

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

MICHAEL NEWAGO, JR.,

Petitioner,

v.

GREG GRAMS, Warden,
Columbia Correctional Institution,

Respondent.

ORDER

07-C-0091-C

Petitioner Michael Newago, Jr., has filed objections to the report and recommendation entered herein by the United States Magistrate Judge on July 10, 2007. The magistrate judge recommended denial of the petition for habeas corpus that petitioner filed, pursuant to 28 U.S.C. § 2254, alleging that he had been convicted unconstitutionally in the County Court for Bayfield County on charges involving distribution of controlled substances, bail jumping and witness intimidation.

Before making his recommendation, the magistrate judge undertook a careful review of petitioner's claims and concluded that petitioner was not entitled to postconviction relief. His thorough report does not require any additional comments from this court. He

considered each of the two issues that petitioner raised in his petition and explained exactly why neither issue was a ground for relief. (Petitioner had raised other challenges to his conviction but he concedes that he procedurally defaulted them.). The magistrate judge discussed the state courts' handling of petitioner's case and analyzed the decision of the state court of appeals (the highest state court to hear petitioner's habeas petition) to determine whether the decision was one "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), or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2).

Although no comment is necessary on the issues petitioner raised, I have considered his objection to the magistrate judge's statement that "[p]etitioner has not challenged any of the state court's factual determinations," but only the resulting conclusions drawn by the state court. Petitioner contends that it was inherent in his challenge to the legal conclusions that he was challenging the state's factual determinations underlying those legal conclusions.

When the magistrate judge adopted the court of appeals' summary, he was not saying that he believed all of the testimony at trial. What he was doing was saying "this is what the court of appeals believed a reasonable jury could have found from the evidence adduced at trial." I understand that petitioner does not agree with the jury's finding that he was the instigator of a drug-buying trip to Minneapolis and the one in possession of the drugs found

in the car in which he was a passenger, but he cannot deny that this is what the jury found.

The trial record is what it is. Much as petitioner might like it to include other matters, such as statements that Maki may have made to the police about helping them to convict petitioner, he is stuck with what is in the record. As the magistrate judge noted, petitioner has not shown that any of the state courts' factual determinations were erroneous.

Petitioner's frustration with the outcome is not surprising. He was convicted in a trial in which two significant errors were made in the admission of prejudicial evidence: the prosecutor was allowed to introduce both the statement of a witness who had died before trial and evidence of petitioner's two prior drug convictions. Had the evidence against petitioner not been as strong as it was, those two errors would have required a new trial. As it was, their effect was offset by the extensive incriminating testimony of petitioner's two companions on the Minneapolis trip and the evidence of petitioner's efforts to keep those witnesses from testifying.

The magistrate judge was correct in finding that petitioner had failed to show that the state court of appeals applied clearly established federal law unreasonably or reached a decision that was contrary to such law. Having failed to make that showing, petitioner is not eligible for habeas relief.

ORDER

IT IS ORDERED that the recommendation of the United States Magistrate Judge to deny petitioner Michael G. Newago, Jr.'s petition for a writ of habeas corpus is ADOPTED. FURTHER, IT IS ORDERED that the petition is DENIED.

Entered this 6th day of August, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge