues that the court of appeals was wrong to have analyzed his ineffectiveness claim under *Veach* instead of under the law existing at the time of counsel's actions, which had held that counsel's failure to pursue a *Wallerman* stipulation as a means of keeping other acts evidence from being admitted at trial was ineffective assistance. *State v. DeKeyser*, 221 Wis. 2d 435, 585 N.W. 2d 668 (Ct. App. 1998). Again, however, Tyler's position is without merit. As the court of appeals noted, the United States Supreme Court rejected this argument in *Lockhart v. Fretwell*, 506 U.S. 364 (1993). In that case, the Court held that in determining whether a defendant was prejudiced by his lawyer's omission, the court must assess whether the act omitted would have merit under current governing law, even if the act might have been considered meritorious at the time of its omission. *Id*. at 369-73. *Lockhart* disposes of Tyler's claim.

Finally, Tyler asserts that the court of appeals failed to consider whether the lawyer he retained for the purpose of filing the interlocutory appeal was ineffective for not filing the appeal and for failing to inform Tyler that such an appeal could have been filed even absent the trial court's refusal to grant a stay. Tyler has procedurally defaulted this claim because

he did not present the operative facts of the claim to the state courts. *See Hough v. Anderson*, 272 F.3d 878, 892 (7th Cir. 2001) (failure to present operative facts underlying claim of ineffective assistance fo counsel to state courts results in procedural default that precludes federal review). Although Tyler mentioned the interlocutory appeal in passing in his briefs before the court of appeals, nowhere did he identify the failure to file the appeal as a stand-alone claim of ineffective assistance of counsel. Moreover, Tyler did not raise the issue in his postconviction motion in the trial court or elicit any testimony from his attorney as to why the appeal was never filed.

A procedural default can be overlooked when the petitioner demonstrates cause for the default and consequent prejudice, or when he shows that a fundamental miscarriage of justice will occur unless the federal court hears his claim. *Wilson v. Briley*, 243 F.3d 325, 329 (7th Cir. 2001). Tyler has not attempted to make either of these showings. Even if he had, he would not prevail. First, it is pure speculation whether the court of appeals would have granted permission for Tyler to appeal from the trial court's ruling on the state's other acts motion. Second, even if the court had granted permission, the likelihood that petitioner would have succeeded on appeal was between slim and none, given the greater latitude that Wisconsin courts are allowed for admitting other acts evidence in cases involving child sexual assault. *See State v. Davidson*, 2000 WI 91, ¶ 37, 236 Wis. 3d 537, 613 N.W. 2d 606. In fact, even petitioner's trial attorney conceded during the motion hearing that at least two of the other acts presented by the state were admissible. In light of these facts, the possibility

that an interlocutory appeal would have resulted in the preclusion of all the other acts evidence proffered by the state was so remote as to make it impossible for Tyler to show prejudice. In short, there was nothing Tyler's attorneys could have done to have prevented the evidence from coming in at trial.

In sum, the state court's analysis of Tyler's claim that his plea was invalid demonstrates that it took his claim seriously and analyzed it under the proper legal standards. Having reviewed the transcripts from the relevant proceedings, petitioner's submissions and the court of appeals' opinion on petitioner's claim, I conclude that the court of appeals reasonably concluded that the circumstances surrounding the plea showed that Tyler understood the nature of the charge against him, that he entered his plea voluntary and that he was not prejudiced by his lawyer's failure to raise the topic of a *Wallerman* stipulation. Accordingly, this court should deny Tyler's habeas petition under §2254(d)(1).

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the petition of Matthew Tyler for a writ of habeas corpus be DENIED.

Dated this 17th day of December, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge