IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LOREN C. ALLIET,

Petitioner,

v.

PAMELA WALLACE, Warden,
Stanley Correctional Institution,

Respondent.

OPINION AND ORDER

05-C-659-C

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In an order dated February 23, 2006, I denied petitioner Loren C. Alliet's request for a writ of habeas corpus because he had failed to allege facts showing that he was prejudiced by the allegedly deficient performance of his trial lawyer. Now before the court is petitioner's motion for reconsideration. Because petitioner's motion was filed within ten days of the denial of his petition, I construe it as a motion to alter judgment pursuant to Fed. R. Civ. P. 59(e). Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 269 (1978) (applying Rule 59 to habeas proceedings). For the reasons set forth below, the motion will be denied.

FACTS

The facts of this case are recounted in detail in the February 23 order. In 1999, petitioner was charged with possession of marijuana with intent to deliver, failure to pay controlled substance tax, possession of drug paraphernalia and keeping a drug car. Had petitioner had been convicted of all four charges, he would have faced a potential sentence of more than twenty eight years' incarceration.

In exchange for petitioner's plea of guilt to the possession charge, the state offered to dismiss the remaining charges against him and recommend a sentence of six months' incarceration. Petitioner conferred with his lawyer, who advised him to take the deal. Petitioner alleges that the lawyer assured him that he would not have to provide a DNA sample upon conviction. On October 30, 2000, petitioner pleaded guilty to one count of possession of marijuana with intent to deliver; however, before he could be sentenced, petitioner absconded.

In April 2001, petitioner was taken into custody after committing an armed robbery. He was convicted of the robbery, sentenced to prison and required to provide a DNA sample. In September 2002, petitioner was returned to court to be sentenced for his drug conviction. At the conclusion of the sentencing hearing, the court ordered petitioner to submit a DNA sample. (Contrary to the statements petitioner attributes to his lawyer, Wis. Stat. § 973.047 required all felons sentenced after January 1, 2000 to submit a DNA sample for analysis.)

Petitioner moved to withdraw his guilty plea, alleging that the plea had been made unknowingly as a result of the ineffective assistance of his lawyer. In support of his request for an evidentiary hearing on the matter, petitioner averred:

> 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. The trial judge denied petitioner's motion without a hearing. In the state appellate courts, petitioner met with no greater success. The state courts emphasized that because petitioner had already provided a DNA sample by the time he was sentenced on his drug offense, he could not show that the erroneous advice of his lawyer had "prejudiced" him, which would be a prerequisite for relief under Strickland v. Washington, 466 U.S. 668, 687 (1984).

On November 14, 2005, petitioner filed a petition for a writ of habeas corpus. In the February 23, 2006 order denying petitioner's request for a writ of habeas corpus, I noted that the state courts erred when they applied the "prejudice" prong of Strickland to the wrong moment in the state court proceedings. Under Hill v. Lockhart, 474 U.S. 52, 56 (1985), prejudice is measured by "whether counsel's constitutionally ineffective performance affected the outcome of the plea process." A defendant satisfies the prejudice requirement when he shows "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." Id. Therefore, the operative question was not whether petitioner had provided a DNA sample by the time of his sentencing but whether he would have gone to trial had he known he would be required to provide a DNA sample. As I discussed at length in the order denying the petition for a writ of habeas corpus, petitioner was not entitled to habeas relief under Hill and Strickland, because he had not introduced evidence demonstrating that he would have proceeded to trial but for his lawyer's bad advice. Without some factual basis for his allegation that he would have done so, he failed to show prejudice.

OPINION

Now, in response to the February 23 order, petitioner has attempted to explain why he would have proceeded to trial had he understood that he would have to provide a DNA sample following conviction. Although petitioner acknowledges that "technically [he] was guilty of the THC charge," he contends that he would have gone to trial for two reasons: because (1) "juries have been known to be less than technical when swayed by convincing testimonial evidence" and (2) he was concerned that a DNA sample would result in "the prosecution of past petty offenses unknown to the state." Mtn. to Reconsider, dkt. #14, at 2-3. Petitioner's factual allegations have come too late.

First, the purpose of a Rule 59(e) motion is to allow the district court to correct legal errors, sparing the parties and appellate courts the burden of unnecessary appellate

proceedings. Charles v. Daley, 799 F.2d 343, 348 (7th Cir. l986). Motions to alter or amend a judgment may be granted to (1) take account of an intervening change in controlling law; (2) take account of newly discovered evidence; (3) correct clear legal error; or (4) prevent manifest injustice. 12 Moore's Federal Practice, 59.30(5)(a)(i) (Matthew Bender 3d ed.). Rule 59 motions are intended to correct error, not introduce facts known to petitioner at the time his petition was filed, but not presented to the court. Because petitioner acknowledges that he was aware of the facts he now alleges at the time he filed his pleading in this case, his motion could be denied on that ground alone.

Second, even assuming petitioner's tardy allegations could be raised in a motion for reconsideration, "comity dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief." O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999). In order for state courts to have "their rightful opportunity to adjudicate federal rights, [a] p[etitioner] must be diligent in developing the record and presenting, if possible, all claims of constitutional error" to the state courts on direct appeal. Williams v. Taylor, 529 U.S. 420, 437 (2000).

If a petitioner fails to develop necessary facts in state court, 28 U.S.C. § 2254(e)(2) prohibits federal courts from holding an evidentiary hearing to develop claims in federal court, unless the statute's stringent requirements are met. Id. Petitioners seeking to develop facts in federal court will be subject to the provisions of § 2254(e)(2) unless they can show

that they made diligent efforts to develop the factual record before the state court and were prevented from doing so through no fault of their own. Id. at 435. At a minimum, diligence requires "that the prisoner . . . seek an evidentiary hearing in state court in the manner prescribed by state law." Id. at 437.

Under Wisconsin law, when a criminal defendant wishes to withdraw his plea because of the alleged ineffective assistance of his trial counsel, the defendant must file a postconviction motion requesting an evidentiary hearing, called a Machner hearing, to develop the factual basis for his claim by soliciting evidence from the allegedly ineffective attorney. State v. Machner, 92 Wis. 2d 797, 285 N.W.2d 905 (1979). A trial court must hold a Machner hearing when the defendant alleges facts that, if true, would entitle him defendant to relief. State v. Allen, 2004 WI 106, ¶ 9, 274 Wis.2d 568, 576, 682 N.W.2d 433, 437. However, if a postconviction motion "does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations . . .the circuit court has the discretion to grant or deny a hearing." Id.; Nelson v. State, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972).

The question, then, is whether petitioner complied diligently with Wisconsin law by alleging facts sufficient to entitle him to an evidentiary hearing on his ineffective assistance of counsel claim. In State v. Bentley, 201 Wis. 2d 303, 313, 548 N.W.2d 50, 55 (1996), the Wisconsin Supreme Court addressed the standards for obtaining a Machner hearing in

the context of a request for plea withdrawal. After reciting the applicable standards for plea withdrawal under Strickland and Hill, the court went on to state:

> This court has long held that the facts supporting plea withdrawal must be alleged in the petition and the defendant cannot rely on conclusory allegations, hoping to supplement them at a hearing. A defendant must do more than merely allege that he would have pled differently; such an allegation must be supported by objective factual assertions.

Id. The court held that it was not enough for a criminal defendant to merely assert that he would have gone to trial absent his lawyer's mistake:

> Without facts to support his allegation that he pled guilty only because of the misinformation, Bentley's allegation amounts to merely a self-serving conclusion. . . not sufficient to require the trial court to direct that an evidentiary hearing be conducted.

Id. at 316. In order to show that he is entitled to an evidentiary hearing, "a specific explanation of why the defendant alleges he would have gone to trial is required." Id. (citing Santos v. Kolb, 880 F.2d 941, 943 (7th Cir.1989)).

In this case, petitioner's motion for postconviction relief was supported by his affidavit, in which he averred that avoiding a DNA sample was "one of [his] primary concerns" and that he "would never have entered a guilty plea" had he "known that the law required a DNA submission from all individuals convicted of a felony after January 1, 2000." Ans., dkt. #7, exh. D, app. 132, at ¶¶ 2, 4. He did not provide the state court with a detailed factual explanation of *why* he would not have pleaded guilty but for his lawyer's bad advice. Because he did not diligently develop the factual basis for his claims in state court,

petitioner's request for an evidentiary hearing in federal court is subject to the provisions of § 2254(e)(2).

Under § 2254(e)(2), when a petitioner has "failed to develop" the factual basis for his federal claim in the state courts, he may be given an evidentiary hearing only if he can show that (1) his claim rests on "a factual predicate that could not have been previously discovered through the exercise of due diligence" and (2) "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." Petitioner cannot make either showing. If his allegations are true, and he wanted to avoid providing a DNA sample because he feared it would lead to prosecution of new offenses, he was aware of that fact at the time he moved to withdraw his plea. Furthermore, petitioner concedes that he was "technically guilty" of the offense for which he was sentenced. Although he may have hoped for acquittal, his desire for jury nullification does not lead to the conclusion that "no reasonable fact finder would have found the applicant guilty of the underlying offense" had he gone to trial. Indeed, a juror who disobeys a judge's instructions is not a reasonable fact finder. E.g., Gibbs v. VanNatta, 329 F.3d 582, 584 (7th Cir. 2003) ("A jury does not have the authority to disregard the law.").

A petitioner must apprise state courts of the operative facts of all federal claims. Harrison v. McBride, 428 F.3d 652, 664 (7th Cir. 2005). Petitioner did not provide the state courts with the facts they needed to assess the merits of his ineffective assistance of

counsel claim on direct appeal and he has failed to satisfy the stringent criteria that would allow this court to review those facts in the first instance. Therefore, his motion for reconsideration must be denied.

ORDER

IT IS ORDERED that petitioner's motion for reconsideration is DENIED.

Entered this 22nd day of March, 2006.

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