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

GARRY VAN DE VOORT,

Petitioner, REPORT AND RECOMMENDATION

v.

01-C-436-C

PHILLIP KINGSTON, Warden,
Columbia Correctional Institution,

Respondent.

REPORT

Before the court for report and recommendation is petitioner Garry Van De Voort's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. In 1996 a jury in the Circuit Court for Price County convicted petitioner of twenty five gun-related charges after rejecting his claim of not guilty by reason of mental disease or defect. Petitioner contends that his trial lawyer was ineffective because she did not call a second favorable expert witness during the trial's responsibility phase.

Because the Wisconsin Court of Appeals's decision affirming petitioner's conviction was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), I am recommending that this court deny petitioner's application for a writ of habeas corpus.

I draw the following facts from the Wisconsin Court of Appeals's opinion in *State v. Van De Voort*, 234 Wis. 2d 151, 610 N.W.2d 512 (Table), 2000 WL 156893 (Ct. App. Feb 15, 2000):

Facts

On a mid-summer morning in 1995, petitioner embarked on a drunken shooting spree from his trailer home in rural northern Wisconsin. Al and Helen Franek and Derald Edinger lived across the road from petitioner and were accustomed to him shooting occasionally at targets on his own property. However, on this particular day, July 15, 1995, petitioner began taking potshots with his .22 caliber rifle at his neighbors' homes. Two of the bullets entered the Franek residence, causing the Franeks and Edinger, who was visiting at the time, to take cover on the floor or in the basement. Law enforcement officers eventually tackled petitioner outside his residence and took him into custody. The ensuing police investigation revealed that 12 bullets had hit the Franeks' and Edinger's property, including two shots that had entered the Franeks' house and two that had entered Edinger's house.

The state charged petitioner with twelve counts of endangering safety by reckless use of a firearm, twelve counts of first-degree recklessly endangering safety and one count of operating a firearm while intoxicated. Petitioner pled not guilty by reason of mental disease or defect (NGI) and went to trial. A jury found petitioner guilty of all charges during the first phase of his trial.

During the subsequent responsibility phase, petitioner presented the testimony of Dr. Michael Galli, a court-appointed psychologist who evaluated petitioner. Dr. Galli testified that petitioner suffered from a mental illness called schizoaffective disorder that was

evidenced by delusions. Dr. Galli further testified that petitioner was unable to conform his actions to the law because of his illness and his delusional thinking. Petitioner also presented the testimony of four jailers, who testified regarding his disruptive and somewhat strange behavior in the jail, and two counselors, who observed petitioner exhibiting paranoia and delusional thinking during their visits with him at the jail.

The state presented the testimony of Dr. Ralph Baker, an expert hired by the prosecution.[1] From his interview with petitioner, Dr. Baker concluded that petitioner had a paranoid personality disorder that did not rise to the level of a mental illness. Further, Dr. Baker testified that petitioner was able to conform his actions to the law, noting that statements made by petitioner when he was apprehended indicated that he was shooting at his neighbors' homes to get back at them for shooting at his. Dr. Baker disagreed that various statements made by petitioner were "delusional" in nature, and noted that petitioner was intoxicated at the time of the shooting incident.

The jury rejected petitioner's NGI claim, concluding that he did not have a mental disease or defect the morning of his shooting spree. The court then sentenced petitioner to a total of 25 years in prison to be followed by a 10-year term of probation.

Petitioner missed the statutory time limit to file a direct appeal. In 1998, petitioner retained counsel who filed a motion requesting that petitioner's direct appeal rights be

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[1] Although Dr. Baker was retained by the State, the jury was not aware of this fact. Dr. Baker testified at trial that he thought the court had appointed him to evaluate petitioner. *See* Tr. of Jury Trial, dkt. #3 in 01-C-123-C, Exh. U at 470.

restored because petitioner had been incompetent to prosecute his appeal in 1996. Petitioner's motion included a February 1998 psychological evaluation of petitioner by Dr. Gene Braaksma. In his report, Dr. Braaksma concluded from interviews and testing of petitioner that, although petitioner had symptoms consistent with a personality disorder, his behaviors were primarily the result of a mental defect, namely, an organic brain injury sustained in a car accident. Dr. Braaksma concluded that petitioner had this defect at the time of the July 15, 1995 incidents and that, as a result of the defect, he was not able to appreciate the wrongfulness of his actions or conform his behavior to the requirements of the law.

On October 9, 1998, the trial court issued written findings of fact and conclusions of law finding that petitioner was unable to comprehend the proper remedies available to him during the time limitations imposed by his appeal. On November 18, 1996, the Wisconsin Court of Appeals entered an order allowing petitioner 30 days in which to file a postconviction motion or notice of appeal. Petitioner then filed a postconviction motion in the trial court in which he alleged, among other things, that his trial lawyer had been ineffective for failing to obtain an expert to testify for petitioner during the NGI phase of the trial. Surprisingly, petitioner did not refer to Dr. Braaksma or his conclusions in his motion. The trial court denied the motion because petitioner had not alleged any facts to show how a second expert's opinions would have differed from those of Dr. Galli.

Petitioner appealed the denial of his postconviction motion to the court of appeals. Petitioner appended to his brief an affidavit from petitioner's trial counsel who averred that she had attempted in early 1996 to retain Dr. Braaksma to evaluate petitioner in connection with his NGI plea; however, her superiors at the state public defender's office had denied her request because of limited funding and because Dr. Galli had already provided an opinion favorable to petitioner. Petitioner urged the court of appeals to consider the affidavit and Dr. Braaksma's report, asserting that he had just recently obtained the affidavit from trial counsel.

The court of appeals considered Dr. Braaksma's opinion, but concluded that it would not have affected the outcome at trial in any material way. In a decision issued on February 15, 2000, the court wrote:

> Psychiatric experts disagreed at trial as to Van De Voort's mental state. The prosecution's expert believed him to be free of mental disease, while a court-appointed expert concluded otherwise. Van De Voort did not have his own expert at trial. However, Dr. Gene Braaksma testified during postconviction proceedings on Van De Voort's behalf that Van De Voort was indeed mentally defective, in part due to a car accident and resulting organic brain damage. No expert witness, however, had tied the brain damage to the car accident during the trial . . .
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> Dr. Braaksma, Van de Voort's postconviction expert, would have furnished largely cumulative testimony had he testified at trial. Dr. Michael Galli, the court-appointed expert, testified that Van de Voort was mentally defective. Two counselors testified that Van de Voort was delusional, and four jail workers related his strange behavior. Van de Voort himself briefly testified about the car accident and its effect on his mind, and Dr. Ralph Baker, the prosecution's expert, alluded to the matter in his report. Under these circumstances, Van De Voort has not shown that Dr. Braaksma's testimony would have materially affected the trial's outcome.

Van De Voort, 2000 WL 156893 at *1.

The state supreme court denied petitioner's petition for review on July 27, 2000.

Analysis

I. Standard of Review

The standard of review governing petitioner's claims is set forth in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254. The relevant portion of the Act provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim– . . .
>
> 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.

28 U.S.C. § 2254(d)(1).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court expounded on this standard, asserting that a state court decision is "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases," or "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Id.* at 405; *see also Anderson v. Cowan*, 227 F.3d 893, 896 (7th Cir. 2000).

The Court then interpreted the "unreasonable application" prong of the statute to encompass situations where "the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case," or "the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407.

The Court held that determining whether the state court unreasonably applied clearly established federal law involves an objective inquiry. *Id.* at 409-10. Acknowledging that the term "unreasonable" defies easy definition, the Court emphasized that an *unreasonable* application of federal law is different from an *incorrect* application of federal law. *Id.* at 410 (emphasis in original). The Court explained that under § 2254(d)(1)'s "unreasonable application" clause, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. Put another way, a federal court cannot substitute its independent judgment as to the correct outcome. *See Washington v. Smith*, 219 F.3d 620, 628 (7th Cir. 2000). A federal court must determine that a state court decision was both incorrect *and* unreasonable before it can issue a writ of habeas corpus. *Id.*

With this standard in mind, I turn to petitioner's Sixth Amendment claim.

II. Ineffective Assistance of Counsel

Petitioner contends that his trial lawyer was ineffective for failing to secure Dr. Braaksma's expert testimony to support petitioner's claim of not guilty by reason of mental disease or defect. To establish ineffective assistance of trial counsel, petitioner has the burden of showing both that counsel's performance was deficient and that petitioner was prejudiced as a result. *See Strickland*, 466 U.S. at 687. To prove that counsel's performance was deficient, petitioner must show that counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* To prove prejudice, petitioner 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. "[B]ecause counsel is presumed effective, a party bears a heavy burden in making out a winning claim based on ineffective assistance of counsel." *United States v. Trevino*, 60 F.3d 333, 338 (7th Cir. 1995).

A federal habeas petitioner claiming that the state courts applied *Strickland* unreasonably bears an even heavier burden: "*Strickland* calls for inquiry into degrees; it is a balancing rather than a bright-line approach . . . This means that only a clear error in applying *Strickland*'s standard would support a writ of habeas corpus." *Holman v. Gilmore*, 126 F.3d 876, 881 (7th Cir. 1997). This is because "*Strickland* builds in an element of

deference to counsel's choices in conducting the litigation [and] § 2254(d)(1) adds a layer of respect for a state court's application of the legal standard." *Id.*

It would take a truly extraordinary case to surmount this incredibly steep barrier. This is not that case. The state court of appeals identified the governing legal standard and evaluated petitioner's claim under the two-part test of *Strickland*. The court of appeals decided the claim on the second prong, concluding that there was no reasonable probability that the outcome at trial would have been different even if Dr. Braaksma had testified. If this court were reviewing petitioner's claim *de novo* I might take a different view of the impact Dr. Braaksma's testimony on organic brain damage might have had at trial. The evidence presented at trial concerning petitioner's car accident consisted of brief comments that may not have flagged for the jury the possibility that plaintiff's behavior on July 15, 1995 had an organic origin. In light of this, Dr. Braaksma's opinion might have affected the outcome. *Cf. Holman*, 126 F.3d at 884 (jurors more likely to credit claims of organic brain injury over claims of mental illness).

That said, I conclude that it was not unreasonable, let alone plain error, for the court of appeals to have decided the prejudice issue against petitioner. Petitioner put on a strong case in support of his NGI claim, including one court-appointed expert, several third party witnesses, and his own rambling, illogical testimony during the guilt phase of the trial. The jury nonetheless found against him. In light of this, the court of appeals reasonably could conclude that adding Dr. Braaksma's opinion to the mix would not have changed the jury's decision.

Additionally, even if the state court had misapplied the prejudice prong of the *Strickland* test--which it did not--petitioner would lose on the performance prong. The existing record demonstrates that petitioner's trial lawyer was not ineffective for failing to hire Dr. Braaksma to evaluate petitioner. Even though the decision not to hire Dr. Braaksma was motivated partly by financial concerns, counsel's affidavit reveals that the decision also was tactical. The court-appointed expert, Dr. Galli, already had concluded that petitioner suffered from a mental illness that rendered him incapable of conforming his conduct to the requirements of the law. With the *court's* expert already in petitioner's corner, it was not unreasonable for counsel's superiors to conclude as a tactical matter that there was nothing to gain by retaining another expert. Favorable testimony from one court-appointed expert is more than most criminal defendants ever get; favorable testimony from *two* experts would be downright chimeric. Petitioner's attorney cannot be faulted for sticking with the hand she had already drawn.

As the state points out, petitioner's trial attorney fully investigated and developed the defense theory of insanity, supported that defense with expert and lay testimony and argued the defense persuasively to the jury. Hindsight suggests that an even stronger defense could have been mustered, but no one had any reason to predict this at the time. There is no doubt that petitioner received a professionally competent defense. This is all the Constitution requires. *See Strickland*, 466 U.S. at 883.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that petitioner Garry Van De Voort's petition for a writ of habeas corpus be DENIED.

Dated this 19th day of October, 2001.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge