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

TONIE CURTIS COTTON,

Petitioner, OPINION AND ORDER

v. 07-C-0287-C

STATE OF WISCONSIN,

Respondent.

This is a petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Tonie Curtis Cotton, an inmate at the Dodge Correctional Institution in Waupun, Wisconsin, challenges his August 18, 2006 judgment of conviction entered in the Circuit Court for Dane County for two counts of second degree sexual assault and one count of false imprisonment. Petitioner raises three claims: 1) trial counsel was ineffective for failing to attack the victim's credibility at the sentencing hearing; 2) trial counsel provided ineffective assistance during the plea process by failing to disclose to petitioner an exculpatory witness statement; and 3) the prosecutor committed misconduct by relying on the victim's testimony, knowing it to be false. Having considered the petition, its attachments and the supplement filed by petitioner on June 15, 2007, I conclude that the petition must be dismissed because it is plain that petitioner is not entitled to relief on any of these claims.

Although petitioner has not provided many details about the state court proceedings, he has attached to his petition copies of two decisions of the circuit court denying petitioner's postconviction motions. Petitioner has not quarreled with any of the facts summarized by the court in its decisions. Accordingly, the facts below are taken largely from the trial court's decisions. 28 U.S.C. § 2254(e)(1) (state court determinations of fact presumed correct unless petitioner rebuts presumption by clear and convincing evidence).

ALLEGATIONS OF THE PETITION

In 2005, petitioner was charged in the Circuit Court for Dane County with two counts of second degree sexual assault and one count of false imprisonment. The victim of the alleged crimes told police that petitioner had held her against her will and raped her in a room at the King's Inn Motel. The victim gave testimony to this effect at a preliminary hearing.

On August 18, 2006, petitioner entered a plea of no contest to one count of second degree sexual assault. The other charges were dismissed pursuant to the state's motion. The parties jointly recommended that the court sentence petitioner to a term of 4 years of initial confinement followed by 15 years of extended supervision. The court accepted the plea agreement and imposed the sentence that the parties had recommended.

Earlier in the proceedings, a private investigator hired by the defense had taken statements from four witnesses regarding the victim's conduct. In general, the witnesses all

indicated that the victim had been exchanging sex for crack cocaine on the date that petitioner allegedly sexually assaulted her. Petitioner submitted three of the investigative reports, two dated December 7, 2005 and one dated December 9, 2005, to the court as attachments to an evidentiary motion. Before the court decided the motion, however, the parties reached the plea agreement. The fourth report, which documented an interview with a witness named Debra Frazier on August 9, 2006, was dated October 19, 2006. Like the other witnesses, Frazier told the investigator that the victim had engaged in sex with various men at the King's Inn in exchange for drugs. However, Frazier had more first hand information than that provided by the other witnesses because the victim had been staying in Frazier's room at the motel during the time period in question. According to the report, Frazier died just days after the interview.

Petitioner did not pursue a direct appeal of his conviction. On December 3, 2006, he filed a motion for sentence modification. (Although the basis for this motion is not clear from the record, I infer that petitioner argued that the reports from the private investigator showed that the victim was not credible.) The court denied the motion, finding that to the extent petitioner had submitted information that was not presented at the time of sentencing, it was not such that it frustrated the purpose of the sentence or showed the absence of a factual basis for the plea. Petitioner did not appeal the court's decision.

On January 29, 2007, petitioner filed a motion for postconviction relief pursuant to Wis. Stat. § 974.06, Wisconsin's collateral attack statute. Petitioner raised four claims: 1)

trial counsel failed to provide competent representation by failing to apprise petitioner of the contents of the October 19, 2006 investigative report; 2) the state knowingly used perjured testimony; 3) newly discovered evidence existed that affected the validity of petitioner's plea and or sentence; and 4) the court lacked jurisdiction to impose sentence. In a decision and order dated April 26, 2007, the circuit court denied the motion. The court rejected petitioner's jurisdictional challenge and his accusation that the state had knowingly used perjured testimony on the ground that petitioner had not pointed to any facts in support of his assertions or explained how the facts supported the legal conclusions he asserted. The court also found that to the extent that petitioner was arguing that the private investigator statements constituted a new factor entitling him to a modification of his sentence, that claim had already been rejected in the January 9 order.

Finally, the court found that petitioner's contention that his lawyer was ineffective for failing to inform him of the contents of the October 19, 2006 investigative report before petitioner entered his plea was "largely nonsensical and otherwise entirely unsupported by sufficient factual basis." The court noted that petitioner had entered his plea on August 16, 2006, more than two months before the report had been prepared. The court recognized that the report was based upon information collected by the private investigator on August 9, 2006, before petitioner had entered his plea. However, petitioner had not provided any factual basis from which the court could infer that trial counsel was ineffective for failing to

be apprised of the report's contents prior to the plea or that counsel was aware of the information in the report prior to October 19, 2006.

Petitioner did not appeal the trial court's decision. On May 22, 2007, he filed a federal habeas petition. In an order entered June 6, 2007, the magistrate judge directed petitioner to provide additional information relating to whether petitioner had exhausted his state court remedies. In response to that order, petitioner submitted a "Brief in Support of Habeas Corpus Petition," which I have considered as a supplement to the petition.

OPINION

Rule 4 of the Rules Governing Section 2254 Cases authorizes the district court to dismiss a petition summarily if "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." In Small v. Endicott, 998 F.2d 411, 414 (7th Cir. 1993), the court elaborated upon the power granted by the rule:

> Rule 4 enables the district court to dismiss a petition summarily, without reviewing the record at all, if it determines that the petition and any attached exhibits either fail to state a claim or are factually frivolous. Even if the petition clears those hurdles, the district court still need not independently review the record so long as the petitioner does not dispute that the facts reported in the state court opinions faithfully and accurately reflect the record.

See also Advisory Committee Note to Rule 4 of Rules Governing Section 2254 Cases in the United States District Courts (habeas corpus petition must state facts that point to real possibility of constitutional error).

All of petitioner's claims are based upon his contention that the victim fabricated her story about what petitioner allegedly did to her at the King's Inn Motel. As support for this contention, petitioner has submitted the four witness statements, referred to above, indicating that on the weekend of the alleged assault, the victim was having sex with various men at the motel in exchange for crack cocaine. In addition, petitioner has submitted information showing that the victim was on probation supervision at the time; had told police that she had loaned her car to a drug dealer in exchange for money she owed for past drug purchases and that she feared having her probation revoked and losing her children as a result of her conduct; had a history of mental illness; and had been using drugs and alcohol during the alleged assault. According to petitioner, this evidence shows that the victim's testimony at the preliminary hearing was perjured and that the state committed misconduct by relying on it as a basis for the charges and at sentencing. In addition, petitioner contends that his lawyer was ineffective for "allowing the introduction [of the victim's testimony] into evidence and sentencing."

To be entitled to federal habeas relief, a prisoner attacking the judgment of a state court must show that he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). It is plain from the petition that petitioner cannot make this showing. Petitioner's insistence that he was wrongly accused and prosecuted overlooks the significant fact that he entered a no contest plea. By pleading no contest, petitioner admitted, by implication, the allegations in the information. Gomez v. Berge, 434

F.3d 940, 942 (7th Cir. 2006). Further, "[i]t is well established that an unconditional plea of guilty operates as a waiver of all formal defects in the proceedings, including any constitutional violations that occurred before the plea was entered." Id. at 942 (citing Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970)). Accordingly, even if petitioner's submissions were sufficient to show that the victim's testimony was perjured (which they are not), petitioner waived his right to challenge the testimony or the state's reliance upon it by entering a plea.

The only one of petitioner's claims that call into question the validity of his plea is his claim that his lawyer was ineffective for failing to disclose to petitioner the contents of Frazier's August 9, 2006 statement to the private investigator. Petitioner alleges that had he been aware of the statement, he "definitely" would not have accepted the plea deal.

When a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of his plea depends on whether the advice he received was within the range of competence demanded of attorneys in criminal cases. Hill v. Lockhart, 474 U.S. 52, 56 (1985). In order to show that his lawyer assisted him ineffectively, a petitioner must meet the two-prong test established by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Hill, 474 U.S. at 57. First, a petitioner must show that his lawyer's performance was deficient; that is, that his counsel's advice regarding the plea was objectively unreasonable. Moore v. Bryant, 348 F.3d 238, 241 (7th

Cir. 2003). Second, the petitioner must show that he was prejudiced by the advice he received. In Hill, 474 U.S. at 59, the Supreme Court stated:

> The second, or "prejudice," requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the proceeding. Strickland, 466 U.S. at 694. It is insufficient to show only that the errors "had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test." Williams, 529 U.S. at 394. Petitioner bears the "highly demanding and heavy burden of establishing actual prejudice." Id. In the context of plea withdrawal, petitioner must allege facts showing why he would not have pleaded guilty but for his lawyer's bad advice. United States v. Winston, 34 F.3d 574, 579 (7th Cir. 1994) ("mere conclusions" insufficient to demonstrate that but for lawyer's error, defendant would not have pleaded guilty).

Petitioner cannot meet either prong of the Strickland test. First, petitioner has pointed to no fact in the record or adduced any evidence to show that his lawyer was apprised of Frazier's statement before petitioner entered his plea on August 16, 2006. Even after the state circuit court criticized petitioner for this same reason, petitioner has not offered any supporting evidence. The only logical conclusion is that such evidence does not exist. Absent some showing that counsel knew or should have known of the content of

Frazier's statement before August 16, 2006, petitioner cannot show that his lawyer performed deficiently.

Second, petitioner's conclusory allegation that he "definitely" would not have entered a plea had he known of Frazier's statement is insufficient to demonstrate that he was prejudiced by his lawyer's alleged error. Petitioner does not explain why, had he known of Frazier's statement, he would have rejected the proposed plea agreement and proceeded to trial.

Moreover, petitioner's assertion that he would have gone to trial had he been advised of Frazier's statement is undermined by the facts of this case. For the most part, Frazier's statement merely corroborated those of the other witnesses who reported that the victim had been offering various men sex in exchange for drugs. Frazier did not offer any knowledge of what transpired between petitioner and the victim apart from stating that when she confronted petitioner about the alleged assault, petitioner denied that it had occurred. Like the reports of which petitioner was aware before he entered his plea, Frazier's statement cast doubt on the reliability of the victim's statements but did not exonerate petitioner. The reports simply do not support petitioner's suggestion that Frazier's statement differed so significantly from those of the other witnesses that it would have made a difference in his decision to plead no contest. In short, petitioner cannot demonstrate prejudice.

Finally, petitioner cannot obtain relief on his claim that his attorney was ineffective for failing to object to the use of the victim's statements at sentencing. Petitioner has not

disputed the state trial court's finding that the sentence the court imposed had been recommended jointly by the parties. Having agreed to the sentence imposed by the court, petitioner has no valid basis on which to contest it.

In sum, having carefully reviewed the petition, the supplement filed by petitioner and the attachments to both submissions, I am convinced that the claims raised in the petition are factually frivolous. In light of this, it is unnecessary to consider whether state court remedies remain available to petitioner or whether he satisfies either of the exceptions to the procedural default rule. Under Rule 4, the petition must be dismissed.

ORDER

Because it is plain from the petition and attached exhibits that petitioner is not entitled to relief in this court, IT IS ORDERED that the petition of Tonie Curtis Cotton for a writ of habeas corpus is DISMISSED WITH PREJUDICE pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Entered this 29th day of June, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge