

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

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OUATI K. ALI,

Petitioner,

v.

MICHAEL BAENEN,

Respondent.  
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ORDER

13-cv-132-bbc

In this petition for a writ of habeas corpus under 28 U.S.C. § 2254, petitioner Ouati K. Ali is challenging his 2006 conviction of first-degree sexual assault on many grounds. In an order dated April 30, 2013, dkt. #5, I made a preliminary determination that petitioner had exhausted his state court remedies with respect to some of his claims, but not others.

In particular, I found that the following claims appeared to be exhausted:

1. Petitioner's trial counsel was ineffective in not moving for the trial judge's recusal on the ground that the judge's wife was involved in the preparation of the victim's videotaped testimony.
2. His appellate counsel was ineffective in not challenging the sufficiency of the evidence or his trial counsel's failure to seek the recusal of the judge.
3. He was wrongfully denied an opportunity to conduct independent DNA testing.

I gave petitioner an opportunity to show that he exhausted various other claims:

1. The trial court allowed the state to introduce evidence of a prior charge of sexual assault of which petitioner had been acquitted in 1991 and other acts of sexual assault that were never charged against him;
2. The trial court denied him a continuance of the trial date although his counsel had only 21 days in which to prepare for trial;
3. His trial counsel was constitutionally ineffective because
  - a. He was unable to suppress evidence obtained from petitioner's cellphone;
  - b. He did not contest the state's motion in limine preventing him from introducing evidence of an alibi;
  - c. He did not investigate "other acts witnesses"; and
  - d. He did not challenge the sufficiency of the evidence.
4. His appellate counsel was constitutionally ineffective because
  - a. He did not conduct a pretrial investigation;
  - b. He did not investigate the DNA evidence; and
  - c. He did not challenge the effectiveness of trial counsel.

Although I included petitioner's sufficiency of the evidence claim with his claims involving ineffective assistance of trial counsel, a second look at the petition shows that petitioner did not specify whether it was a standalone claim or part of ineffective assistance of either trial counsel or appellate counsel.

In his response to the court's order, petitioner did not develop an argument about

exhaustion. Instead, he responded to the order by filing various records from the state court proceedings: (a) the decision from the Wisconsin Court of Appeals on petitioner's direct appeal of the conviction; (b) the Wisconsin Supreme Court's decision denying review of petitioner's direct appeal; (c) the decision of the Wisconsin Court of Appeals on petitioner's appeal of the trial court's denial of his post conviction motion; (d) the petition for review with the Wisconsin Supreme Court regarding petitioner's post conviction motion; (e) the Wisconsin Supreme Court's decision denying review of petitioner's post conviction motion; and (f) an affidavit from petitioner's trial counsel. Dkt. #7-5.

These documents do not show that petitioner exhausted all of the claims in his petition. In particular, I see no mention in the court of appeals decisions or the petition for review of any of the following claims: (1) petitioner's trial counsel was ineffective because he did not contest the state's motion in limine preventing him from introducing evidence of an alibi; (2) petitioner's appellate counsel was ineffective for failing to conduct a "pretrial" investigation; and (3) petitioner's appellate counsel was ineffective because he did not investigate the DNA evidence. Further, the court of appeals made no mention in its decisions about petitioner's claims that: (1) trial counsel was ineffective because he was unable to suppress evidence obtained from petitioner's cell phone; and (2) trial counsel was ineffective because he did not investigate "other acts witnesses." Petitioner did not file with this court any of the briefs he submitted to the court of appeals and he does not allege that the court of appeals failed to consider any issues that petitioner raised in his brief. Accordingly, I conclude that petitioner did not exhaust any of these claims.

With respect to sufficiency of the evidence, the documents petitioner filed show that he exhausted a claim that *appellate* counsel was ineffective for failing to raise that issue, but they do not show that he raised the same claim with respect to trial counsel.

With respect to petitioner's claims that the trial court erred in allowing the state to introduce evidence of a prior charge of sexual assault of which petitioner had been acquitted in 1991 and other acts of sexual assault that were never charged against him, I noted in the April 30, 2013 order that it was not clear which alleged previous acts of sexual assault petitioner challenged in the court of appeals. Unfortunately, the court's decision does not clarify the issue. At this stage, I will assume that petitioner has exhausted his state court remedies as to both the allegations that ended with an acquittal and those that were never charged. However, respondent is free to ask the court to revisit this issue if he has contrary evidence.

With respect to petitioner's claim that the trial court denied him a continuance of the trial date although his counsel had only 21 days in which to prepare for trial, the court of appeals decision shows that petitioner raised this claim on direct appeal. Although petitioner did not submit to this court a copy of the petition for review with the supreme court, I will assume at this stage that petitioner presented this issue to the supreme court. Again, if respondent has contrary evidence, he is free to raise the issue.

With respect to ineffective assistance of appellate counsel for failing to challenge the effectiveness of trial counsel, the only issue discussed by the court of appeals was trial counsel's failure to seek recusal of the trial judge. Accordingly, I find that petitioner has not

exhausted any other claim that appellate counsel was ineffective for failing to challenge trial counsel's ineffectiveness.

As I noted in the April 30 order, when the petition includes both exhausted and unexhausted claims, the petitioner must choose one of two options: (1) dismiss all of his claims without prejudice so that he can finish exhausting his state court remedies before returning to federal court; or (2) abandon his unexhausted claims and proceed with his exhausted claims only. Rose v. Lundy, 455 U.S. 509 (1982). If petitioner wishes to complete the exhaustion process but he does not believe that he has enough time to do so before the statute of limitations runs, he may ask the court for a stay rather than a dismissal. Rhines v. Weber, 544 U.S. 269, 277 (2005).

Unfortunately, petitioner did not say in his response which of these options he would choose in the event that the court did not agree with his view that he had exhausted all of his claims. Accordingly, I will give him one more opportunity to do so. In deciding which course of action to pursue, petitioner should consider the following: if he decides to give up his unexhausted claims and present only the ones that he has already exhausted, it is unlikely that this court would allow him to raise the unexhausted claims in a subsequent federal habeas petition. Lundy, 455 U.S. at 521 ("[A] prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions.") (citing 28 U.S.C. § 2254 Rule 9(b), authorizing dismissal for abuse of the writ).

To summarize, I have concluded that petitioner has not exhausted the following

claims:

1. Trial counsel was ineffective because he did not contest the state's motion in limine preventing petitioner from introducing evidence of an alibi;

2. Trial counsel was ineffective because he was unable to suppress evidence obtained from petitioner's cell phone;

3. Trial counsel was ineffective because he did not investigate "other acts witnesses;

4. Appellate counsel was ineffective for failing to conduct a "pretrial" investigation;

5. Appellate counsel was ineffective because he did not investigate the DNA evidence;

6. The evidence was not sufficient to support a conviction;

7. Trial counsel was ineffective for failing to argue that the evidence was insufficient;

and

8. Any claim regarding appellate counsel's ineffectiveness for failing to challenge trial counsel's ineffectiveness other than petitioner's claim that appellate counsel was ineffective in not challenging trial counsel's failure to seek the recusal of the judge.

Petitioner's allegations and evidence are sufficient at this stage to show that he has exhausted the following claims:

1. Trial counsel was ineffective in not moving for the trial judge's recusal on the ground that the judge's wife was involved in the preparation of the victim's videotaped testimony.

2. Appellate counsel was ineffective in not challenging the sufficiency of the evidence or his trial counsel's failure to seek the recusal of the judge.

3. Petitioner was wrongfully denied an opportunity to conduct independent DNA testing.

4. The trial court erred in allowing the state to introduce evidence of a prior charge of sexual assault of which petitioner had been acquitted in 1991 and other acts of sexual assault that were never charged against him.

5. The trial court denied petitioner a continuance of the trial date although his counsel had only 21 days in which to prepare for trial.

#### ORDER

IT IS ORDERED that

1. Petitioner Ouati Ali may have until July 19, 2013, to tell the court whether he wishes to pursue his unexhausted claims in state court or whether he prefers to amend his petition to delete the unexhausted claims and proceed solely on the exhausted claims.

2. If petitioner chooses not to delete his unexhausted claims but to make an effort to exhaust them in state court, then it will be necessary to decide whether his entire petition should be dismissed without prejudice or whether petitioner qualifies for “stay and abeyance” of his petition. It will be up to petitioner to show that he qualifies.

3. If petitioner advises the court that he chooses to proceed with his exhausted claims, then I will order a response from respondent on those claims.

4. If petitioner does not respond by July 19, then the petition will be dismissed without prejudice for his failure to exhaust his state court remedies, pursuant to Rose v.

Lundy.

Entered this 8th day of July, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge