IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ALLAN OWENS,

Petitioner,

v.

RANDALL HEPP, Warden,
Fox Lake Correctional Institution,

Respondent.

OPINION AND ORDER

16-cv-0016-bbc

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Allan Owens, an inmate at the Fox Lake Correctional Institution, has filed this action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his June 2013 conviction in the Circuit Court for Pepin County for one count of sexual assault and one count of felon in possession of a firearm. Petitioner initially filed his petition on January 7, 2016. However, I deferred screening that initial petition because it failed to identify all of petitioner's grounds for relief and all of the facts supporting each ground. Petitioner has now filed an amended petition containing additional detail. Petitioner has also paid the five dollar filing fee, so his petition is ready for screening pursuant to Rule 4 of the Rules Governing Section 2254. After reviewing the petition, I conclude that petitioner has set forth a plausible constitutional claim warranting a response.

OPINION

Although his allegations are difficult to understand, petitioner's claims appear to fall into four general categories. First, petitioner contends that the prosecution failed to turn over exculpatory material in violation of his due process rights. Second and third, petitioner contends that his appellate and trial counsel were deficient in various respects. Fourth, petitioner contends that the trial court violated his constitutional rights by refusing to hold a Franks hearing. I will address each of these contentions in turn.

A. Prosecution's Failure to Turn Over Exculpatory Evidence

Petitioner's primary contention appears to be that prosecutors failed to turn over exculpatory evidence in violation of his due process rights, Brady v. Maryland, 373 U.S. 83, 87 (1963), and that had he been given this evidence, he would not have entered a plea of "no contest" to the charges against him. The exculpatory material at issue appears to be investigation reports issued by "the DSH" and the "Sheriff's Department." Plaintiff contends that both entities' reports concluded that his accuser's allegations were "unfounded and untruthful." (It is not clear which sheriff's department plaintiff is referring to and what "the DSH" stands for). Petitioner contends that he should have been allowed to withdraw his "no contest" plea because without this information, his plea was not "knowing and voluntary." I conclude that these allegations are sufficient to state a plausible constitutional claim. United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) ("The government's obligation to make [Brady] disclosures is pertinent not only to an accused's preparation for

trial but also to his determination of whether or not to plead guilty."). Petitioner's constitutional rights were seriously violated if the prosecution failed to produce investigatory reports concluding that the allegations of petitioner's accuser had been deemed "unfounded" or "untruthful." In all likelihood, this evidence would have materially affected his decision to plead no contest.

B. Ineffective Assistance of Appellate Counsel

Next petitioner claims that his appellate counsel provided him ineffective assistance. To succeed on this claim, petitioner must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) that he was prejudiced as a result. Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing familiar two-part "performance" and "prejudice" test for ineffective assistance of counsel claims). As an initial matter, petitioner's claim that his appellate counsel was ineffective is confusing because petitioner waived his right to appellate counsel and was unrepresented on appeal. Accordingly, it is difficult to see how his non-existent appellate counsel could have been "ineffective."

To the extent petitioner is contending that he did not knowingly waive his right to appellate counsel, this contention also fails. Petitioner asserts that he was never questioned by the trial court regarding his ability to proceed on his own, whether he understood the seriousness of the charges and whether he understood the difficulties of self-representation. However, plaintiff's argument improperly conflates the trial court's inquiry when it comes to waiving the right to *trial* counsel with the standard applicable when a defendant waives

his right to *appellate* counsel. In the case of appellate counsel, the defendant does not need to be formally questioned by the trial court regarding the aforementioned topics. Instead, "the necessary 'colloquy' may be accomplished via written communications with the defendant, initiated either by the court *or by counsel seeking to withdraw*." State v. Thornton, 2002 WI App 294 ¶ 22, 259 Wis. 2d 157, 565 N.W.2d 45 (emphasis added). Plaintiff received a letter from his appellate counsel informing him of his right to counsel on appeal and the risks of proceeding pro se, which satisfied counsel's obligations before withdrawing from representing plaintiff on appeal.

C. Ineffective Assistance of Trial Counsel

Plaintiff also contends that his trial counsel was ineffective. In support of this claim, plaintiff identifies six areas in which his trial counsel failed to provide him effective representation. After considering each of these six grounds, I conclude that only two of them are sufficient to state a plausible claim that his trial counsel was ineffective and that his constitutional rights were violated as a result.

Petitioner's first two arguments both relate to his counsel's failure to conduct a proper investigation. In particular, plaintiff contends that his counsel never contacted the agencies in O'Fallon, Missouri, that initiated the investigation and first spoke to his accuser. Although it is not entirely clear from the face of the petition whether these Missouri agencies were responsible for preparing the reports and materials finding the statements of plaintiff's accuser to be "unfounded" and "untruthful," I will assume for purposes of screening his

petition that they were and that had his counsel contacted the agencies, plaintiff would have obtained this exculpatory material prior to entering his no contest plea. By failing to contact the agencies that opened the investigation, trial counsel may have failed to fulfill its obligation "to investigate possible defenses or make reasonable decisions that particular investigation are unnecessary." Warren v. Baenen, 712 F.3d 1090, 1100 (7th Cir. 2013) (quoting Burt v. Uchtman, 422 F.3d 557,. 566 (7th Cir. 2005)). Accordingly, these allegations state a plausible constitutional claim that warrants a response.

However, petitioner's remaining contentions regarding the deficiencies of his trial counsel fail to state a viable constitutional claim. For example, petitioner alleges that his counsel "coerced [him] to confess to a crime he never committed," but he does not explain *how* he was coerced. This type of conclusory assertion fails to state an ineffective assistance claim. United States v. Lawson, 947 F.2d 849, 853 (7th Cir. 1991) ("Conclusory allegations of ineffective assistance are insufficient to satisfy a defendant's burden of showing cause.").

Petitioner also alleges that his counsel "failed to realize" that the affidavit statements supporting probable cause were false. However, petitioner fails to explain how his counsel should have known the statements were lies. Defendants are entitled to effective representation, not omniscient and infallible counsel. Yarborough v. Gentry, 540 U.S. 1, 9 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Moreover, plaintiff does not identify the specific lies to which he is referring or why the state would have lacked probable cause to search his residence without the benefit of those statements.

Next petitioner alleges that although his trial counsel filed two motions to withdraw his plea, these motions were deficient because they did not cite any case law to support petitioner's argument. However, plaintiff does not explain how this failure to cite case law was prejudicial. He has not identified what cases his counsel should have cited or explained how citations to such cases would have convinced the judge to allow him to withdraw his plea. Accordingly, petitioner has not shown that he was prejudiced by his counsel's alleged failure to cite case law.

Finally, petitioner's allegations that his counsel failed to inform him that he should be released on bond per Wis. Stat. § 971.10(4) fails to state a plausible constitutional claim. Habeas challenges directed toward pretrial custody are rendered moot when the prisoner is ultimately convicted and held pursuant to a state court's judgment. Jackson v. Clements, 796 F.3d 841, 843 (7th Cir. 2015). Petitioner fails to explain how knowing that he could have been released on bond under Wis. Stat. § 971.10(4) would have affected his current custody, which is all that is at issue in a § 2254 petition.

D. Right to a Franks Hearing

Finally, petitioner argues that the state court improperly denied him a Franks hearing. However, his allegations fail to set forth a plausible constitutional claim because, as the Court of Appeals of Wisconsin determined, petitioner waived his right to challenge the search warrant or the officers' probable cause by pleading no contest. State v. Riekkoff. 112 Wis. 2d 119, 123, 332 N.W.2d 744 (1983). The state court did not violate plaintiff's

constitutional right to a Franks hearing when plaintiff waived that right by pleading no-contest. "When a state court resolves a federal claim by relying on a state-law ground that is both independent of the federal question and adequate to support the judgment, federal habeas review of the claim is foreclosed." Kaczmarek v. Rednour, 627 F.3d 586, 591 (7th Cir. 2010). The guilty plea waiver rule set forth in Riekkoff has been deemed both independent and adequate. Prouty v. Wallace, No. 11-C-645, 2012 WL 2525650, at *1 (E.D. Wis. June 29, 2012) (discussing guilty plea waiver rule). Accordingly, petitioner's Franks hearing argument fails to state a constitutional claim.

ORDER

IT IS ORDERED that

1. Pursuant to an informal service agreement between the Attorney General for the State of Wisconsin and the court, copies of the petition and this order are being sent today to the Attorney General for service on Warden Hepp.

2. Within 30 days of the date of service of this order, respondent must file an answer to petitioner's claims that (1) prosecutors failed to provide him the exculpatory evidence petitioner identifies and (2) that his trial counsel was ineffective because he failed to conduct an adequate investigation and independently uncover this material. The answer must comply with Rule 5 of the Rules Governing Section 2254 Cases and must show cause, if any, why this writ should not issue.

3. **Dispositive motions**. If the state contends that the petition is subject to dismissal

on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion or procedural default, it is authorized to file a motion to dismiss, a supporting brief and any documents relevant to the motion, within 30 days of this order, either with or in lieu of an answer. If the state contends that the petition presents a mix of exhausted and unexhausted claims, it must address in its supporting brief whether petitioner meets the criteria for a stay announced in Rhines v. Weber, 544 U.S. 269 (2005), in the event he opts to pursue his unexhausted claims in state court. Petitioner shall have 20 days following service of any dismissal motion within which to file and serve his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

If the court denies the motion to dismiss in whole or in part, it will set a deadline within which the state must file an answer, if necessary, and establish a briefing schedule regarding any claims that have not been dismissed.

4. **When no dispositive motion is filed**. If respondent does not file a dispositive motion, the parties shall adhere to the following briefing schedule regarding the merits of petitioner's claims:

- Petitioner shall file a brief in support of the petition within 30 days of the date of service of the answer. Petitioner bears the burden to show that his conviction or sentence violates the federal Constitution, United States Supreme Court case law, federal law or a treaty of the United States. With respect to any claims that were adjudicated on the merits in a state court proceeding, petitioner bears the burden to show that the state court's 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.

28 U.S.C. § 2254(d). Petitioner should keep in mind that in a habeas proceeding, a federal court is required to accept the state court's determination of factual issues as correct, unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

NOTE WELL: If petitioner already has submitted a memorandum or brief in support of his petition that addresses the standard of review set out above, then he does not need to file another brief. However, if petitioner's initial brief did not address the standard of review set out in § 2254(d), then he should submit a supplemental brief. If he fails to do so, then he risks having some or all of his claims dismissed for his failure to meet his burden of proof.

- Respondent shall file a brief in opposition within 30 days of the date of service of petitioner's brief.

- Petitioner shall have 20 days after service of respondent's brief in which to file a reply brief.

5. For the time being, petitioner must serve by mail a copy of every letter, brief, exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not docket or consider any submission that has not been served upon the state. Petitioner should note on each of his submissions whether he has served a copy of that document upon the state.

6. Petitioner's claims related to his request for a Franks Hearing and the effectiveness of his appellate counsel are DISMISSED for failure to state a constitutional claim.

Entered this 9th day of May, 2016.

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