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

MICHAEL SVEUM,

Petitioner,

v.

JUDY P. SMITH, Warden, Oshkosh Correctional Institution,

Respondent.

ORDER

00-C-563-C

Michael Sveum seeks to appeal this court's order of December 15, 2004 denying his motion to vacate a December 14, 2000 judgment denying his petition for a writ of habeas corpus. In an order entered January 12, 2005, petitioner was informed that he would have to pay the appellate filing fee or obtain leave to proceed in forma pauperis on appeal before he could appeal the order.

Petitioner has now filed a motion for leave to proceed in forma pauperis on appeal. From petitioner's affidavit of indigency and accompanying trust fund statement, I find that petitioner lacks the ability to prepay or give security for the costs and fees of this appeal. Further, I find that petitioner is taking his appeal in good faith. Accordingly, petitioner's request for leave to proceed in forma pauperis on appeal will be granted. 28 U.S.C. § 1915(a)(3).

In the January 12, 2005 order, I concluded that petitioner did not need a certificate of appealability in order to pursue an appeal in light of my conclusion that petitioner's motion to vacate was in effect a successive habeas petition over which this court lacked jurisdiction. However, in a recent decision, the Court of Appeals for the Fourth Circuit has concluded otherwise, holding that a district court's dismissal of a petition for a writ of habeas corpus on the ground that it was an unauthorized successive petition constitutes a final order in a "habeas corpus proceeding" within the meaning of 28 U.S.C. § 2253(c)(1)(A), thereby triggering the certificate of appealability requirement. Jones v. Braxton, 392 F.3d 683, 685-688 (4th Cir. 2004). The court reasoned in part that the Supreme Court in Slack v. McDaniel, 529 U.S. 473 (2000), had presupposed this conclusion, insofar as it had held that Slack's appeal of the dismissal of his habeas petition as successive was subject to the certificate of appealability requirement because his notice of appeal had been filed after the Antiterrorism and Effective Death Penalty Act became effective. Id. at 688 (discussing Slack). Although the Court of Appeals for the Seventh Circuit has not addressed the issue directly, it has suggested in at least one case that it agrees with the Fourth Circuit's view as expressed in Jones. See Melton v. United States, 359 F.3d 855, 857 (7th Cir. 2004) (defendant's petition for writ of audita querela, asserting ineffective assistance of counsel, was successive motion under § 2255 over which district court lacked jurisdiction and for which defendant needed certificate of appealability in order to obtain appellate review).

In light of these authorities, which I find persuasive, I have sua sponte reconsidered my conclusion that this court need not make the determination whether petitioner satisfies the criteria for the issuance of a certificate of appealability. I now reverse course and conclude that 28 U.S.C. § 2253(c)(1)(A) applies to the dismissal of petitioner's motion as an unauthorized successive petition.

A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000); see also 28 U.S.C. § 2253(c)(2). In order to make this showing, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack, 529 U.S. at 484 (quoting Barefoot v. Estelle, 463 U.S. 880, 893, n.4 (1983)). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at484. Thus, "[d]etermining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." Id. at 484-85.

Starting with this court's procedural ruling, I conclude that reasonable jurists could debate the correctness of my conclusion that petitioner's motion was in effect an unauthorized successive petition over which this court lacked jurisdiction as opposed to a valid motion under Rule 60(b). The basis for petitioner's motion to vacate the judgment denying his 2000 habeas petition was that the court erred in denying some of his ineffective assistance of trial and postconviction counsel claims without an evidentiary hearing because the record was devoid of any factual findings by the state courts on this issue. Although I concluded that this allegation was simply a belated attack on the correctness of this court's judgment, and therefore implicated the validity of his underlying conviction, reasonable jurists could debate whether petitioner's allegations instead implicated "the integrity of the court's habeas proceeding" and were properly brought in a motion under Rule 60(b).

Furthermore, having taken another look at the record and petitioner's submissions, I conclude that he has made a substantial showing of the denial of a constitutional right with respect to his claim that his trial attorney was ineffective for giving him bad advice about the strength of the state's case and that his postconviction attorney was ineffective for not preserving this issue for appeal. Petitioner alleged in his petition that his trial lawyer had advised him incorrectly about the state's ability to rely on alleged incidents that occurred outside the time period charged in the information to satisfy the elements of stalking and harassment, that he had relied on this advice in deciding to reject the state's plea offer and that he received a much harsher sentence after trial as a result of rejecting the plea offer.

Pet., dkt. #1, at ¶ 22C. The state conceded that the record contained no factual findings with respect to this allegation because the state courts had denied petitioner's claim without an evidentiary hearing. Answer, dkt. #3, at p. 5, ¶ B.1. In denying petitioner's § 2254 petition, I found no basis on which to conclude that the state courts acted unreasonably in concluding that an evidentiary hearing was not warranted on any of petitioner's ineffective assistance of trial counsel claims because petitioner could not show prejudice in light of the robust and convincing evidence that was presented against him at trial. Op. and Order, Dec. 14, 2000, dkt. #5, at 19. Reasonable jurists would not debate that conclusion as it pertains to petitioner's claims of ineffective assistance of counsel that relate to counsel's alleged omissions with respect to his performance at trial. However, reasonable jurists could debate whether petitioner's inability to show prejudice at trial was sufficient to defeat his allegations of ineffective assistance of counsel that related to the plea negotiation process. See Engelen v. United States, 68 F.3d 238, 241 (8th Cir. 1995) (defendant who rejects proposed plea bargain and receives fair trial may still show prejudice under Strickland if plea bargain would have resulted in lesser sentence) (collecting cases).

Nonetheless, I am precluded from granting petitioner's request for a certificate of appealability. When petitioner originally requested a certificate of appealability so that he could appeal this court's order denying his habeas petition, I concluded that he had not made a substantial showing of the denial of a constitutional right, even though he had identified ineffective assistance of counsel in connection with the plea negotiation process

as one of the issues he sought to appeal. See Mot. for Issuance of Cert. of Prob. Cause for Appeal, dkt. #7, at 12-13. On June 5, 2001, the Court of Appeals for the Seventh Circuit agreed after reviewing the record that petitioner had not made a substantial showing of the denial of a constitutional right, and denied his request for a certificate of appealability. Order, June 5, 2001, dkt. #11. The court of appeals' conclusion that petitioner has not made a substantial showing of the denial of a constitutional right with respect to any of the claims raised in his petition stands as the law of the case. Accordingly, although I would grant petitioner's request for a certificate of appealability on the issue of counsel's alleged ineffectiveness during the plea negotiation process were I reviewing this case in the first instance, I am bound by previous rulings that prevent my doing so now.

ORDER

IT IS ORDERED:

1. Michael Sveum's motion for leave to proceed in forma pauperis on appeal is GRANTED.

2. Pursuant to 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b), his request for a certificate of appealability is DENIED for the reasons stated above.

Entered this 31st day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge