

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

FRANCIS E. ALTMAN,

Petitioner,

OPINION AND ORDER

v.

07-C-303-C

JEFFREY P. ENDICOTT, Warden,
Redgranite Correctional Institution,

Respondent.

Francis Altman, an inmate at the Redgranite Correctional Institution, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the five dollar filing fee. Petitioner challenges his November 10, 2003 judgment of conviction entered in the Circuit Court for Marathon County for seven various drug charges. He contends that his custody resulting from that conviction is in violation of his constitutional rights.

Petitioner raises three claims: 1) the prosecution withheld exculpatory evidence, namely an audiotape of petitioner's conversation with an informant, until trial; 2) one of the jurors was biased, and should have been stricken by petitioner's trial lawyer or the court on its own motion; and 3) petitioner's right to a meaningful appeal was denied as a result of tight deadlines imposed by the state appellate court. Because the petition and its attachments plainly show that petitioner is not entitled to relief on any of these claims, the

petition will be dismissed summarily pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Apart from information about the charges, the petition contains few details about the proceedings below. However, copies of the trial court's decision denying petitioner's motion for postconviction relief and the court of appeals' decision affirming that decision are attached to the petition. Petitioner has not quarreled with any of the facts summarized by these courts in their decisions. Accordingly, the facts below are taken largely from the state court 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

On August 1, 2003, petitioner was tried by a jury for various drug charges. The charges arose from the discovery of marijuana during a police search of Silas Langsdorf's residence. Langsdorf told police he had purchased the marijuana from petitioner and subsequently agreed to participate in a controlled buy of marijuana from petitioner. During a telephone call to petitioner, Langsdorf asked where petitioner was, asked if he had "some more" and asked if they could meet, to which petitioner agreed. Langsdorf then made another call "to set up the meeting place" with petitioner. The two agreed to meet in a retail store parking lot. The two phone conversations were recorded, reduced to audiotape and later played for the jury.

Petitioner was ultimately arrested in the parking lot where the sale was to occur. During a search of his car, officers found a large quantity of marijuana, drugs and drug paraphernalia. The officers also found more than \$9,000 and a padlock key on petitioner's person. After obtaining search warrants, officers found marijuana and drug paraphernalia in petitioner's bedroom. The officers also found approximately two pounds of brick marijuana in a safe secured with a padlock fitting the key that was found on petitioner.

The jury found petitioner guilty of three counts of being a dealer in possession of an untaxed controlled substance and one count each of delivery of THC, possession with intent to deliver schedule IV drugs, possession with intent to deliver LSD and possession with intent to deliver THC. The trial court imposed a sentence totaling 13 years' initial confinement followed by 12 years' extended supervision.

A new lawyer was appointed to represent petitioner in postconviction proceedings or on appeal. However, that lawyer eventually moved to withdraw and petitioner proceeded pro se. Petitioner filed a motion for a new trial, alleging that his trial lawyer had been ineffective for "allowing" petitioner to testify and for failing to listen to or test the audiotapes of the conversations in which petitioner agreed to sell drugs to Langsdorf. The trial court held a hearing on the motion at which petitioner's trial lawyer testified. (According to the docket sheet available electronically at <http://wcca.wicourts.gov/index.xsl>, this hearing was convened approximately four months after petitioner filed his motion.) At the hearing, the court allowed petitioner to raise additional issues that he had not raised in

his motion, including his claim that the lesser-included offenses upon which the jury was instructed were improper, that his speedy trial right was violated and that defense counsel was ineffective for failing to convince the jury that Langsdorf was an incredible witness. Petitioner did not raise any claim that any juror was biased.

After the hearing, the court denied the motion in its entirety. With respect to the audiotape, the court found that petitioner's lawyer testified that he had listened to the tapes and had not noticed anything about the recordings that raised any suspicion that the tapes might have been tampered with. The court noted that the only evidence of tampering offered by petitioner was his own recollection that the conversations were longer in duration than reflected on the tapes, a showing that was insufficient to meet petitioner's burden to show that counsel's performance was deficient. The court rejected all of petitioner's other claims.

Petitioner appealed the trial court's decision. In a decision issued August 1, 2006, the Wisconsin Court of Appeals affirmed the trial court's decision. The appellate court agreed that petitioner had failed to show that he was prejudiced by his lawyer's failure to more thoroughly analyze the audiotape. The court explained:

With respect to the audiotape, Altman argues that a cursory examination of the tape would have revealed an approximately sixty-second gap in the tape, and the gap would have discredited Langsdorf. At the [postconviction] hearing, however, trial counsel testified that although his repeated requests for a copy of the tape were unsuccessful, he had, in fact, listened to the audiotape with the district attorney. Counsel additionally testified that if what he heard on the tape prior to trial had differed from what was played at trial, he would have commented on it. To the extent Altman is challenging counsel's failure

to have the tape tested for gaps or other flaws, the trial court found that Altman's recollection that the conversation was longer than what was heard on the tape was insufficient to establish that the tape had been altered. Moreover, Altman has failed to identify what he believes took place during the alleged gap on the tape, or how any missing portion of the conversation would have impacted the outcome at trial.

State v. Altman, 2006 WI App 194, 2006 WL 212531, ¶ 11 (unpublished opinion).

The court refused to consider petitioner's claim, raised for the first time on appeal, that trial counsel was ineffective for failing to raise claims of juror bias. Id. at ¶ 16. The court explained that allegations of ineffective assistance had to be raised first in the trial court. Id.

On December 5, 2006, the Wisconsin Supreme Court denied petitioner's petition for review.

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).

A. Failure to Disclose Exculpatory Evidence

In his first ground for relief, petitioner contends that his conviction was obtained “by the unconstitutional failure of the prosecution to disclose to Petitioner evidence favorable to the Petitioner.” Pet., dkt. #1, at 8. As supporting facts, petitioner alleges that 1) trial counsel was ineffective for “failing to retrieve the audiotape of [petitioner’s] conversation with an informant when the informant called Petitioner to set up the ‘controlled’ buy”; and 2) the state failed to disclose the audiotape until trial, “where Petitioner stated there was inculpatory evidence missing from the tape.” Petitioner alleges that he made both of these allegations in his postconviction motion.

I infer that with respect to his second allegation, petitioner meant to state “exculpatory” rather than “inculpatory.” Even with that correction, however, petitioner’s allegations fail to show a possibility of constitutional error with respect to the audiotapes. As an initial matter, it is unclear whether petitioner is stating a claim of ineffective assistance of counsel or whether he is alleging that the prosecutor violated his rights to due process as guaranteed by Brady v. Maryland, 373 U.S. 83, 88 (1963) (suppression by prosecution of

evidence favorable to accused violates due process where evidence is material to guilt or punishment). In either case, petitioner's claim fails. Notably, petitioner has not challenged the state courts' finding that the prosecution disclosed the existence of the tapes and allowed petitioner's lawyer to listen to them before trial. Thus, petitioner's claim that the state "failed to disclose" the tapes or that his lawyer failed to listen to them before trial is patently frivolous. Even more problematic, petitioner has not alleged what was said during the portion of the conversation that is allegedly missing from the tape or how that evidence would have affected the outcome at trial. Even after the state court of appeals criticized petitioner for this same reason, petitioner has not offered any supporting evidence. The only logical conclusion is that such evidence does not exist or if it does, it would not tend to exonerate petitioner. Without evidence to show that exculpatory evidence was deleted from the tape, petitioner's claims related to the tape are frivolous.

B. Biased Juror

Petitioner alleges that one of the jurors who heard his case was biased. As proof, petitioner states that 1) the juror stated during voir dire that she would be biased if she was to learn that petitioner had been convicted of a similar offense in the past; and 2) "During the examination of this juror by the state, the prosecution told the juror that Petitioner had in fact been convicted of a similar offense." Petitioner further alleges that his trial lawyer

was ineffective for failing to take steps to remove the juror and that the trial court erred when it did not dismiss the juror on its own motion.

Although it is questionable whether the sketchy facts provided by petitioner are sufficient to point to a real possibility of constitutional error, it is not necessary to reach this question because petitioner failed to properly preserve the biased juror issue in the state courts. Petitioner failed to present either his claim of ineffective assistance of counsel or trial court error related to the biased juror to the trial court during postconviction proceedings. Although petitioner claimed on appeal that his trial lawyer had been ineffective for failing to strike the juror, the court of appeals refused to consider the claim because petitioner had not raised it in the trial court. Apparently, petitioner did not argue on appeal that the trial court ought to have removed the juror for cause *sua sponte*.

1. Ineffective assistance of counsel

Under the doctrine of procedural default, the state appellate court's conclusion that petitioner had forfeited his opportunity to challenge his lawyer's performance in relation to the allegedly biased juror bars this court from considering the claim so long as the procedural ground on which the state court relied was independent of the federal question and adequate to support the judgment. Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004). A state ground is "independent" of the federal claim if the state court "actually relied on a state rule sufficient to justify its decision." Prihoda v. McCaughtry, 910 F.2d 1379, 1382 (7th Cir.

1990). “A state ground is ‘adequate’ only if the state court acts in a consistent or principled way.” Id. at 1383.

In refusing to consider petitioner’s claim of ineffective assistance of counsel in relation to the biased juror issue, the court of appeals cited State v. Machner, 92 Wis. 2d 797, 804, 285 N.W. 2d 905, 908 (Ct. App. 1979), which held that “it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel.” Wisconsin appellate courts consistently apply this rule and refuse to consider claims of ineffective assistance of counsel raised for the first time on appeal. E.g., State v. Curtis, 218 Wis.2d 550, 554-55, 582 N.W.2d 409 (Ct. App. 1998). Accordingly, because the state procedural rule is both independent and adequate to support the court’s judgment, this court may not review the merits of petitioner’s ineffective assistance claim concerning the biased juror unless petitioner demonstrates (1) cause for the default and actual prejudice from failing to raise the claim as required, or (2) that enforcing the default would lead to a “fundamental miscarriage of justice.” Steward v. Gilmore, 80 F.3d 1205, 1211-12 (7th Cir. 1996) (quoting Wainwright v. Sykes, 433 U.S. 72, 87 (1977)).

Petitioner cannot make either showing. Petitioner represented himself in postconviction proceedings and on appeal, so he cannot show that the performance of any lawyer was the “cause” for his default. Petitioner asserts that he did not receive his file from his appointed lawyer until shortly before his postconviction motion was due and therefore he did not have time to discover the biased juror issue. However, petitioner presumably was

present during voir dire so he ought to have been aware of the issue even without reviewing the trial transcripts. Moreover, petitioner does not explain why he could not have uncovered the issue during the four months that elapsed between the time he filed his motion and the time the trial court held the evidentiary hearing, at which the court allowed petitioner to raise other additional issues that he had not raised in his written motion. Petitioner's allegations are inadequate to show that external circumstances beyond his control prevented him from raising the biased juror issue at the postconviction hearing.

Accordingly, this court may consider petitioner's ineffective counsel claim only if he establishes that enforcing the default would lead to a fundamental miscarriage of justice. To make this showing, petitioner must demonstrate that it is more likely than not that no reasonable juror would have convicted petitioner in light of any new evidence. Schlup v. Delo, 513 U.S. 298, 327 (1990). Petitioner cannot meet this demanding standard because he has not adduced any new evidence. Further, the state court of appeals found that the state had adduced an overwhelming amount of evidence supporting the verdict, including Langsdorf's testimony that he had purchased drugs from petitioner and agreed to participate in a controlled buy from petitioner; taped recordings of Langsdorf's conversations with petitioner; drugs discovered in petitioner's car, home and on his person; and the absence of tax stamps on the bricks of marijuana or other drugs. Apart from his vague and unsupported attack on the audiotape, petitioner has not challenged any of this evidence. He cannot show that his default should be excused under the fundamental miscarriage of justice exception.

Accordingly, because it is plain that petitioner has procedurally defaulted his claim that his trial lawyer was ineffective for failing to strike an allegedly biased juror, it must be dismissed.

2. Trial court error

As for petitioner's claim that the trial court erred in not removing the juror for cause on the court's own motion, petitioner did not present that claim either to the state trial court or the court of appeals. When a petitioner fails to present his claim to the state courts and it is clear that those courts would now hold the claim procedurally barred, a federal court is precluded from reaching the merits of that claim under the procedural default doctrine. Perruquet, 390 F.3d at 514. Under Wisconsin law, a defendant who fails to raise a claim on direct appeal is barred from raising that claim in a later motion unless the defendant can show a "sufficient reason" for his failure to raise the claim in his direct appeal. Wis. Stat. § 974.06(4); State v. Escalona-Naranjo, 185 Wis. 2d 168, 181, 517 N.W. 2d 157, 162 (1994). For the same reason petitioner cannot demonstrate cause for his failure to raise his claim that his lawyer should have sought to remove the juror, he cannot demonstrate a "sufficient reason" for his failure to raise his claim that the court should have removed the juror. Because the state courts would now hold this latter claim to be procedurally barred, this court is barred from considering it. Furthermore, as explained above, petitioner cannot

satisfy either the cause-and-prejudice or fundamental miscarriage of justice exceptions to the procedural default rule.

C. Denial of Right to Appeal

Finally, petitioner contends that he was denied his right to meaningfully appeal his conviction because he did not have adequate time to prepare his postconviction motion. I have already rejected this claim as factually frivolous in the context of considering whether cause existed to excuse petitioner's state court defaults.

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 Francis Altman for a writ of habeas corpus is DISMISSED WITH PREJUDICE pursuant to Rule 4 of the Rules Governing Section 2254 Cases.

Entered this 22d day of June, 2007.

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