

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

FELICIANO T. DOUGLAS,

Petitioner,

v.

PHIL KINGSTON, Warden,
Waupun Correctional Institution,

Respondent.

OPINION AND
ORDER

05-C-373-C

Petitioner Feliciano Douglas, a Wisconsin prisoner currently incarcerated in the Waupun Correctional Institution in Waupun, Wisconsin, has petitioned the court for the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2001 conviction and sentence in the Circuit Court for Rock County, Wisconsin, for two counts of second degree sexual assault with use of force as a habitual criminal, in violation of Wis. Stat. §§ 940.225(2)(a) and 939.62(1)(c). Petitioner alleges that he is in custody in violation of the laws and Constitution of the United States because he was denied his right to an impartial jury. Specifically, petitioner alleges that one of his jurors was employed as a deputy sheriff and that she told at least two other jurors that petitioner was being held at the Rock County jail on an unrelated matter.

The state concedes that the petition is timely and that petitioner has exhausted his state court remedies; however, it contends that the trial court properly found that no extraneous information was provided to the jury during petitioner's trial. Because the trial court's finding was not unreasonable in light of the testimony it heard during the postconviction motion hearing, I will deny petitioner's application for a writ of habeas corpus.

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

FACTS

A. The Trial

On August 17, 2000, petitioner was charged in the Circuit Court for Rock County with two counts of second degree sexual assault as a habitual criminal, in violation of Wis. Stat. §§ 940.225(2)(a) and 939.62(1)(c). While awaiting trial on the sexual assault charges and sentencing on an unrelated drug conviction, petitioner was incarcerated in the Rock County jail. At a pretrial hearing held in this case on March 9, 2001, the trial court ruled that, unless petitioner testified, the state would be precluded from introducing at trial any evidence of petitioner's drug dealing and prior criminal history, with the exception of the victim's testimony regarding her personal knowledge of petitioner's criminal activities.

Thirteen venire panel members were selected for the trial: twelve jurors and one alternate juror. One of the jurors, Amanda Hornung, was employed in the Rock County Sheriff's Department as a corrections officer in the jail division. During voir dire, Hornung testified that she was not acquainted with petitioner and stated, "I think I could be fair and impartial."

Trial began on March 12, 2001, and lasted two days. During trial, the state produced seven witnesses. However, only the victim testified about the sexual assaults on June 29-30, 2001, and the events that occurred between the assaults. The victim provided details of each assault, as well as details of petitioner's drug-dealing activities on the night of the assaults. Petitioner did not testify in his defense. After approximately three hours and fifteen minutes of deliberation, the jury found petitioner guilty on both counts.

On May 17, 2001, petitioner was sentenced to concurrent terms of twenty years' incarceration on each of the two counts, with twelve years' initial confinement and eight years' extended supervision. (The sentences were consecutive to the twenty-five year sentence petitioner received for his drug conviction.)

B. The Postconviction Hearing

On April 17, 2001, petitioner filed a motion for postconviction relief, alleging that during deliberations juror Hornung told at least two other jurors that petitioner was being

held in the Rock County jail on unrelated charges at the time of the trial. On June 19, 2002, and July 16, 2002, the trial court reconvened the jury for a postconviction hearing.

At the postconviction hearing, each of the thirteen venire panel members testified individually. On June 19, 2002, while waiting their turn to testify at the hearing, most of the jurors sat together in a jury room for approximately three to four hours. When called to testify, several jurors stated that, while waiting, they had discussed petitioner's trial with other waiting jurors and had tried to remember collectively what had or had not been discussed in their deliberations.

Juror Linda Schwab was the first juror to testify that extraneous information had been provided to her during the trial. In response to questioning from defense counsel, she testified as follows:

Q. During jury deliberations, did you ever become aware of the fact that at the time of the trial Mr. Douglas was being housed in the Rock County Jail?

A. I knew that.

Q. And how did you become aware of that?

A. I don't know if one of the persons that was in there said it or, you know, I am assuming she did, but — that he was being housed out there.

Q. When you say you are assuming she did, who was that?

A. Amanda Hornung.

Q. Okay. So during deliberations, did you talk with her about whether or not the defendant was being housed in the Rock County Jail?

A. I didn't talk to her specifically about if he was being housed out there, no.

Q. Did you hear her make statements that the defendant was being housed —

A. Yeah.

Q. When she made those statements that the defendant was in the Rock County Jail, who all was present?

A. I am not even sure if it was just a couple of us that only heard it, because I am not really sure who even heard it.

. . . .

Q. [D]uring jury deliberations, were you aware that the defendant was also facing other charges?

A. Umm – yes, I was.

Q. And how did that happen? Who made you aware of it?

A. I think Amanda did.

Ans., dkt. #4, exh. Q, at 126:9-127:7, 11-14. When asked whether it “was ever brought up by any of the other jurors that the defendant was in the Rock County Jail,” Schwab answered, “No.” Id. at 128:12-15.

Juror Connie Brown provided the following account of the jury deliberations:

It was me and Amanda [Hornung] and I think one or two other women in the

jury that were sitting outside on a break and that [Hornung] mentioned that she had talked to [petitioner] and seen him where she worked . . . at the Rock County Jail.

Ans., dkt. #4, exh. Q, at 142:10-14.

When cross-examined by the prosecution, Brown stated:

[Hornung] didn't tell us what [petitioner] was in for. We just knew it was something other than what we were here for that day, that case. She said he was in there for something else and then she was, like, either she or somebody else, actually, we're not supposed to be talking about this. And that was the end of it.

Ans., dkt. #4, exh. R, at 9:23-10:4. Brown went on to testify that the extraneous information was "brought up in [the] actual deliberation." Id. at 11:2. She stated, "After we were dismissed to make our decisions it was brought up again and again and again and again in that process . . . by everybody that was in there." Id. at 11:3-5, 7.

In response to questioning from defense counsel, juror Linda Schwab testified as follows:

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A. I knew that.

Q. And how did you become aware of that?

A. I don't know if one of the persons that was in there said it or, you know, I am assuming she did, but — that he was being housed out there.

- Q. When you say you are assuming she did, who was that?
- A. Amanda Hornung.
- Q. Okay. So during deliberations, did you talk with her about whether or not the defendant was being housed in the Rock County Jail?
- A. I didn't talk to her specifically about if he was being housed out there, no.
- Q. Did you hear her make statements that the defendant was being housed —
- A. Yeah.
- Q. When she made those statements that the defendant was in the Rock County Jail, who all was present?
- A. I am not even sure if it was just a couple of us that only heard it, because I am not really sure who even heard it.
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- Q. [D]uring jury deliberations, were you aware that the defendant was also facing other charges?
- A. Umm – yes, I was.
- Q. And how did that happen? Who made you aware of it?
- A. I think Amanda did.

Ans., dkt. #4, exh. Q, at 126:9-127:7, 11-14. When asked whether it “was ever brought up by any of the other jurors that the defendant was in the Rock County Jail,” Schwab answered, “No.” Id. at 128:12-15.

Juror Hornung testified that she did not know petitioner was incarcerated at the time of trial and never worked on the floor of the jail on which petitioner was housed. She testified that she had not worked at all during the week of the trial because she was on jury duty. Furthermore, she testified that she had not discussed petitioner's incarceration with any juror prior to reaching a verdict.

The ten remaining jurors testified that they had not heard Hornung discuss petitioner's incarceration. Although several jurors acknowledged the possibility that they had not heard every word spoken during deliberations, none corroborated Brown's testimony that the topic was discussed by any of the jurors.

An investigator for the District Attorney's Office, John Markley, testified that in April 2001, he had interviewed the jurors in petitioner's case. He reported that juror Donna Risseuw told him that a few days after petitioner's trial ended, she and juror Hornung had been selected as jurors in a civil trial. According to Markley, Risseuw told him that during the civil trial Hornung told Risseuw that she had seen petitioner in jail while she was on duty.

At the postconviction hearing, however, juror Risseuw testified as follows:

Q. When was the [civil] trial?

A. I believe it was on Thursday, two days later, we finished on it.

Q. Okay. And did [Hornung] tell you, you know, though — did she say anything

as to whether or not [petitioner] had been in custody at the time of the first trial?

A. No. I know she didn't.

Id. at 184:6-12.

In a written opinion issued December 11, 2002, the trial judge stated:

The idea of different witnesses to a discussion telling entirely different versions under oath about what they said and heard leaves the unsettling sense that the truth will never really be known for certain. Nor will there be an explanation of why the narrators would see the incident in such starkly different ways. In resolving the issue, the court need not assign blame, or find that one juror is lying and another is telling the truth. The core decision the court must make after weighing the testimony is whether defendant has met his burden of proof. In light of the conflicting testimony presented, the court concluded that defendant had not proven by clear, satisfactory and convincing evidence that the allegedly extraneous information had been introduced to the jury.

Answer, dkt. # 4, exh. B, at 10.

The court went on to state that it was

satisfied that jurors Michael Bellcour, Jodi Brown, Richard Carey, Gary Allan, Gerald Amundson, Mark Warner, Donna Risseuw, William Bladon, George Brunett, Chad Sisko and Amanda Hornung all testified truthfully and accurately about what happened in jury deliberations. In particular, there is great credibility in the collective testimony of jurors Allan, Risseuw, Bladon, Brunett and Sisko, who each spoke with a high degree of certainty and precision. Their answers corroborate each other. . . By contrast, the recollections of Connie Brown and Linda Schwab as to what happened in jury deliberations are simply less credible.

Id. at 10-11. The court found that petitioner had not proven by clear, satisfactory and

convincing evidence that the allegedly extraneous information had been introduced to the jury.

C. The Appeal

In an unpublished decision issued April 1, 2004, the Wisconsin Court of Appeals affirmed the trial court, stating:

On appeal, Douglas makes some very reasonable arguments why a court could have made a different credibility determination. However, it is well-established that credibility determinations are for the circuit court. Therefore, we accept the court's finding.

2004 WI App 109, ¶ 5, 273 Wis. 2d 784., 680 N.W.2d 832 (unpublished opinion). The court went on to conclude that even if the extraneous information had been conveyed to the jury, it was not prejudicial, because

[w]e do not regard it as likely that the jurors in this case would have been more inclined to convict Douglas [because he was incarcerated on other charges] because they did not know the other reason why Douglas was in jail. . . The jury was more specifically aware of other prejudicial acts by Douglas that are not challenged on appeal. These include Douglas's statement to the victim that he was a "drug dealer" and the victim's observation that Douglas appeared to be in possession of cocaine.

Id., ¶ 6.

Petitioner filed a petition for review with the Wisconsin Supreme Court, which denied it on June 24, 2004.

OPINION

The Antiterrorism and Effective Death Penalty Act provides, in relevant part, that habeas relief may be granted only when a state court’s adjudication of a petitioner’s claim has “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.” 28 U.S.C. § 2254(d)(1). Acknowledging that the term “unreasonable” defies easy definition, the United States Supreme Court emphasized in Williams v. Taylor, 529 U.S. 362, 410 (2000), that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. (Emphasis in original.) Before a federal court can issue a writ of habeas corpus, it must determine that a state court decision was both incorrect and unreasonable. Rompilla v. Beard, 125 S. Ct. 2456, 2462 (2005).

In this case, petitioner contends that he was denied his right under the Fourteenth Amendment to trial by an impartial jury when extraneous information was introduced to the jury during their deliberations. The due process clause of the Fourteenth Amendment entitles a state criminal defendant to “a jury that determines guilt on the basis of the judge’s instructions and the evidence introduced at trial, as distinct from preconceptions or other extraneous sources of decision.” Oswald v. Bertrand, 374 F.3d 475, 477 (7th Cir. 2004). If, in reaching its verdict, petitioner’s jury received extraneous information that had a substantial and injurious effect on him, petitioner would be entitled to a writ of habeas

corpus. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). However, before petitioner can demonstrate that he was prejudiced by extraneous information, he first must establish that such information was introduced to the jury at all. Because he is unable to do so, his petition will be denied.

Federal courts must begin their analysis of any habeas petition with the state court's determinations of fact. Williams, 529 U.S. at 386. When a state court has made findings of fact that obviate the need to rule upon the substantive merits of a claim, the Antiterrorism and Effective Death Penalty Act circumscribes federal court review of those factual determinations. Conner v. McBride, 375 F.3d 643, 655 (7th Cir. 2004). A federal court's mere disagreement with a state court's determination of the facts is not a ground for relief. Rather, pursuant to § 2254(e), the state court's findings of fact are presumed correct, and it is the petitioner's burden to show by clear and convincing evidence that the state court's factual determinations are incorrect and unreasonable. Harding v. Walls, 300 F.3d 824, 828 (7th Cir. 2002).

In this case, the trial court held an evidentiary hearing during which each member of the jury panel was questioned individually by counsel regarding his or her knowledge of petitioner's incarceration at the time of trial. Eleven panel members (ten jurors and one alternate juror) testified that they had not been told that petitioner was incarcerated during the trial. All but one of the jurors who deliberated in the case testified that the juror had not

discussed petitioner's incarceration during jury deliberations. In a thorough written opinion, the trial court concluded that the eleven panel members who denied knowledge of extraneous information were more credible than the two jurors who alleged that they had been given extraneous information. The court noted that under Wisconsin law the burden of persuasion lay with defendant to show by clear and convincing evidence that extraneous information had been given to the jury. State v. Broomfield, 223 Wis. 2d 465, 479, 589 N.W.2d 225, 231 (1999). Having heard the testimony and observed the witnesses, the court found that defendant had failed to meet his burden and held that the jury had received no extraneous information.

Petitioner raises two challenges to the state court's findings of fact. First, he asserts that the trial court made no credibility determinations and therefore did not find the facts relevant to his case. Petitioner contends that the statement in the court's December 11, 2002 order that "[t]he court need not assign blame, or find that one juror is lying and another is telling the truth." Ans., dkt. #4, exh. B, at 10. The argument is pure casuistry. After having heard the testimony of all thirteen jurors, the court clearly held that Brown's and Schwab's testimony was not wholly consistent and was "simply less credible" than the testimony of the remaining jurors. Id. at 11. Although the judge did not rule explicitly that Brown or Schwab were "lying," he did find that "jurors Michael Bellcour, Jodi Brown, Richard Carey, Gary Allan, Gerald Amundson, Mark Warner, Donna Risseuw, William

Bladon, George Brunett, Chad Sisko and Amanda Hornung all testified truthfully and accurately about what happened in jury deliberations” when they denied having knowledge of petitioner’s incarceration on unrelated charges. Id. at 10. By choosing to believe Hornung’s testimony, the court implicitly rejected the possibility that she had revealed extraneous information to jurors Brown and Schwab. In doing so, the court determined the credibility of the witnesses.

Next, petitioner contends that it was objectively unreasonable for the trial court to disbelieve the testimony of jurors Schwab and Brown and investigator Markley’s report regarding his conversation with juror Risseuw. Petitioner contends that in the absence of evidence that these witnesses were motivated to lie, the trial court acted illogically when it resolved the contradictions in witness testimony in favor of the state. After all, he argues, if juror Hornung did not tell Brown and Schwab that petitioner was incarcerated on other charges, how did they obtain the information? Why would they lie about the source of their knowledge? These are troubling questions that, in the words of the trial court, may “never really be known for certain.” Id. at 10. Nevertheless, to adopt petitioner’s position would raise equally troubling questions. If the matter of petitioner’s incarceration was raised “again and again and again and again” in jury deliberations, as Brown asserted, why would each of the remaining jurors deny that such a conversation occurred? Why would they lie under oath?

There is no question that, when reconvened fifteen months after petitioner's trial for the postconviction hearing, the jury panel members testified with apparent confidence to some facts that were blatantly contradictory. The most likely explanation for these contradictions is not a "grand conspiracy," as petitioner suggests, but rather the natural disintegration of the memory of an event that had occurred fifteen months previously.

Several jurors testified that they formed a belief that petitioner was in custody because of the number of guards present in the courtroom or because of delays in returning petitioner to the courtroom following recesses. It is well within the realm of possibility that jurors Brown and Schwab formed a similar belief and attributed their knowledge to the wrong source. Of course, the reverse scenario is possible as well. Perhaps other jurors learned of petitioner's incarceration from juror Hornung and misattributed their knowledge to other inferences they had drawn. Regardless, in concluding that the testimony of the majority was more credible than the testimony of jurors Brown and Schwab the trial court did not act *unreasonably* within the meaning of 28 U.S.C. 2254(e).

The trial judge found that petitioner did not meet his burden under Wisconsin law of demonstrating by "by clear and convincing evidence that extraneous information had been given to the jury." Broomfield, 223 Wis. 2d at 479, 589 N.W.2d at 231 (1999). To prevail on his petition for a writ of habeas corpus in this court, petitioner would have had to show clearly and convincingly that the trial court's decision not to find clear and convincing

petitioner's proof of extraneous information was not simply wrong, but was outright unreasonable. That dizzying burden has simply not been met. Therefore, because petitioner has not rebutted the presumption in favor of the trial court's finding that no extraneous information reached the jury, I need not decide whether such information would have prejudiced him. His petition will be denied.

ORDER

The petition of Feliciano Douglas for a writ of habeas corpus is DENIED.

Entered this 5th day of December, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge