

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

JOHN F. BROWN,

Petitioner,

v.

MARC CLEMENTS, Warden,
Fox Lake Correctional Institution,

Respondent.

OPINION and ORDER

12-cv-861-bbc

Petitioner John F. Brown, a prisoner at the Fox Lake Correctional Institution, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his conviction in the Circuit Court for Dane County on one count of second-degree sexual assault of a child under sixteen years of age. He contends that his custody violates the Constitution of the United States because he received ineffective assistance of counsel. He alleges that his trial counsel failed to impeach the alleged victim with her prior inconsistent statements and failed to introduce evidence that a witness for the prosecution had received favorable treatment in his own case in exchange for implicating petitioner.

In a previous order I directed the state to respond to the petition. Dkt. #2, at 2. After reviewing the parties' briefs, I conclude that the Wisconsin Court of Appeals did not act unreasonably when it applied the Strickland standard for ineffective assistance of counsel or when it determined the facts in light of the evidence presented at trial. Therefore, I will

deny the petition because it does not meet the requirements of 28 U.S.C. § 2254(d).

For the purpose of deciding this motion, I find the following facts from the record.

FACTS

On July 23, 2007, the state charged petitioner in reliance on allegations that a fifteen-year-old girl had performed oral sex on him. At trial, the alleged victim testified that she was riding in a car with her friend, petitioner and petitioner's two sons, one of whom was the alleged victim's boyfriend. She stated that she performed oral sex on the boyfriend and petitioner while all five people were in the car. She testified that later that day the other son forced her to perform oral sex on him. During cross-examination, the victim admitted that although she immediately reported the brother's assault, she waited more than ten months to report petitioner's involvement. However, defense counsel did not attack her credibility by pointing to specific discrepancies between the statements she made to police and the testimony she gave at the preliminary hearing.

The victim's friend, the boyfriend and the boyfriend's brother also testified at trial. The friend largely confirmed the victim's testimony. The boyfriend testified that she performed oral sex on petitioner. In contrast, the boyfriend's brother testified that petitioner was not involved. This contradicted the brother's testimony at the preliminary hearing, at which he had implicated petitioner. At the time of the preliminary hearing, the brother was awaiting sentencing for a conviction of sexual assault in the same matter. At trial, the brother testified that he had implicated petitioner because he was upset with him, and because he

hoped to divert attention from his own case and receive favorable treatment at sentencing. Defense counsel did not elicit from the brother any details concerning the charges or the terms of his sentence or evidence that the brother received favorable treatment at sentencing in exchange for implicating petitioner. (It is unclear from the record whether defense counsel could have established that the brother received favorable treatment. During petitioner's Machner hearing, the circuit court stated that "the prosecutor and the judge did not make concessions to [the brother] because he implicated his father," Memorandum Decision, Dft.'s Motion for a New Trial, dkt. #1, Exh. 3, at 6; however, the court of appeals stated that the brother "had, in fact, received favorable sentencing treatment in exchange for his preliminary hearing testimony against the defendant," State v. John F.B., 2011 WI App 143, ¶ 6, 337 Wis. 2d 557, 806 N.W.2d 268.)

On February 19, 2009, the jury found petitioner guilty of second-degree sexual assault of a child under sixteen years of age. On June 10, 2009, the court imposed a term of seven years of initial confinement and five years of extended supervision. On March 3, 2010, petitioner filed a post conviction motion for an order setting aside the finding of guilt and an order granting a new trial. In the motion, petitioner made two claims of ineffective assistance of counsel: (1) counsel was ineffective by failing to impeach the victim with her prior inconsistent statements and (2) counsel was ineffective by failing to elicit from the brother the fact that he received favorable treatment at sentencing in exchange for implicating petitioner.

Defense counsel testified at petitioner's Machner hearing, stating that he chose not to

attack the victim's credibility because he felt that the jury was already sympathetic towards her. He testified that some of the jurors seemed to react emotionally when the victim entered the courtroom crying. He also did not think that impeaching her would be effective, because there were other witnesses to the incident, and the prosecution would argue persuasively that she made inconsistent statements because she was ashamed and embarrassed about the incident. Regarding the second claim, defense counsel testified that he did not think further cross-examination of the brother would improve petitioner's case. The brother had already testified that he had lied about petitioner's involvement at the preliminary hearing because he hoped to receive favorable treatment at sentencing. Defense counsel did not think it was important for the jury to know whether the brother actually received the favorable terms he had hoped to gain by lying.

On June 29, 2010, the state circuit court issued its opinion, denying petitioner's motion for a new trial. The court applied Strickland v. Washington, 466 U.S. 668, 690-92 (1984), which requires a defendant to show both deficient performance and resulting prejudice in order to establish ineffective assistance of counsel.. Applying the first prong, the court found that defense counsel's performance was not deficient, because he had valid reasons for not eliciting further testimony from the girl and for not introducing the details of the brother's charges or sentence. Under the second prong, the court found that petitioner was not prejudiced by counsel's decisions because both the victim's friend and boyfriend corroborated her testimony that she had performed oral sex on petitioner and their testimony was sufficient to find petitioner guilty.

On September 1, 2011, the Wisconsin Court of Appeals affirmed the circuit court's decision. It concluded that defense counsel had valid strategic reasons for not impeaching the victim and for not establishing the details of the brother's charges or sentence. The court did not address the prejudice prong of Strickland. The Wisconsin Supreme Court denied petitioner's petition for review.

OPINION

The federal statute governing petitions for writs of habeas corpus, 28 U.S.C. § 2254, provides for a "highly deferential" standard of review. Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (internal quotation and citation omitted). Under 28 U.S.C. § 2254(d), a district court may not grant a state prisoner's petition

with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable 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.

Under § 2254(d) a state court decision is contrary to clearly established federal law where "the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 695 (2002) (citation omitted). A state court applies clearly established precedent unreasonably if it identifies the correct governing legal principle but applies that principle to the facts of the case unreasonably. E.g., Brown v. Payton, 544 U.S. 133, 141 (2005). Under this standard, an

unreasonable application is more than merely incorrect or erroneous; rather, the state court's application of clearly established law must be "objectively unreasonable." Williams v. Taylor, 529 U.S. 362, 409 (2000).

Defendants have a constitutional right to effective assistance of counsel. Strickland, 466 U.S. at 685-86. Under Strickland, a defendant seeking to prove ineffective assistance of counsel must establish deficient performance and resulting prejudice. Id. at 690-92. To show deficient performance, a defendant must point to specific acts or omissions that were "outside the wide range of professionally competent assistance." Id. at 690. For its part, the court must "strongly presume[] [that counsel] rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. To establish prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

The Wisconsin Court of Appeals analyzed petitioner's claims under Strickland, the correct legal standard. Therefore, the decision is not "contrary to clearly established Federal law." Nor did the court apply Strickland in an objectively unreasonable manner. The court found that "counsel's tactical decision" to not impeach the victim "was reasonably based on an analysis of the strengths and weaknesses of the case and personal courtroom observations, and was well within professional norms." State v. John F.B., 2011 WI App at ¶ 10. This is not an unreasonable conclusion: defense counsel provided a credible explanation why

impeaching the victim would not help and might even hurt petitioner's case. Furthermore, it was not unreasonable for the court to determine that counsel had a plausible explanation for not providing details about the terms of the brother's charges or sentence. The court concluded that

the relevant information for assessing the brother's motivation for making earlier incriminating statements against [petitioner] was what treatment the brother hoped or believed he might receive at the time he made the statements. Therefore, counsel provided effective assistance by asking the brother whether he thought his statements would help him at his own sentencing hearing.

Id. This is sound reasoning: the brother's motivation for implicating petitioner might tend to establish petitioner's innocence and the jury was already aware of this information. Moreover, the petition provides no evidence that the court's factual determinations were objectively unreasonable in light of the evidence presented at petitioner's trial. Rather, the court relied on undisputed dispositive facts, such as the testimony of several witnesses that the victim performed oral sex on petitioner. Petitioner has failed to show that he is entitled to a writ of habeas corpus.

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). Because petitioner fails to show such a denial, no certificate of appealability will issue.

ORDER

It is ORDERED that

(1) Petitioner John F. Brown's petition 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 6th day of June, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge