

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

FLOYD HIPSHER,

Petitioner,

MEMORANDUM and ORDER

v.

06-C-136-S

PAMELA J. WALLACE,

Respondent.

Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Respondent filed a response on April 19, 2006. Petitioner has failed to file a traverse.

FACTS

On January 22, 2001 petitioner was charged with one count of violating Wis. Stats. §948.025. The charge was based upon allegations by his sixteen-year old step-daughter that he had improper sexual contact with her between June 1996 and August 1999.

After a two day jury trial in Bayfield County Circuit Court petitioner was convicted of repeated sexual assault of the same child in violation of Wis. Stats. § 948.025(1). He was sentenced to twenty years in prison.

At trial during the voir dire a juror stated that she had dated the prosecutor's father. Petitioner had knowledge of the relationship and wanted her to remain on the jury.

Petitioner presented his defense through a police investigator who interviewed petitioner. During the interview petitioner had denied inappropriately touching his stepdaughter. The prosecutor's cross examination of the officer consisted of the following two questions:

Q. During the course of questioning of the defendant, at some juncture did he terminate the interview?

A. Yes.

Q. And were you concluded with your interview at that juncture or was it your desire to continue it?

A. I wished to continue speaking with him.

Petitioner appealed his judgment of conviction to the Wisconsin Court of Appeals. He claimed that a juror's failure to disclose her relationship with the prosecutor's father entitled him to new trial. On May 20, 2003 the Wisconsin Court of Appeals affirmed his conviction. The Court of Appeals found that all of petitioner's arguments concerning the juror's relationship with the prosecutor's father fail because of petitioner's knowledge of the relationship and his determination that she not be stricken. On August 13, 2003 the Wisconsin Supreme Court denied petitioner's petition for review.

On October 28, 2003 petitioner filed a postconviction motion claiming that the prosecutor in his trial impermissibly presented evidence that petitioner invoked his right to remain silent. The trial court denied the motion. The Wisconsin Court of Appeals affirmed the trial court's decision on December 20, 2005. The Court of Appeals found as follows:

We need not determine whether the prosecutor's questions violated the rule set out in **Doyle** because the error , if any was harmless beyond a reasonable doubt. See **Hannemann v. Boyson**, 2005 WI 94, 282 Wis 2d 664, 698 N.W.2d 714. The two questions and answers were diminimis in the context of the two-day jury trial. The prosecutor did not mention Hipsher's termination of the interview in his closing argument. As the trial court noted at the postconviction hearing , this case was decided on the demeanor of the complaining witness and the other testimony presented by the State. It was not decided on the basis of who terminated the police interview. In the context of the entire trial, any damage done to the defense by these questions could only be minimal.

The Court of Appeals also found that since petitioner was not prejudiced by these questions, his counsel was not ineffective according to the standard provided by Strickland v. Washington, 466 U.S. 668, 694 (1984). The Wisconsin Supreme Court denied petitioner's petition for review on February 27, 2006.

MEMORANDUM

Petitioner claims that his right to silence and his right to am impartial jury were violated. He also claims his counsel was ineffective.

A federal court may grant relief on a petition for a writ of habeas corpus of a person in state custody only if the state court's adjudication of the claim was on the merits and:

(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)(1) and (2).

The Court of Appeals decided on direct appeal that all of petitioner's arguments concerning the juror's relationship with the prosecutor's father failed because of petitioner's knowledge of the relationship and his desire to have her remain on the jury. The Court concludes after a review of the record that this decision was neither contrary to clearly established law nor based on an unreasonable determination of the facts. Accordingly, petitioner's petition for a writ of habeas corpus on this claim will be dismissed with prejudice.

The Court of Appeals decided on appeal of petitioner's post conviction motion that the prosecutor did not violate Doyle v. Ohio, 426 U.S. 610, 619 (1976) by its cross-examination of the police investigator concerning petitioner's termination of the interview because any error was harmless. The Court also found that petitioner's counsel's failure to object to the questions was not ineffective assistance of counsel.

The Court concludes after a review of the record that this decision was neither contrary to clearly established law nor based on an unreasonable determination of the facts. Accordingly,

petitioner's petition for a writ of habeas corpus on this claim will be dismissed with prejudice.

Petitioner also claims his counsel was ineffective. To establish ineffective assistance of counsel, petitioner must show that his counsel's performance was ineffective and that such performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984). The Court of Appals found on two occasions that petitioner's counsel was not ineffective. These decisions were neither contrary to clearly established law nor based on an unreasonable determination of the facts. The Court also finds de novo that petitioner's counsel was not ineffective. Accordingly, petitioner's petition for a writ of habeas corpus on this claim will be dismissed with prejudice.

Petitioner's petition for a writ of habeas corpus will be dismissed with prejudice. Petitioner is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his petition must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that petitioner's petition for a writ of habeas corpus is DISMISSED with prejudice.

Entered this 17th day of May, 2006.

BY THE COURT:
S/

JOHN C. SHABAZ
District Judge