

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

JACOB M. BAKER,

Petitioner,

MEMORANDUM and ORDER

v.

06-C-485-S

GREG GRAMS,

Respondent.

Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Respondent filed a response on September 28, 2006. Petitioner filed a reply on September 28, 2006 and an amended reply on October 12, 2006.

FACTS

Petitioner was convicted of homicide by intoxicated use of a motor vehicle after a jury trial in Columbia County on March 19, 2003. He was sentenced to 15 years in prison and 8 years extended supervision.

Petitioner filed an appeal of his conviction. His appointed counsel filed a no-merit report pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals affirmed petitioner's conviction on June 28, 2005. The Wisconsin Supreme Court denied his petition for review on October 14, 2005.

MEMORANDUM

Petitioner claims that his conviction was obtained by use of evidence gained pursuant to an unconstitutional search and seizure. He also contends that the prosecution withheld exculpatory evidence from the jury and that his trial counsel was ineffective. He further argues that the trial court abused its discretion at sentencing.

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).

Petitioner claims his blood was seized after the accident without a warrant or his consent. The Court of Appeals found that probable cause existed for the blood draw. See Schmerber v. California, 384 U.S. 757(1966). The Court concludes after a review of the record that the state court's 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 claims that the prosecution withheld exculpatory evidence from the jury. Although it is not completely clear it appears that plaintiff is arguing that false testimony was provided concerning the direction he was traveling prior to the accident and that this fact was withheld from the jury. The Court of Appeals held that plaintiff had not shown there was arguable merit to this issue. The Court concludes after a review of the record that the state court's decision was neither contrary to clearly established law nor based on an unreasonable determination of the facts. Accordingly, petitioner petition for a writ of habeas corpus on this claim will be dismissed with prejudice.

Petitioner also claims his trial counsel was ineffective because he did not adequately defend him. 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).

A review of the record indicates that petitioner has not shown that his counsel's performance was deficient nor that he was prejudiced by his counsel's performance. Accordingly, petitioner's petition for a writ of habeas corpus on this claim will be dismissed with prejudice.

Petitioner's claim that the trial court abused its discretion at sentencing is not a claim that can be raised in a federal

petition for a writ of habeas corpus. See Johnson v. Bett, 349 F.3d 1030, 1037 (7th Cir. 2003). 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 16th day of October, 2006.

BY THE COURT:
S/

JOHN C. SHABAZ
District Judge