IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DONALD A. NEWELL,

Petitioner,

v.

JUDY P. SMITH, Warden,
Oshkosh Correctional Institution,

Respondent.

OPINION AND ORDER

12-cv-432-bbc

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Petitioner Donald A. Newell, a prisoner at the Oshkosh Correctional Institution, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner challenges his conviction in the Circuit Court for Chippewa County on ten counts of second-degree sexual assault of a person with a mental deficiency. He contends that his custody violates the laws or Constitution of the United States because his confession was not corroborated sufficiently to support a conviction on eight of the ten counts of sexual assault.

In a previous order I dismissed all but one of petitioner's 24 claims as procedurally barred. Dkt. # 17, at 1. I directed the state to respond to the corroboration claim. Having reviewed the parties' briefings, I conclude that this claim is procedurally barred because petitioner did not fairly present the constitutional nature of the claim to the Wisconsin state courts. Moreover, even if petitioner had been allowed to bring his corroboration claim, I would conclude that the state court's application of that rule was reasonable.

BACKGROUND

On August 2, 2007, petitioner was convicted of ten counts of second-degree sexual assault for having intercourse with a person suffering a mental deficiency. The conviction was based in part on petitioner's written confession, in which he admitted having intercourse with the victim ten to twelve times. The victim testified that there were two incidents of intercourse, and other witnesses corroborated additional details of the confession. On October 16, 2007, the court imposed a term of 21 years on each count, consisting of six years of initial confinement followed by 15 years of extended supervision, with the terms to run concurrently. On September 25, 2008, the circuit court increased the term of initial confinement to eight years.

On direct appeal, petitioner argued that the state did not sufficiently corroborate his confession, because the evidence did not establish that there were more than two incidents of sexual assault. State v. Newell, 2010 WI App 84, ¶ 1, 326 Wis. 2d 264, 787 N.W.2d 59, 2010 WL 1851344 (unpublished); Br. and App'x of Appellant-Def. at 10-11, State v. Newell, 2010 WI App 84, 326 Wis. 2d 264, 787 N.W.2d 59 (No. 2009AP449-CR). The court of appeals affirmed the conviction, finding that there was sufficient evidence to corroborate the overall trustworthiness of the confession. Id. at ¶ 3. The Wisconsin Supreme Court denied petitioner's petition for review on September 21, 2010.

On November 15, 2010, petitioner filed an application in this court for a writ of habeas corpus under 28 U.S.C. § 2254. He raised 25 grounds for relief. Order, case no. 10-cv-707-bbc, dkt. #8, at 1. Because he had exhausted only the corroboration claim at the

state court level, I gave petitioner the option of dismissing the petition and refiling it after he had exhausted all of his claims. Id. at 4-5. Petitioner responded that he wished to dismiss the petition and return to state court. Response, case no. 10-cv-707-bbc, dkt. #9, at 1.

Petitioner filed a motion in the state circuit court on February 16, 2011, asserting 25 claims for relief. The circuit court construed the submission as a motion for post conviction relief under Wis. Stat. § 974.06, under which a prisoner may collaterally attack his conviction after the time for appeal or postconviction remedy has expired. The circuit court found that petitioner's claims were procedurally barred. Petitioner did not appeal. On April 5, 2011, petitioner filed a second motion in state court under Wis. Stat. § 974.06, repeating all 25 claims. The circuit court denied the motion. On review, the court of appeals held that petitioner's claims "have either already been litigated or are procedurally barred" and affirmed the circuit court's order. State v. Newell, 2012 WI App 73, ¶ 1, 342 Wis. 2d 250, 816 N.W.2d 351. The court concluded also that the appeal was "frivolous" and imposed sanctions against petitioner for "repetitively litigating the same matters in his postconviction motions." Id. at ¶ 8. Petitioner did not appeal. On June 20, 2012, petitioner filed this new petition.

OPINION

A. Constitutional Dimensions of the Corroboration Rule

A district court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he

is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Petitioner's claim for relief is that the state did not sufficiently corroborate his confession. Both Wisconsin and the federal courts have a common-law corroboration rule under which a confession must be supported by independent evidence. As a threshold matter, I must determine whether this rule is constitutionally mandated.

The corroboration rule requires the government to adduce sufficient evidence that the crime actually occurred, independent of the defendant's confession. Opper v. United States, 348 U.S. 84, 89-90 (1954). The rule is inherent in our "concept of justice" and exists because "the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession." Id. at 89-90. Both the federal and Wisconsin corroboration rules focus on whether the corroboration establishes the trustworthiness of the confession. Under the federal rule, there must be "substantial independent evidence which would tend to establish the trustworthiness of the statement." Id. at 93; see also Smith v. United States, 348 U.S. 147, 152-53 (1954); Wong Sun v. United States, 371 U.S. 471, 488-89 (1965). Under the Wisconsin rule, there must be corroboration of "any significant fact . . . in order to produce a confidence in the truth of the confession." State v. Bannister, 2007 WI 86, ¶ 26, 302 Wis. 2d 158, 734 N.W.2d 892.

However, the United States Supreme Court has never held explicitly that this rule is constitutionally required and thus a proper basis for relief under § 2254. The federal courts

are split on this question. See, e.g., Tash v. Roden, 626 F.3d 15, 18 (1st Cir. 2010) (an alleged violation of the corroboration rule "is not (standing alone) a basis for habeas corpus" because "Opper and Smith made no reference to constitutional compulsion; corroboration was merely deemed a better rule sanctioned by common law."); United States v. Brown, 617 F.3d 857, 862 (6th Cir. 2010) ("the reality [is] that the corroboration rule is thought of as a non-constitutional rule."). But see Aschmeller v. State of South Dakota, 534 F.2d 830, 831 (8th Cir. 1976) (the state is "constitutionally bound" to introduce independent substantial evidence to establish the trustworthiness of the confession."). The Court of Appeals for the Seventh Circuit has not squarely decided the matter. In Spivey v. State, 20 Fed. Appx. 514, 516 (7th Cir. 2001) (unpublished),the court "question[ed] whether Spivey's [corroboration] claim could ever warrant collateral relief . . . [because there is] the question whether the corroboration rule discussed in *Smith, Opper,* and *Wong Sun* is constitutionally mandated." However, the court chose not to decide the question because the petitioner's claim failed on the merits. Id. I will follow the example of the Seventh Circuit and assume without deciding that there is a constitutional dimension to the corroboration rule.

B. Procedural Default

Even assuming that petitioner has shown that a constitutional question is at issue, a procedural hurdle remains. A federal court cannot hear an application for a writ of habeas corpus, unless the petitioner has exhausted the remedies available in state court. §

2254(b)(1)(A). This means that he must have "fairly presented" the federal claim to the state court, so that the state had the "initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Picard v. O'Connor, 404 U.S. 270, 275 (1971) (internal quotation omitted). Where the petitioner has already pursued his state court remedies, but has not raised the question he wants to raise in federal court, the related doctrine of procedural default prevents habeas relief. Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004). Procedural default occurs where the petitioner "failed to fairly present to the state courts the claim on which he seeks relief in federal court" and "it is clear that those courts would now hold the claim procedurally barred." Id. To determine whether petitioner can proceed, I must determine whether he fairly presented his constitutional claim to the Wisconsin state courts, and, if he did not do so, whether he has failed to exhaust or whether he has procedurally defaulted the claim.

A petitioner has fairly presented a federal claim where he has "apprised [the state court] of the constitutional nature of the claim." Anderson v. Benik, 471 F.3d 811, 815 (7th Cir. 2007). This means that "both the operative facts and the controlling legal principles must be submitted to [the state] court." Verdin v. O'Leary, 972 F.2d 1467, 1474 (7th Cir. 1992) (internal quotation omitted). If the petitioner did not specify the federal basis for the claim, then four factors determine whether the state court nonetheless had the opportunity to consider the claim:

> (1) whether the petitioner relied on federal cases that engage in a constitutional analysis; (2) whether the petitioner relied on state cases which apply a constitutional analysis to similar facts; (3) whether the petitioner framed the claims in terms so particular as to call to mind a specific

> constitutional right; and (4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation.

Anderson, 471 F.3d at 815.

Petitioner does not state explicitly in his appellate briefs that the state violated his constitutional right to sufficient corroboration. Br. and App'x of Appellant-Def. at 7; Reply Br. of Appellant-Def. at 1, State v. Newell, 2010 WI App 84 (No. 2009AP449-CR). Therefore, I must determine whether petitioner nonetheless fairly apprised the court of the federal nature of his claim. Regarding the first factor in Anderson, the briefs do not rely on any federal cases. Second, the briefs cite a variety of state cases, but these cases do not discuss the constitutional underpinnings of the corroboration rule. See, e.g., Bannister, 2007 WI 86 at ¶¶ 22-32 (cited in reply brief); State v. Hauk, 2002 WI App 226, ¶¶ 20-26. 257 Wis. 2d 579, 652 N.W.2d 393 (cited in brief); State v. Verhasselt, 83 Wis. 2d 647, 661-62, 266 N.W.2d 342 (1978) (cited in brief).

Petitioner cannot satisfy factors three and four, because it is not established that the corroboration rule is constitutionally required. Petitioner did not frame his argument in terms "so particular as to call to mind a specific constitutional right." In fact, it is likely that the Wisconsin Court of Appeals assumed that there was no constitutional claim, because Wisconsin courts have never explicitly stated that there is a constitutional basis to the rule. Hauk, 2002 WI App 226 at n.4 ("Neither the United States Supreme Court nor the Wisconsin Supreme Court has ever held that the corroboration rule is required by the State or federal constitutions."). For the same reason, the petitioner did not "allege[] a pattern

of facts that is well within the mainstream of constitutional litigation." I conclude that petitioner did not fairly present the corroboration claim to the Wisconsin state courts.

When a claim was not fairly presented to the state court, procedural default occurs if that court would now hold that the claim is procedurally barred. The Wisconsin Court of Appeals held that petitioner's state-law corroboration claim is procedurally barred, because it was litigated on direct appeal, Newell, 2012 WI App 73 at ¶ 1, but it did not discuss whether a federal claim would be procedurally barred as well. However, petitioner has already brought two motions for collateral relief under Wis. Stat. § 974.06. In both cases, the circuit court held that the claims were already litigated or were procedurally barred. In addition, the court of appeals stated that further attempts to litigate claims would result in sanctions. In these circumstances, it is certain that the Wisconsin courts would find that a federal corroboration claim is procedurally barred. For this reason, I conclude that petitioner has procedurally defaulted his corroboration claim.

Despite the procedural default, the court may hear petitioner's claim if he can demonstrate cause for the default and prejudice resulting therefrom or he can show that a miscarriage of justice will result if the court does not consider the merits of the claim. Perruquet, 390 F.3d at 514; Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977); Murray v. Carrier, 477 U.S. 478, 495-96 (1986). To establish cause, petitioner must show that an external obstacle prevented him from fairly presenting the federal claim to the state court. Perruquet, 390 F.3d at 515; Murray, 477 U.S. at 488. An external obstacle is one "that cannot fairly be attributable" to the petitioner. Coleman v. Thompson, 501 U.S. 722, 743

(1991). Second, petitioner must show actual and not merely possible prejudice. Perruquet, 390 F.3d at 515; Murray, 477 U.S. at 494. To succeed on a miscarriage of justice exception, petitioner must demonstrate actual innocence, meaning that "no reasonable juror would have found him guilty but for the error(s) allegedly committed by the state court." Perruquet, 390 F.3d at 515.

These are affirmative defenses, so there is no requirement that a petitioner must set out in his petition for a writ of habeas corpus exactly why one of these exceptions applies. Nonetheless, I conclude that no purpose would be served by giving petitioner an opportunity to show either that he was prevented by an external obstacle from presenting his federal claim in state court or that he will suffer actual prejudice if he is not allowed to present his federal claim in this court. Nothing in petitioner's extensive state court filings gives any reason to suppose that any external obstacle prevented him from citing federal law or relying on it in his post conviction motion. Nothing in his filings suggests that he can demonstrate actual innocence. He never alleged in the brief he filed in the court of appeals that he was actually innocent of the crimes; his argument was that the state should have produced separate corroboration for each count of sexual assault. Br. and App'x of Appellant-Def. at 10-11.

C. Merits of Petitioner's Claim

In any case, even assuming that petitioner had not procedurally defaulted his corroboration claim, he would not have succeeded on the merits of the claim. A court cannot grant a claim in an application for a writ of habeas corpus unless it

> (1) resulted in a decision that was contrary to, or involved an unreasonable a 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), (2). A court may grant relief under § 2254(d)(1) where the petitioner shows that the state court identified the correct rule of law but unreasonably applied it to the facts of the case. Williams v. Taylor, 529 U.S. 362, 404 (2000) (opinion of O'Conner, J.); Harding v. Wells, 300 F.3d 824, 827-28 (7th Cir. 2002). Under § 2254(d)(2), a court may grant relief where the petitioner shows by clear and convincing evidence that the state court's factual determinations were objectively unreasonable. Williams, 529 U.S., at 399; Harding, 300 F.3d at 828; § 2254(e)(1). A determination is objectively unreasonable if it is "so inadequately supported by the record as to be arbitrary and therefore objectively unreasonable." Morgan v. Hardy, 662 F.3d 790, 798 (7th Cir. 2011) (internal quotation omitted).

Ultimately, petitioner cannot show that the state court decision was contrary to the federal corroboration rule or that the factual basis for the court of appeals' conclusion was arbitrary or objectively unreasonable. Petitioner admitted that he had sexual intercourse with the victim on two occasions, and this was corroborated by the victim. Testimony from

the victim and other witnesses showed that petitioner engaged in "grooming behavior to gain [the victim's] confidence and trust and to give [petitioner] the opportunity to sexually exploit her," also corroborating petitioner's version of events. Newell, 2010 WI App 84 at ¶ 3 (internal quotation omitted). In short, the facts adduced in the case were sufficient to corroborate petitioner's confession, so his habeas claim fails on the merits.

D. Certificate of Appealability

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). Where denial of relief is based on procedural grounds, the petitioner also must show that jurists of reason "would find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner shows neither a denial of a constitutional right nor a debatable issue of procedure. Therefore, no certificate of appealability will issue.

ORDER

IT IS ORDERED that

(1) The petition of Donald A. Newell for a writ of habeas corpus under 28 U.S.C. § 2254, dkt. #1, is DENIED.

(2) Petitioner is DENIED a certificate of appealability. If petitioner wishes, he may seek a certificate from the court of appeals under Fed. R. App. 22.

Entered this 4th day of June, 2013.

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