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

SEAN BUTLER,

Petitioner, OPINION AND ORDER

v. 10-cv-128-bbc

PETER HUIBREGTSE, Warden,
Wisconsin Secure Program Facility,

Respondent.

On March 25, 2010, this court dismissed Sean Butler's application for a writ of habeas corpus on the ground that he had failed to show that the remedy afforded him by D.C. Code § 23-110 was ineffective or inadequate, so that he would be entitled to pursue post conviction relief in federal court. On May 11, 2010, I denied petitioner's motion for reconsideration. Petitioner now seeks to amend or supplement his petition to add a new claim of ineffective assistance of appellate counsel for counsel's failure to raise on direct appeal the claims that petitioner seeks to raise in his habeas petition. Dkt. #s 7, 9 (corrected version). According to petitioner, this claim falls outside the scope of this court's order because the local remedy available in D.C. Code § 23-110 has been found ineffective for addressing claims of ineffective assistance of appellate counsel. Williams v. Martinez, 586 F.3d 995, 998 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 2073 (Mar. 29, 2010). In the alternative, petitioner asks the court to issue a certificate of appealability.

OPINION

I. Motion to Amend Petition

Because the rules governing Section 2254 Cases do not address amendments to the petition, petitioner's motion is governed by the Federal Rules of Civil Procedure. Rule 11 of the Rules Governing Section 2254 Cases (permitting application of civil rules in habeas cases "to the extent that [the civil rules] are not inconsistent with any statutory provisions or [the habeas] rules"); Johnson v. United States, 196 F.3d 802, 805 (7th Cir. 1999). Under Rule 15(a), leave to amend should be freely granted, but can be denied when the amendment would be futile. Foster v. DeLuca, 545 F.3d 582, 584 (7th Cir. 2008). In the post judgment context, a party seeking leave to amend must have the judgment reopened under Rule 59(e) or Rule 60(b) and then request leave to amend. Dierson v. Chicago Car Exchange, 110 F.3d 481, 488 (7th Cir.1997); First National Bank v. Continental Ill. Nat'l Bank & Trust Co., 933 F.2d 466, 468 (7th Cir. 1991) ("Since First National wanted the judgment altered [to amend complaint], it had to persuade the judge to reopen the case-had therefore to file a postjudgment motion under Fed. R. Civ. P. 59(e) or 60(b).").

Petitioner filed his motion to amend his petition on June 23, 2010, more than 28 days after judgment was entered. Accordingly, to the extent he seeks to vacate the judgment, his motion would have to be considered under Rule 60(b). It is too late for him to file a motion under Rule 59(e), which must be brought within 28 days of entry of judgment.

Rule 60(b) relief is an extraordinary remedy and is granted only in exceptional circumstances. Karraker v. Rent-A-Center, Inc., 411 F.3d 831, 837 (7th Cir. 2005). A Rule 60(b) motion permits relief from a final judgment in limited circumstances: (1) mistake; (2) newly discovered evidence; (3) fraud or misrepresentation by an adverse party; (4) discovery that the judgment entered is void (such as when the court rendering the judgment lacked subject matter jurisdiction); (5) satisfaction of judgment or (6) for "any other reason justifying relief from the operation of the judgment." Petitioner makes no attempt to show that any one of these limited circumstances is present in his case. Relief under the rule is not available for a party who wants to change his theory of relief after judgment has entered, which is what petitioner seeks to do by amending his petition. Because petitioner has not shown grounds to vacate the judgment under Rule 60(b), it is not necessary to consider his motion to amend his petition.

For the sake of completeness, I note that even if petitioner had shown a basis for reopening the judgment under Rule 60(b), I would deny the motion to amend on the ground of futility. Foman v. Davis, 371 U.S. 178, 182 (1962) (noting futility as one reason for denying leave to amend complaint). Lying at the core of petitioner's layered ineffective assistance claims is his contention that the trial court erred in denying his motion to suppress a videotaped statement he gave to police regarding the murder for which he was ultimately convicted. Documents attached to petitioner's amended petition show that at the suppression hearing on petitioner's claim that his statement was involuntary, the trial court

determined after hearing testimony from petitioner, his grandmother and one of the two officers who appeared at petitioner's home and asked him to come to the police station for questioning that Butler had made the statement only in exchange for a promise to be released that evening and therefore the statement had to be suppressed. After a lunch recess, however, the court agreed to reopen the hearing and permit the government to introduce the testimony of the second officer who had been at petitioner's house and encouraged him to make a statement. That officer testified that neither of the two officers had told petitioner he would be arrested if he failed to give a statement but, to the contrary, told him that he did *not* have to come to the station and give a statement. In reliance on the second officer's testimony, which the court found credible, the court reversed its earlier ruling on the suppression motion.

After he was tried and convicted, petitioner appealed. Among the grounds raised was one based on the trial court's alleged error in failing to suppress the videotaped statement. The court of appeals rejected petitioner's argument and affirmed the conviction, finding that the second officer's testimony did not contradict that of the first. Butler v. United States, 614 A.2d 875, 881 (D.C. 1992).

A federal court may grant a writ of habeas corpus only if the petitioner shows that he is in custody in violation of the laws or treaties or Constitution of the United States. 28 U.S.C. § 2254. Petitioner contends that he was denied his Sixth Amendment right to effective assistance of counsel at trial and on direct appeal when his trial lawyer failed to

object to the court's "irreconcilable" findings at the suppression hearing and his appellate lawyer failed to challenge trial counsel's ineffectiveness or to argue the issue directly on appeal as a "plain error." The appropriate standard for evaluating a claim of ineffective assistance of appellate counsel is the standard established in Strickland v. Washington, 466 U.S. 668 (1984), for evaluating claims of ineffective trial counsel. Winters v. Miller, 274 F.3d 1161, 1167 (7th Cir. 2001). In order to prevail on a Sixth Amendment ineffectiveness claim, the petitioner must satisfy both prongs of a two-pronged test. He must first show that his lawyer's performance "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Second, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694.

Nothing in petitioner's amended petition suggests that petitioner could make either of these showings. As an initial matter, the trial court's rulings were not "irreconcilable"; the second ruling was based upon evidence that the court did not have before it when it ruled on the matter the first time. Therefore, neither trial nor appellate counsel had any basis to object on the ground that the findings were inconsistent. Second, a review of petitioner's brief in his direct appeal shows that his lawyer presented at least a variation of petitioner's argument on appeal. Counsel argued: "The [second] detective's statement that the appellant was not told he would be arrested and not released (if he failed to give a statement) was contradicted and superseded by the statement of the [first] detective as well

as by the necessary implication of the promise actually made . . .". Dkt. #7, exh. 4, at p.17. Although counsel did not frame the issue in the exact terms now being suggested by petitioner, the court does not second-guess counsel's reasonable, strategic choices. Strickland, 466 U.S. at 690 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . ."); see also Smith v. Farley, 59 F.3d 659, 665 (7th Cir. 1995) (appellate counsel generally provides ineffective assistance only when he fails to perfect his client's appeal or waives potentially meritorious grounds for reversal).

It was not unreasonable for counsel to decide to challenge the trial court's suppression ruling by arguing that the evidence overall was insufficient to support the court's factual determinations rather than attack the trial court for changing its ruling. Further, there is no basis on which to find that the approach now being advanced by petitioner would have probably resulted in a different outcome on appeal. The appellate court reviewed the transcript of the suppression hearing and rejected petitioner's contention that the officers had presented conflicting testimony. Accordingly, because the documents attached to petitioner's amended petition show that his ineffective assistance of appellate counsel claim is without merit, it would be futile to allow him to amend his petition.

II. Certificate of Appealability

In the alternative, petitioner asks the court to grant him a certificate of appealability. I denied this request in the March 25 order. Nothing in petitioner's latest submissions gives me reason to reconsider that determination.

ORDER

IT IS ORDERED that petitioner Sean Butler's motion to amend his petition, dkt. #9, is DENIED. Petitioner's motion to amend his supplemental petition, dkt. #7, and his motion to correct typographical errors, dkt. #8, are DENIED as moot.

Entered this 13th day of August, 2010.

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