

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

ANDREW MATTHEW OBRIECHT,

Petitioner,

v.

LARRY JENKINS, Warden,
Kettle Moraine Correctional Institution,

Respondent.

ORDER

06-C-0253-C

Before the court is Andrew Matthew Obrecht's request for leave to proceed in forma pauperis on appeal and request for a certificate of appealability from this court's judgment entered November 11, 2006 denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. As explained below, I will grant petitioner's request for a certificate of appealability solely on the issue whether his lawyer was ineffective at petitioner's sentencing-after-revocation hearing for failing to present mitigation evidence. However, I am staying petitioner's request for leave to proceed in forma pauperis until he submits a current six-month trust account statement.

I begin by addressing two preliminary matters. First, petitioner has been transferred from the Wisconsin Resource Center to the Kettle Moraine Correctional Institution. Although the Department of Corrections' action of transferring petitioner without court authorization constitutes a technical breach of Rule 23(a) of the Federal Rules of Appellate

Procedure, that breach does not divest either this court or the court of appeals of jurisdiction. Ward v. United States Parole Commission, 804 F.2d 64, 66 (7th Cir. 1986); Reimnitz v. State's Attorney of Cook County, 761 F.2d 405, 409 (7th Cir. 1985). However, Warden Jenkins must be substituted for Byran Bartow as the respondent in this action. Ward, 804 F.2d at 66. I have changed the case caption to reflect this and will direct the clerk to substitute Warden Jenkins as the respondent.

Second, on December 7, 2006, the magistrate judge entered an order directing petitioner to either pay the \$455 appellate filing fee or submit a six-month trust fund account statement. In response to that order, petitioner has submitted an old trust fund statement covering the six-month period from December 20, 2004 to June 20, 2005. In his cover letter, petitioner explains that the department has not yet transferred his funds from the Wisconsin Resource Center to Kettle Moraine and therefore he lacks money to obtain a copy of a current trust fund statement. Petitioner estimates that his funds will arrive from his former institution in the next few weeks. Because it appears from documents petitioner has submitted thus far that he has sufficient funds to pay at least a portion of the appellate filing fee, I will stay a decision on his application for leave to proceed in forma pauperis until petitioner has submitted an updated trust account statement. Without that information, I am unable to determine accurately what amount petitioner ought to prepay, if any.

Turning to petitioner's request for a certificate of appealability, a court may issue that certificate "only if the applicant has made a substantial showing of the denial of a

constitutional right.” Id.; see also 28 U.S.C. § 2253(c)(2). To make this showing, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893, n.4 (1983)). “When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” Slack, 529 U.S. at 484. Thus, “[d]etermining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding.” Id. at 484-85.

Petitioner seeks a certificate of appealability with respect to the following claims:

- 1) The trial court denied petitioner’s federal rights by failing to state its reasons for imposing the sentence it did at the post-revocation hearing;
- 2) Petitioner’s lawyer at the post-revocation hearing was ineffective for failing to present mitigation evidence on petitioner’s behalf; and
- 3) Petitioner’s initial plea was invalid because of his lawyer’s ineffectiveness and procedural defects in the proceedings.

I will grant petitioner's request for a certificate of appealability only with respect to his second claim. Petitioner's assertion that his lawyer failed to present evidence that could have supported a more lenient post-revocation sentence states a valid claim of ineffective assistance of counsel. I denied the claim on the ground that petitioner had not fairly presented the underlying facts to the state supreme court in his petition for review, finding that it was not enough for petitioner merely to have referred the state supreme court to the appellate brief he had filed in the court of appeals. In reaching that decision, I relied on the Supreme Court's decision in Baldwin v. Reese, 541 U.S. 27 (2004), and the Seventh Circuit's decision in Lockheart v. Hulick, 443 F.3d 927, 929 (7th Cir. 2006), which hold that a petitioner cannot preserve an issue for federal review in his petition to the state supreme court merely by incorporating by reference an argument made in another document. However, jurists of reason might debate whether that rule applies when, as here, the petitioner refers to his appellate brief to show the state supreme court that the lower appellate court missed one of his issues.

As for petitioner's first claim, reasonable jurists would not disagree with my conclusion that neither federal law nor the United States Constitution imposes any requirement on state court judges to announce the reasons for their sentence. The laws petitioner cites apply to federal judges, not state court judges. Moreover, as I noted in previous orders in this case, even if those laws did apply to state court judges, petitioner

could not show that the state trial court's failure to explain the reasons for its sentence caused petitioner's custody.

As for petitioner's third claim, jurists of reason would not disagree with my conclusion that petitioner's claim is procedurally barred, either as a result of his state court default or because he failed to file a federal habeas petition challenging his initial conviction until more than one year after his conviction became final. Petitioner is incorrect when he asserts that he made the requisite showings of cause and prejudice to excuse his default. In his brief in opposition to the state's motion to dismiss, petitioner's "cause and prejudice" argument consisted solely of his unsupported assertion that he had made the requisite showings of cause and prejudice in his initial and amended habeas petition. A review of those petitions, however, revealed nothing that purported to be a cause-and-prejudice argument. Furthermore, at no time has petitioner attempted to challenge the state's contention that his challenge to his plea was untimely under 28 U.S.C. § 2244(d). For these reasons, jurists of reason would not find it debatable that I was correct in my procedural ruling with respect to petitioner's challenges to his initial plea.

ORDER

IT IS ORDERED that:

1. The clerk of court is directed to substitute Larry Jenkins, Warden of the Kettle Moraine Correctional Institution, for Byran Bartow as the respondent in this action.

2. Petitioner's request for a certificate of appealability is GRANTED IN PART and DENIED IN PART. It is granted with respect to his claim that his lawyer provided ineffective assistance of counsel at the post-revocation proceeding by failing to present mitigation evidence. It is denied as to all other claims.

3. Petitioner's request for leave to proceed in forma pauperis is STAYED until petitioner submits a current, six-month trust account statement.

Entered this 20th day of December, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge