IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

LOREN C. ALLIET,

Petitioner,

OPINION AND ORDER

v.

05-C-659-C

PAMELA WALLACE, Warden,
Stanley Correctional Institution,[1]

Respondent.

- -

Loren C. Alliet, an inmate at the Stanley Correctional Institution, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his October 30, 2000 conviction in the Circuit Court for Washington County for possession of marijuana with intent to deliver. Petitioner contends that he is in custody in violation of the laws and Constitution of the United States because 1) the lawyer who represented him at the plea hearing was ineffective for erroneously advising him that he would not have to provide a DNA sample upon conviction and 2) when deciding to sentence petitioner to the maximum allowable sentence, the trial court considered the fact that he was appealing his conviction

[1]At respondent's request, the caption in this case has been updated to show that Pamela Wallace has replaced former respondent Daniel Benik as warden of the Stanley Correctional Institution.

and sentence in another case. Because petitioner has not shown that the outcome of his plea hearing would have been different but for his counsel's alleged errors and because he has failed to demonstrate that the sentencing court deprived him of any right under federal law, his petition will be denied.

From hearing transcripts, the trial court's postconviction order and the decision of the Wisconsin Court of Appeals, I draw the following facts.

FACTS

A. The Crime

On October 7, 1999, two Milwaukee police officers witnessed a man breaking into the trunk of a vehicle. When the man noticed the officers, he ran from the car into a nearby house. The officers looked into the open trunk of the car and saw garbage bags containing a substance later identified as marijuana. Shortly thereafter, petitioner approached the officers and told them that the car and its contents belonged to him. The officers removed three garbage bags from the car, containing 306.97, 445.42 and 636.35 grams of marijuana, respectively. Petitioner confessed to police officers and later to the court that he knew the "hemp" was in the trunk of his vehicle.

Petitioner was charged with one count of possession with intent to deliver more than 500 grams and less than 2500 grams of THC. The charges were later amended to include

three additional drug-related counts: failure to pay controlled substance tax, possession of drug paraphernalia and keeping a drug car.

During the time petitioner's case was pending, he was advised repeatedly of the serious nature of his offense and the likely consequences of proceeding to trial. After denying petitioner's motion to suppress evidence of the marijuana found in his vehicle, Milwaukee County Circuit Court Judge Richard Sankovitz told petitioner, "I assume you appreciate, Mr. Alliet, that you have a nearly zero chance of being acquitted at trial. Take that into consideration." Ans., dkt. #7, exh. Q, at 26:21-22. Several weeks later, the judge delayed petitioner's trial in order to allow petitioner to obtain a lawyer. The judge commented, "Our experience is that professional advice sometimes leads to the resolution of the case . . . I think in this case, particularly, in this case where I don't believe there's any dispute as to the possession of this substance, that it would be best for Mr. Alliet to talk to a lawyer." Ans., dkt. #7, exh. R, at 3:21-23, 25-4:3. At a scheduling conference held on September 15, 2000, the trial judge warned petitioner again, "Mr. Alliet, your chances of prevailing in this case are dim. You have a right to a trial. We'll respect that right but I want you to be clear on this up front." Ans., dkt. #7, exh. T, at 3:4-7.

B. The Plea

On October 30, 2000, the state agreed to dismiss three of the charges against petitioner and to recommend a six-month sentence in exchange for petitioner's plea of guilty

to the original charge of possession with intent to deliver. Before accepting the plea, Judge Sankovitz engaged in the following colloquy with petitioner:

> Court: Do you understand that if you are convicted I can order you to spend up to five years in the State prison and not less than three months and pay a fine of up to $50,000 and not less than $1,000?
>
> Petitioner: Yes.
>
> Court: Do you understand that I am not required to follow the State's recommendation?
>
> Petitioner: Yes.

Ans., dkt. #7, exh. V, at 4:23-5:4. After confirming a factual basis for petitioner's plea and informing petitioner of the rights he was waiving by pleading guilty, the judge accepted the plea and stated, "I guess we don't have a DNA order since it is a 1999 case." Id. at 9:22-23. The court then adjourned the case for sentencing.

Petitioner did not appear in court at his scheduled February 8, 2001 sentencing hearing and a warrant was issued for his arrest.

C. The Law

Despite Judge Sankovitz's statement that it was not necessary to impose a "DNA order" on petitioner because his crime was committed in 1999, petitioner was in fact required by law to provide a DNA sample following his conviction. Wisconsin Statutes section 973.047(1f), enacted in 1999, required courts to order all convicted felons to "provide a biological specimen to the state crime laboratories for deoxyribonucleic acid

analysis." Section 973.047 took effect on January 1, 2000 and applied to all felons sentenced after December 31, 1999. 1999 Wis. Act 9 § 9358(5x).

D. Sentencing

On April 4, 2001, petitioner committed an armed robbery, for which he was later tried, convicted and sentenced to eight years' initial confinement and eleven years' extended supervision. Petitioner was appointed a new lawyer to represent him at sentencing on his marijuana conviction. A sentencing hearing was scheduled for September 19, 2002, before Milwaukee County Circuit Court Judge Elsa Lamelas.

Before the sentencing hearing, petitioner's new lawyer filed a motion to withdraw his plea based upon the ineffective assistance of petitioner's previous lawyer. However, at the hearing, petitioner agreed to withdraw his request for plea withdrawal and proceed directly to sentencing in exchange for the state's agreement to recommend a six-month sentence, to run concurrently with his sentence for the armed robbery.

Before allowing petitioner to abandon his motion for plea withdrawal, Judge Lamelas had the following exchange with counsel:

> Court: You're recommending six months concurrent?
>
> Prosecutor: Yes.
>
> Court: Obviously, I have to listen to what everybody's explanations are, but I'm not at all sure that I will impose six months concurrent here. I don't know, and I don't want to mislead anybody, so if you want, if he wants to persist in this motion he may, and I

> will hear whatever there is, or we will go forward to sentencing. But I will want information on the defendant in the usual ways on the factors I have to consider, and it may be that I'll impose six months concurrent, but it may be that I don't.

Ans., dkt. #7, exh. AA, at 6:10-22. After conferring with his attorney off the record, petitioner decided to proceed to sentencing. When making her sentencing recommendation, the prosecutor engaged in the following conversation with the court:

> Prosecutor: I am recommending the six months which was pursuant to original plea negotiations, and I also believe that running it concurrent would not unduly depreciate the offense given that he is facing, he is serving a substantial amount of time [on his armed robbery conviction] that is actually even in excess of what he is even facing in this case. And I think given all of the circumstances it is appropriate to run it concurrent.
>
> Court: Is he appealing that conviction?
>
> Prosecutor: He is.
>
> Court: You were going to say something, Ms. Rablin?
>
> Def. Counsel: Well, I was just going to say, the court knows how often people are successful on appeals; and he's representing himself in that matter, so the likelihood of his success, though I don't mean this in any way toward Mr. Alliet, the likelihood of success on appeal is very small . . .

Id. at 10:17-11:9.

The court asked why petitioner had filed a motion to withdraw his plea. His lawyer answered that he was angry at his trial counsel for a "lack of communication," but that she had advised petitioner to withdraw the motion in exchange for the state's sentencing recommendation. Id. at 12: 1-2.

After counsel offered information regarding petitioner's criminal history and the crime for which he was being sentenced, Judge Lamelas stated:

> Court: You are facing a very significant period of incarceration from the [armed robbery] conviction. I am informed that you have eight years of initial confinement and eleven years of extended supervision, and both the state and your lawyer have urged me to impose a six month concurrent sentence.
>
> I am also informed that you are appealing that conviction; and while I tend to agree with Ms. Rablin when she says the eight years of initial confinement is enough to serve the kinds of purposes that we want to serve through confinement, that is to protect the community, to rehabilitate you, to make sure that you do not reoffend in the future, I do want my sentence to reflect the seriousness of the offense, your character and background, and my obligation to protect the community . . .
>
> I am, therefore, consistent with my obligations, imposing a concurrent sentence. It is a concurrent sentence of five years.

Id. at 24:17-25:6, 25:24-26:1. The judge then ordered petitioner to submit a DNA sample, which prompted the following exchange with defense counsel:

> Counsel: Judge, does the — he has already given the DNA sample so this is really moot.
>
> Court: I always order it; and then if the Department of Corrections doesn't take it up, that's up to the Department of Corrections. But I think I am required to order it.
>
> Counsel: And I'm unclear about this, but my client is adamant that because it's pre – because it's a '99 case that there is no mandatory DNA, but I believe it's upon to [sic] conviction date, not based on the offense date. But I am unsure, so I am just putting that on the record.

Court: Okay. If you look into it, Ms. Rablin, and you are — and he is right, and you and I are wrong, then I will vacate that portion of the sentence.

Counsel: Okay.

Id. at 26:17-27:8. Shortly thereafter, before concluding the hearing, the court asked whether there were any additional matters to be discussed, to which petitioner's attorney answered yes.

Counsel: In the transcript apparently Judge Sankovitz indicated, "Well, I guess we don't have a DNA order because it's a 1999 case."

Court: Well —

Counsel: That's what he wanted me to point out to you.

Court: Okay. Would you check that out, Ms. Rablin?

Counsel: I will.

Court: If I'm wrong, I will certainly vacate it.

Id. at 27:23-28:8. The hearing was then concluded.

E. Appeal

Following sentencing, petitioner filed a postconviction motion to withdraw his guilty plea and for an evidentiary hearing. Accompanying his motion was an affidavit in which petitioner asserted the following:

> One of the primary concerns I had at the time I entered the plea was that I not be required to submit a DNA sample . . . My trial attorney, Alexander Krezminski, assured me that the DNA submission requirements of the law did

> not apply to my case. Further, the trial judge during my plea hearing indicated that he did not believe that a DNA order was appropriate since my case was a "1999 case." . . . Had I known that the law required a DNA submission from all individuals convicted of a felony on or after January 1, 2000, I would never have entered a guilty plea and would have chosen to go to trial . . .

Ans., dkt # 7, exh. D, app. 132, at ¶¶ 2, 4. In his motion, petitioner asked to withdraw his plea or, in the alternative, to be re-sentenced because of the court's allegedly impermissible consideration of the pending appeal of his armed robbery conviction. In a written decision issued November 23, 2003, the court denied petitioner's motion without conducting an evidentiary hearing.

Petitioner timely appealed the denial of his postconviction motion to the Wisconsin Court of Appeals. In that court, he asserted that (1) his plea was not made knowingly and voluntarily because he relied upon the erroneous advice of his trial counsel and (2) the sentencing court erred by considering the pendency of his armed robbery appeal when determining what sentence to impose for his drug possession charge, in violation of state and federal law.

In analyzing petitioner's claim of ineffective assistance, the state appellate court applied the two-prong test for ineffective assistance of counsel claims outlined in Strickland v. Washington, 466 U.S. 668, 687 (1984). The court stated:

> In order to prove ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984) . . . In the context of a plea withdrawal, to prove prejudice, the defendant must demonstrate that there is a reasonable probability that, but for counsel's alleged errors, he or she would not have pled guilty and

> would have insisted on going to trial. State v. Bentley, 201 Wis. 2d 3030, 312, 548 N.W.2d 50, 54 (1996).

State v. Alliet, 2005 WI App 1, ¶ 10, 277 Wis. 2d 873, 690 N.W.2d 885 (unpublished decision).

The court offered two explanations for its conclusion that petitioner had not been prejudiced by his attorney's error:

> First, he continued with the sentencing hearing in 2002, agreed to take back his motion to withdraw his guilty plea to the marijuana charge, and did not before the end of the sentencing hearing seek to reinstate his motion to withdraw his guilty plea (and add to that motion the DNA-sample claim). Second, he had already given a DNA sample before the 2002 sentencing (as his sentencing-hearing lawyer told the trial court). This means that the DNA-sample aspect of his guilty plea in 2000 was then moot — his sample was already on file by the 2002 sentencing, and possibly having to give it again did not prejudice him.

Id., ¶ 13.

With respect to petitioner's claim that the sentencing court had erred in considering his pending appeal, the appellate court stated:

> The trial court's comments [at sentencing] were proper. It noted that the crime was serious because of the amount of marijuana the police found and because Alliet had a prior drug conviction. The trial court also opined that Alliet's character and background "concern[ed it] probably more than the nature of the offense" because Alliet had absconded before the trial court could impose sentence in the marijuana case, and had committed armed robbery while he was an absconder. The trial court referred to Alliet's appeal in this context; that is, the trial court wanted to assure itself that Alliet would spend sufficient time in prison even if his appeal was successful. Indeed, the trial court imposed this sentence concurrent to the armed-robbery sentence, which shows that it did not wish to impose additional prison time.

Id., ¶ 18.

Petitioner filed a petition for review in the Wisconsin Supreme Court. On May 11, 2005, the court denied his petition as untimely. Petitioner then filed a petition for a writ of habeas corpus, asking the Wisconsin Supreme Court to accept his petition for review, even though his counsel had filed it in an untimely fashion. The court granted the writ of habeas corpus and then proceeded to deny the petition for review.

OPINION

The Antiterrorism and Effective Death Penalty Act provides that when a petitioner brings a claim in federal court that was adjudicated on its merits in state court, the federal court may grant relief only when the state court's adjudication

> (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
>
> (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).

A state court decision is contrary to Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in decisions of the United States Supreme Court or if the state court confronts a set of facts that are materially indistinguishable from those found in a decision of the Supreme Court and nevertheless arrives at a different result. Williams v. Taylor, 529 U.S. 362, 405 (2000). A state court decision is an unreasonable application of Supreme Court precedent if the state court

identifies the correct governing legal rule but unreasonably applies it to the facts of the case before it. Id. at 407.

A federal court may not issue a writ of habeas corpus simply because the court concludes in its independent judgment that a state court applied the law incorrectly. Relief is available under 28 U.S.C. § 2254(d)(1) only if the state court's decision is objectively unreasonable. Yarborough v. Alvarado, 541 U.S. 652, 665-666 (2004).

A. Plea Withdrawal

1. State court decision

By pleading guilty to a criminal offense, a defendant waives his Sixth Amendment right to trial by jury. Florida v. Nixon, 543 U.S. 175, 187 (2004). Because of the significance of such a waiver, a guilty plea is "valid only if entered voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970); Bradshaw v. Stumpf, 125 S. Ct. 2398, 2405 (2005). When a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of his plea depends on whether the advice he received was within the range of competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 56 (1985).

In order to show that his lawyer assisted him ineffectively, a petitioner must meet the two-prong test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668

(1984). Hill, 474 U.S. at 57. First, a petitioner must show that his lawyer's performance was deficient; that is, that his counsel's advice regarding the plea was objectively unreasonable. Moore v. Bryant, 348 F.3d 238, 241 (7th Cir. 2003). Second, the petitioner must show that he was prejudiced by the advice he received. In Hill, 474 U.S. at 59, the Supreme Court stated:

> The second, or "prejudice," requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

In this case, petitioner contends that his plea of guilt to the marijuana possession charge was not entered knowingly because he made the decision to plead in reliance on the advice of his lawyer, who assured him that he would not be required to provide a DNA sample upon entry of his guilty plea. Assuming the truth of petitioner's assertion, there is no question that his lawyer's advice was incorrect. In 1999, Wisconsin enacted a law requiring convicted felons to submit DNA sample for analysis by the state crime laboratory. Wis. Stat. § 973.047(1f). The law applies to all felons sentenced on or after January 1, 2000. 1999 Wis. Act 9 § 9358(5x). Because petitioner pleaded guilty after January 1, 2000, he was required to provide a DNA sample following his sentencing hearing.

In analyzing petitioner's claim that his plea was unknowing, the Wisconsin Court of Appeals did not address whether the misinformation provided to petitioner by his attorney constituted deficient performance under Strickland. Instead, the court proceeded directly

to consider whether petitioner had shown he was prejudiced by the advice he received. The court concluded that petitioner failed to show prejudice for two reasons: (1) prior to sentencing he withdrew his initial motion to withdraw his guilty plea and did not renew the motion before the end of the sentencing hearing; and (2) by the time the DNA order was entered, petitioner had already provided a DNA sample in conjunction with his armed robbery conviction. Alliet, 2005 WI App 1, ¶ 15. Neither of these conclusions reflects a reasonable application of the standards that apply to plea withdrawal motions premised upon the ineffective assistance of trial counsel, as set forth in Hill, 474 U.S. at 58-59.

The sequence of events in this case belies the accuracy of the Wisconsin court's conclusion that petitioner's failure to reinstate his plea withdrawal motion before the termination of the sentencing hearing meant that he had abandoned the importance of the court's DNA order. Petitioner's initial motion for plea withdrawal was brought and abandoned before he was sentenced. At the time petitioner withdrew the initial motion, he had not yet discovered that he was subject to DNA registration under § 973.047 but was still operating under the incorrect belief, allegedly conveyed by his first attorney and confirmed by Judge Sankovitz, that the DNA statute did not apply to his case. Therefore, his decision to withdraw his first motion for plea withdrawal is unrelated to the merit of the motion he would later bring, requesting plea withdrawal based upon the incorrect advice his lawyer had given him regarding the applicability of the DNA registration statute to petitioner's case.

Moreover, although petitioner did not formally renew his motion for plea withdrawal before the sentencing hearing ended, it is clear from the record that he still did not realize that his first lawyer's advice regarding the DNA requirement was incorrect. Immediately after the court imposed the DNA order, petitioner's lawyer stated, "And I'm unclear about this, but my client is adamant that because it's pre – because it's a '99 case that there is no mandatory DNA, but I believe it's upon to [sic] conviction date, not based on the offense date. But I am unsure, so I am just putting that on the record." Shortly thereafter, the lawyer indicated that her "client want[ed] [her] to point out" the statement made by Judge Sankovitz at the end of petitioner's plea hearing: "Well, I guess we don't have a DNA order because it's a 1999 case." From these comments, it is clear that at the time he was sentenced, petitioner still thought his first lawyer's advice may have been correct, a possibility left open by the equivocal statements made by his lawyer and the court during the sentencing hearing. Therefore, his failure to renew his motion for plea withdrawal before the end of the hearing does not establish that he was not prejudiced by the misinformation. On the contrary, the statements made by petitioner's counsel at the hearing establish that petitioner *was* concerned about the court's DNA order and believed it to have been entered in error. The state appellate court's emphasis on petitioner's conduct *before* he realized his lawyer had erred reflects an unreasonable application of Hill. See, e.g., U.S. v. Giardino, 797 F.2d 30, 32 (1st Cir. 1986) (statements by criminal defendant expressing satisfaction with

lawyer at time of plea irrelevant to defendant's later claim that lawyer was ineffective when lawyer's errors were unknown to defendant at time of plea).

Next, in arriving at the conclusion that petitioner was not prejudiced by the error of his trial counsel, the Wisconsin Court of Appeals identified the alleged "prejudice" to petitioner as the surrender of his DNA. Because petitioner had already provided a DNA sample following his armed robbery conviction in 2001, the court concluded, he would suffer no prejudice from having to give a second sample. However, under Hill, the question is not whether petitioner was prejudiced by the error *at the time of his sentencing hearing*, but whether petitioner was prejudiced by counsel's error *at the time he entered his plea*, thereby rendering the plea "unknowing." Hill, 474 U.S. at 59 (prejudice analysis "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process"). Here, the prejudice petitioner allegedly suffered was not having to provide a DNA sample; it was entering a guilty plea that he alleges was influenced by his lawyer's erroneous advice about whether he would have to provide a DNA sample upon conviction. By focusing its prejudice analysis on the circumstances as they existed at the time of petitioner's sentencing hearing, instead of at the time petitioner entered his plea, the court of appeals unreasonably applied the law as set forth in Hill.

2. Application of governing law

The conclusion that the state appellate court unreasonably applied clearly established

federal law to petitioner's claim does not entitle him automatically to habeas relief. The Court of Appeals for the Seventh Circuit "has held that under § 2254(d), finding error is only a necessary step" in the process of determining whether a prisoner is entitled to relief. Ben-Yisrayl v. Davis, 431 F.3d 1043 (7th Cir. 2005). To be entitled to habeas relief, a petitioner still must demonstrate that he is "in custody in violation of the Constitution or laws of the United States." 28 U.S.C. § 2254(a). To decide that question, this court must consider petitioner's claim anew and determine whether he has shown that there is a reasonable probability that he would have taken his case to trial but for the erroneous advice of his lawyer.

Because the state court did not grant petitioner's request for an evidentiary hearing on his postconviction motion, it is not possible to determine from the record whether, as petitioner alleges, his trial counsel told petitioner he would not have to provide a DNA sample following his conviction. However, even assuming that petitioner could establish that fact, he still would not be entitled to an evidentiary hearing in this court. To be entitled to a hearing, at minimum petitioner must allege facts which, if proven, would entitle him to relief. Davis v. Lambert, 388 F.3d 1052, 1061 (7th Cir. 2004).

In order to show that he was prejudiced by the erroneous advice given him by his lawyer, petitioner must demonstrate that "there is a reasonable probability that but for counsel's unprofessional errors, the result [of his plea hearing] would have been different." Strickland, 466 U.S. at 694. A "reasonable probability" is a probability sufficient to

undermine confidence in the outcome of the proceeding. Id. It is insufficient to show only that the errors "had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test." Williams, 529 U.S. at 394. Petitioner bears the "highly demanding and heavy burden of establishing actual prejudice." Id. In the context of plea withdrawal, petitioner must allege facts showing why he would not have pleaded guilty but for his lawyer's bad advice. United States v. Winston, 34 F.3d 574, 579 (7th Cir. 1994) ("mere conclusions" insufficient to demonstrate that but for lawyer's error, defendant would not have pleaded guilty).

Petitioner has failed to allege facts from which the court can conclude that there is a reasonable probability that but for his lawyer's bad advice, he would not have entered a guilty plea. In support of his assertion that he would have proceeded to trial had he known he would be required to provide a DNA sample upon conviction, petitioner has alleged only that submitting a DNA sample was "one of [his] primary concerns" at the time he entered his plea and that "had [he] known that the law required a DNA submission from all individuals convicted of a felony on or after January 1, 2000, [he] would never have entered a guilty plea and would have chosen to go to trial." At no time has petitioner indicated *why* the DNA requirement mattered to him or offered any credible explanation for his alleged preoccupation with that issue at the time of his plea.

Moreover, petitioner's assertion that he would have gone to trial had he known he would be subject to Wis. Stat. § 973.047 is undermined by the facts of this case. During the

time petitioner's case was pending in circuit court, he confessed to the police and to the trial court that the marijuana found in the trunk of his car belonged to him. He was admonished by the trial court on numerous occasions that his possibility of success at trial was "nearly zero." Perhaps most tellingly, prior to pleading guilty, petitioner faced four criminal charges, some with penalty enhancers, carrying significant potential penalties. By pleading guilty to one charge with no enhancers, petitioner reduced his potential maximum penalty to a sentence of five years and obtained the state's recommendation of a six-month sentence. Petitioner's suggestion that he would have nevertheless passed up the proffered deal and gone to trial on a hopeless case merely to avoid giving a DNA sample is patently incredible.

In the absence of facts supporting his assertions, petitioner's conclusory and self-serving allegation that he would have gone to trial is insufficient to entitle him to an evidentiary hearing on the question of his lawyer's ineffective assistance. Winston, 34 F.3d at 579. Because petitioner has failed to show that he suffered prejudice as a result of the misinformation he received, his petition will be denied with respect to his claim that his plea was entered unknowingly because of the ineffective assistance of his trial counsel.

B. Sentencing Factors

Petitioner contends that the trial court violated his rights under federal law by making reference at sentencing to the pending appeal of his 2001 armed robbery conviction. There is no constitutional right to appeal a criminal conviction. Martinez v. Court of Appeal of

California, Fourth Appellate Dist., 528 U.S. 152 (2000) ("The Sixth Amendment does not include any right to appeal."); Abney v. U. S., 431 U.S. 651, 656 (1977). The right of appeal, as we presently know it in criminal cases, is purely a creature of statute. Id. Petitioner's right to appeal his sentence arose under Wis. Stat. § 809.30, which governs the right of a criminal defendants to seek an appeal following conviction and sentencing. Although states are not obligated to provide any process for appellate review of convictions, once such a process has been established, states are obligated to provide "fair process" and equal protection to all litigants exercising their state-created right to appeal. Smith v. Robbins, 528 U.S. 259, 270 (2000). Therefore, if petitioner were to show that the sentencing court interfered with his right to due process in the prosecution of his appeal, he would state a federal claim under the Fourteenth Amendment. However, because petitioner has not shown that the sentencing court's consideration of his pending appeal had *any* effect on that appeal, he has failed to show a deprivation of his rights under federal law.

The Wisconsin Court of Appeals held that petitioner's pending appeal had been considered by the sentencing judge for the sole purpose of "assur[ing] itself that Alliet would spend sufficient time in prison" on his drug conviction even if his appeal of his armed robbery case were successful. Alliet, 2005 WI App 1, ¶ 18. The appellate court found as fact that the trial court's decision to impose a concurrent sentence "show[ed] that [the court] did not wish to impose additional prison time" on petitioner. Id.

Factual determinations made by a state court are presumed to be correct under 28 U.S.C. § 2254(e). It is petitioner's burden to show by clear and convincing evidence that the state court's factual determinations are both incorrect and unreasonable. Harding v. Walls, 300 F.3d 824, 828 (7th Cir. 2002). In this case, petitioner is unable to make either of the necessary showings.

From the transcript of the sentencing hearing, it is apparent that the court's inquiry into the status of petitioner's appeal was prompted not by a desire to interfere with petitioner's appeal of his unrelated conviction, but by the suggestion that she should rely upon petitioner's armed robbery sentence as a sufficient sanction for his drug conviction. The parties jointly recommended a six-month concurrent sentence for petitioner's drug conviction. In supporting that recommendation, the prosecutor asked the court to impose a short, concurrent sentence because petitioner was already "serving a substantial amount of time" for his armed robbery conviction. By asking the judge to impose a minimal sentence and to rely on the armed robbery sentence to keep petitioner incapacitated for a "substantial" amount of time, the parties invited the court to inquire into the possibility that the eight-year sentence he was serving might be overturned on appeal.

As the state appellate court found, by imposing a concurrent five-year sentence, the court insured that petitioner would serve a sentence on his drug conviction that accurately reflected his culpability for the crime before the court, without extending the amount of time he would spend incarcerated. Rather than punishing petitioner for his appeal of the armed

robbery conviction, the court responsibly imposed a sentence in keeping with its evaluation of the severity of the case before her. In doing so, it did not violate any of petitioner's rights under federal or state law. Therefore, petitioner is not entitled to habeas relief on this claim.

ORDER

The petition of Loren C. Alliet for a writ of habeas corpus is DENIED.

Entered this 23rd day of February, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge