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

MARK RENALDO LOWE,

Petitioner,

v.

MATTHEW FRANK, Secretary, Wisconsin Department of Corrections,

Respondent.

REPORT AND RECOMMENDATION

03-C-0266-C

REPORT

Mark Renaldo Lowe, a Wisconsin inmate imprisoned at the Prairie Correctional Facility in Appleton, Minnesota, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Lowe challenges his December 17, 1998 conviction in the Circuit Court for St. Croix County for drug trafficking crimes, including a tax stamp violation. Lowe contends that the evidence against him was seized in violation of his Fourth Amendment rights, and that Wisconsin's tax stamp statute is unconstitutional because it violates his Fifth Amendment right not to incriminate himself. This court dismissed Lowe's other claims in the June 12 order to show cause.

Before the court for report and recommendation is the state's motion to dismiss the two remaining claims. The state argues that Lowe's first claim is barred by the rule of *Stone v. Powell*, 428 U.S. 465 (1976), and the second is procedurally barred. The state is correct and I am recommending that this court grant the state's motion and dismiss the petition with prejudice.

Facts

In a decision issued December 18, 2001, the Wisconsin Court of Appeals described the facts leading to Lowe's arrest and conviction as follows:

> Wayne Flak, a Wisconsin state trooper, observed Lowe's car as it caught up to Flak on the interstate during the early daylight hours of December 27, 1998. Flak observed Lowe's car straddling the left and right lanes of the interstate. He saw it drift across the right lane and cross over the fog line on the right.
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> Flak slowed from sixty-five miles per hour to forty-five to fifty miles per hour. After Flak slowed his car, Lowe also slowed down and did not pass the patrol car. Lowe traveled behind Flak for about a mile or two. Flak pulled over to the shoulder and allowed Lowe to pass him. He then pulled out behind Lowe and followed him for a couple of miles before stopping him and calling for backup.
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> Flak walked up to the passenger side fo the car and asked for Lowe's driver's license. Lowe gave Flak his Minnesota license. Flak observed personal belongings and fast food items in the car. Lowe said that he owned the car, but it was not registered to him. He claimed he had not yet transferred title. Flak testified that Lowe and the passenger looked nervous and like they had not slept all night. He said they appeared more nervous than most people at normal traffic stops.
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> Flak informed Lowe that he was issuing him a warning for lane deviation and improper registration. Flak went to his squad car and ran checks on Lowe. He then returned to Lowe's car, going to the passenger side. Flak asked Lowe to sign the warning form. As he was talking to Lowe and the passenger, Flak observed what he thought was a "roach" in the ashtray. He

testified that roaches are the remains of marijuana cigarettes and that they are distinctive and do not look like tobacco cigarettes. The ashtray was in the console in the front seat, and both the driver and the passenger had access to it.

Flak asked Lowe to give him the ashtray. Lowe passed the ashtray to the passenger, who passed it to Flak. Flak confirmed that there was a roach in the ashtray and asked Lowe whose it was. Lowe said it was his, but that he had not smoked that day. Flak then asked Lowe to step out of the vehicle.

After Lowe exited the vehicle, the other trooper patted him down. He found a small baggie of marijuana and placed Lowe under arrest by handcuffing him and placing him in the squad car. The passenger also was identified, searched and arrested when the trooper found marijuana in her purse. Subsequently, the troopers searched the vehicle and found the drugs for which Lowe was prosecuted.

State v. Lowe, No. 01-1163-CR, Dec. 18, 2001 (per curiam) (unpublished).

Trooper Flak recorded his stop of Lowe's vehicle and the events that followed with a video recording device mounted in his squad car and with a microphone attached to Trooper Flak's uniform. Although the video recording device was on continuously, the microphone was not.

Lowe was charged with: possession with intent to deliver between 15 and 40 grams of cocaine as a party to the crime; possession as a dealer of cocaine without the required tax stamp; possession with intent to deliver marijuana as a party to the crime; possession as a marijuana dealer without the required tax stamp; and possession of marijuana.

On September 10, 1999, Lowe filed a motion to dismiss the case on the ground that the state had failed to preserve relevant and exculpatory evidence, namely, the sound of the videotape recorded by Trooper Flak. In the motion, Lowe's lawyer asserted that Lowe's former lawyer and Brush's lawyer had viewed the tape following the arrest and that the tape at that time had included audio of "the conversations of the defendants and the arresting officers during the period of the initial stop, interrogation of the defendants and subsequent arrest of the defendants." Counsel asserted that "[i]n a subsequent review of the tape by current defense counsel there is no sound on the tape during the entire arrest process" except for a brief recording of the television program, Hard Copy. Counsel predicted that the missing audio "would have been extremely relevant in ascertaining the conversations between the parties resulting in the production of the ashtray by the defendant." The record does not indicate whether the trial court ruled on the motion.

Lowe filed a motion to suppress the drug evidence found in the car, asserting that Flak had no probable cause to continue the traffic stop.[1] The court held a two day suppression hearing on November 12, 1999 and December 21, 1999. The videotape was part of the state's evidence at the hearing. At the beginning of the hearing, Lowe's lawyer stipulated to the tape's foundation and its admission. The parties also agreed that the relevant portion was about 20 minutes long. Before the prosecutor played the tape, he noted

[1] Lowe's passenger was charged in a separate complaint and filed her own motion to suppress. The court held simultaneous hearings on both motions.

that approximately 10 seconds of it had been "accidentally taped over" with an excerpt from the televison series, "Hard Copy." The prosecutor noted that an "M" would appear on the screen at the times that Trooper Flak had his microphone turned on.

After playing the tape, the prosecutor called Trooper Flak as a witness. On cross-examination, Lowe's lawyer asked Trooper Flak some questions about the tape, including some of the statements he made during the stop and arrest. He did not ask Trooper Flak any questions that related to the 10-second, dubbed-over portion of the tape. Lowe's attorney also called the back-up officer, Trooper Brown, who testified adversely.[2] Again, Lowe's lawyer did not ask any questions related to the altered portion of the tape.

Trooper Flak testified that he had decided before approaching Lowe's vehicle for the second time that he was going to ask Lowe for consent to search the vehicle and that he conveyed his plan to Trooper Brown. According to Trooper Flak, Trooper Brown opposed requesting a consent search.

In his post-hearing brief, Lowe did not contest the propriety of the initial traffic stop, instead arguing that the officers had no probable cause to continue their investigation after Lowe signed the warning citation. Lowe made no mention of the dubbed-over portion of the tape in his suppression brief.

The trial court denied Lowe's suppression motion. It concluded that Trooper Flak properly had asked Lowe to pass him the ashtray because he had a reasonable suspicion that

[2] The court continued the suppression hearing to allow the defendants to question Trooper Brown.

there was a roach in the ashtray. The court further found that, upon confirming the roach contained marijuana, Trooper Flak had probable cause to arrest Lowe and search his car.

Lowe went to trial, was convicted and received a fourteen year prison sentence. The trial court granted Lowe's motion to vacate his conviction of simple possession of marijuana because it was a lesser included offense of possession with intent to deliver.

Lowe filed a *pro se* direct appeal in which he raised the following claims: 1) the trial court erred when it denied his motion to suppress; and 2) his convictions for both possession of controlled substances and possession of controlled substances without a tax stamp were multiplicitous, subjecting him to double jeopardy. In a decision issued December 18, 2001, the Wisconsin Court of Appeals agreed with the trial court that the evidence showed that Trooper Flak had probable cause to stop Lowe's vehicle. It rejected Lowe's contention that the trooper improperly had expanded the scope of the stop when he asked Lowe to pass the ashtray to him. The court observed that the trooper's conduct was reasonably supported by his plain view observation of what appeared to be a roach in the ashtray. The court also found that Lowe's convictions were not multiplicitous. *State v. Lowe*, 01-1163-CR, at 4-8.

The Wisconsin Supreme Court denied Lowe's petition for review on March 19, 2002.

On May 30, 2002, Lowe filed a motion in the trial court to vacate his sentence on the ground that Wisconsin's tax stamp law was unconstitutional under *State v. Hall*, 207 Wis. 2d 54, 557 N.W. 2d 778 (1997). That same day, the trial court denied the motion. The court noted that although the Wisconsin Supreme Court had found in *Hall* that the tax

stamp law was unconstitutional because it compelled self-incrimination, the Wisconsin Legislature subsequently had amended the statute to address the supreme court's concerns. The trial court found that because Lowe had committed his crimes after the amended statute's effective date, *Hall* did not provide a basis on which to grant Lowe's motion.

Lowe appealed the trial court's denial of his motion to the state court of appeals. In an opinion issued December 23, 2002, the court of appeals summarily affirmed the trial court. *State v. Lowe*, 02-1584 (Ct. App. Dec. 23, 2002) (unpublished opinion), attached to Pet., dkt. 1, at App. J. The court found that under Wis. Stat. § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W. 2d 157 (1994), Lowe had waived his right to challenge the constitutionality of the tax stamp law by failing to raise it on direct appeal. *Id*., at 2. In addition, the court found that the trial court correctly had denied Lowe's motion because *Hall* had addressed a version of the tax stamp law that was not in effect at the time Lowe committed his offenses. *Id*. The court noted that it recently had found the new tax stamp law constitutional. *Id*. (citing *State v. Jones*, 257 Wis. 2d 319, 651 N.W. 2d 305 (Ct. App. 2002), *pet. for review dismissed*, 257 Wis. 2d 122, 653 N.W. 2d 893 (Oct. 21, 2002)).

The Wisconsin Supreme Court denied review on April 22, 2003.

Analysis

I. Fourth Amendment Claim

As this court has noted in several previous orders in this case, the Supreme Court held in *Stone v. Powell*, 428 U.S. 465 (1976), that a claim like Lowe's that is based upon the exclusionary rule is not a proper basis for collateral relief if the state has "provided an opportunity for full and fair litigation" of the Fourth Amendment claim. The Court of Appeals for the Seventh Circuit has held that a defendant receives a full and fair opportunity to litigate if

> (1) he has clearly informed the state court of the factual basis for that claim and has argued that those facts constitute a violation of his fourth amendment rights and (2) the state court has carefully and throughly analyzed the facts and (3) applied the proper constitutional case law to the facts.

Hampton v. Wyant, 296 F.3d 560, 563 (7th Cir. 2002) (citing *Pierson v. O'Leary*, 959 F.2d 1385, 1391 (7th Cir. 1992)). To show this, Lowe must show more than that the state courts decided his claim incorrectly; rather, he must show that his hearing was a "sham" or was subverted in some "obvious way." *Cabrera v. Hinsley*, 324 F.3d 527, 531 (7th Cir. 2003). "Absent a subversion of the hearing process, [the federal court] will not examine whether the judge got the decision right." *Id*.

Lowe points to the altered videotape as proof that he did not receive a full and fair opportunity to litigate his Fourth Amendment claim. He argues that the recorded-over portion of the videotape was critical to his ability to impeach Trooper Flak's testimony at the suppression hearing. Lowe believes that the unaltered tape contained admissions by

Trooper Flak to Trooper Brown that he did not have a reason to search Lowe's vehicle and that he was engaging in improper "racial profiling."

Insofar as Lowe appears to be contending that the alteration of the videotape violated his constitutional right to exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and its progeny, this court already has held that habeas relief is not available to him on this claim. *See* Order, July 16, 2003, dkt. 5 at 2-3. Accordingly, I will not evaluate Lowe's arguments about the altered videotape within the *Brady* framework but only will consider them as support for his contention that he fits within an exception to *Stone.*

The alteration of the videotape does not overcome the bar of *Stone.* First, Lowe's "belief" about what the audio from the tape would reveal not only is unsupported, it is incredible. Notably, he did not object at the suppression hearing about the dubbed-over portion of the tape or complain that it prejudiced his ability to litigate his suppression motion, and neither he nor Brush questioned either of the arresting officers about what would have been seen or heard on the unaltered tape during the missing 10 seconds. It is logical to assume that Lowe's lawyer would have made such objections if the recorded-over portion of the tape had contained evidence "crucial" to the suppression motion, as Lowe now contends. In any event, it is difficult to imagine how a 10 second gap in a 20-minute tape could prejudice Lowe, particularly when the court allowed wide latitude to question the

officers about the traffic stop and the conversations they had on the scene. Lowe's cries of foul play are inconsistent with his silence before the state trial court.[3]

Second, even if this court were to assume the truth of Lowe's newly-developed theory about what was on the tape, this would not change the outcome of his suppression motion. It is undisputed that Trooper Flak did not have probable cause to search Lowe's vehicle before he observed the roach in the ashtray; if he did, he would not need to seek consent to search. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (consent search need not be supported by probable cause). But once Trooper Flak observed the roach in the ashtray, the calculus changed. As the Wisconsin courts found, that observation alone was enough to make Trooper Flak suspicious that there was unlawful activity afoot beyond that which gave rise to the initial traffic stop. Therefore, the trooper was allowed to extend the duration of the stop by investigating further, as he did when he asked Lowe to pass him the ashtray.

As the Wisconsin Court of Appeals recognized:

> Once a justifiable stop is made . . . the scope of the officer's inquiry, or the line of questioning, may be broadened beyond the purpose for which the person was stopped only if additional suspicious factors come to the officer's

[3] I note that Lowe refers repeatedly to the trial court's alleged failure to rule on the motion to dismiss concerning the lack of sound on the videotape. Although it is unclear how the motion to dismiss was resolved, I infer from Lowe's lawyer's silence at the suppression hearing that at that time there was no concern about the lack of sound on the tape. The transcript from the suppression hearing reveals that the tape played at the hearing did have audio at the times that Trooper Flak had had his microphone turned on, which included his conversation with Lowe and Brush when he observed the roach in the ashtray. *See* Tr. of Supp. Hrg., Nov. 12, 1999, dkt. #23 at 42, 44. Accordingly, it appears that the concerns that counsel raised in the motion to dismiss were resolved later. There is nothing about the court's failure to rule on the motion to dismiss that suggests Lowe did not receive a full and fair opportunity to litigate his suppression motion.

> attention--keeping in mind that these factors, like the factors justifying the stop in the first place, must be "particularized" and "objective." If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer's intervention in the first place, the stop may be extended and a new investigation begun.

State v. Betow, 226 Wis. 2d 90, 94-95, 593 N.W.2d 499, 502 (Ct. App.1999). *Accord Valance v. Wisel*, 110 F.3d 1269, 1276-77 (7th Cir. 1997) (officer may extend traffic stop if events occur during course of stop that give rise to reasonable suspicion that criminal activity afoot beyond traffic violation). In other words, the observation of the roach was a "new" factor that allowed Trooper Flak to extend the scope and duration of the traffic stop, even if he had no basis for doing so before then. Thus, any dubbed-over conversations that Trooper Flak may have had with Trooper Brown before observing the roach are irrelevant to the Fourth Amendment analysis.

Lowe suggests that the unaltered tape could have helped him establish that Officer Flak merely had a "hunch" that there might be something in the ashtray and that there was no truth to his testimony that he actually had observed a roach in it before asking Lowe to pass the ashtray to him. As noted previously, however, this is speculation. Furthermore, Lowe had the opportunity at the suppression hearing to impeach the trooper's motives and credibility with his other taped statements, and to challenge his ability to have observed the roach in the ashtray. The trial court granted wide leeway during cross-examination of the arresting officers and it permitted Lowe to submit a brief in support of his motion. In light of this, the absence of 10 seconds from the tape did not subvert the hearing process.

Finally, the decisions of the state courts on Lowe's Fourth Amendment claim show that they carefully and throughly analyzed the facts and applied the proper constitutional case law to the facts. Accordingly, Lowe's Fourth Amendment challenge is barred.

II. Unconstitutionality of Tax Stamp Conviction

Lowe contends that his conviction under Wisconsin's tax stamp law, Wis. Stat. § 139.95, is unconstitutional because it violates his Fifth Amendment right against self-incrimination. Specifically, Lowe agues that the statute does not prohibit the direct and derivative use of information compelled by the law. The state contends that this court is barred from considering this claim because Lowe defaulted it in state court. "When a state court denies a prisoner relief on a question of federal law and bases its decision on a state procedural ground that is independent of the federal question, the federal question is procedurally defaulted." *Lee v. Davis*, 328 F.3d 896, 899 -900 (7th Cir. 2003) (citing *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)).

In its order affirming the trial court's dismissal of Lowe's motion to vacate his sentence, the Wisconsin Court of Appeals ruled that Lowe's challenge to the constitutionality of the tax stamp law was barred because "he did not challenge the constitutionality of the law in his original appeal from his judgment of conviction." *State v. Lowe*, 02-1584 (Ct. App. Dec. 23, 2002) (unpublished opinion), at 2 (citing Wis. Stat. § 974.06(4) and *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W. 2d 157 (1994)).

Although the court briefly discussed the merits of the claim, the state procedural ground is determinative because it was clearly stated and independent of the federal ground asserted in Lowe's postconviction motion. *See Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002) (when state court rejects claim on both state procedural grounds and merits, federal court must respect both rulings).

Lowe contends that the court of appeals erred in finding that he did not raise his constitutional challenge to the tax stamp law on direct appeal. Lowe points to two pages in his brief in support of his direct appeal where he mentioned the *Hall* case and its finding that the predecessor statute to the tax stamp statute violated the privilege against compelled self-incrimination. However, this court does not review errors in the application of state law concerning waiver or procedural default so long as the state's procedural rule is "adequate." *Bobo v. Kolb*, 969 F.2d 391, 399 (7th Cir. 1992). A state procedural rule is adequate if

> the state court acts in a consistent and principled way. A basis of decision applied infrequently, unexpectedly, or freakishly may be inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted.

Prihoda v. McCaughtry, 910 F.2d 1379, 1383 (7th Cir. 1990).

There was nothing inconsistent or freakish about the court of appeals' finding that Lowe had not raised his Fifth Amendment challenge to the tax stamp statute on direct appeal. Lowe referred to the *Hall* case on direct appeal in the context of his argument that his convictions for possession with intent to deliver and failure to possess a tax stamp violated the prohibition against double jeopardy. Perhaps Lowe *meant* to challenge the

constitutionality of the tax stamp statute, but if so, he failed to do so intelligibly. It is well-settled in Wisconsin that a party who fails adequately to develop legal arguments in a brief waives the issue, *see State v. Jackson*, 229 Wis. 2d 328, 337, 600 N.W. 2d 39 (Ct. App. 1999); furthermore, since *Escalona-Naranjo* was decided in 1994, Wisconsin courts routinely and consistently have applied its holding that claims not raised on direct appeal may not be raised on collateral attack absent sufficient reason. Accordingly, the court of appeals' finding of procedural default is an adequate basis for barring habeas relief.

Procedural default may be excused if the Lowe can show cause for and prejudice from the default or that a fundamental miscarriage justice will result if the claim is not heard. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Lowe has not argued that his default should be excused under either of these exceptions. Instead, he contends that because he is claiming that he was convicted for violating a statute that is unconstitutional and therefore void, his claim is not subject to procedural default rules. In its order to show cause, this court noted the existence of some authority to support this position. Order, June 12, 2003, dkt. #2, at 9 (citing *United States v. Ross*, 9 F.3d 1182, 1193 n. 10 (7th Cir. 1993); *Gonzalez v. Abbott*, 967 F.2d 1499 (11th Cir. 1992)).

The state argues that neither of these authorities provides controlling or persuasive authority for the proposition that an exception to the procedural default rules exists for claims that challenge the constitutionality of the statute for which the petitioner was convicted of violating. I agree. As the state notes, the court in *Ross* merely noted some

authority for the proposition but declined to decide the matter. *Ross*, 9 F.3d at n. 10 ("we have never addressed the matter and need not do so today"). *Gonzalez*, 967 F.2d 1499, which the court cited in *Ross*, is inapposite. In that case, petitioner claimed that his conviction was void because the Georgia Legislature had repealed the statute that created the substantive offense for which he was convicted before his judgment of conviction became final. *Id*. at 1504. In finding that petitioner's claim was not barred by his state court procedural default, the court noted that petitioner "in effect asserts that a fundamental miscarriage of justice has occurred; he argues that he was convicted for conduct that was not a crime and that he is therefore "actually innocent." *Id*. (citations omitted). Thus, the court did not create a new exception to the procedural default rule, but found that petitioner had satisfied the fundamental miscarriage of justice exception.

Apart from the court's passing reference in *Ross*, I have found no cases in the Seventh Circuit that suggest that a petitioner need not satisfy either the cause-and-prejudice or manifest injustice exceptions if he procedurally defaults a constitutional challenge to a statute by failing to raise it properly in state court. To the contrary, other decisions from the Seventh Circuit have not excepted attacks on the constitutionality of a statute from the normal rules governing procedural default. *See*, *e.g.*, *Pitsonbarger v. Gramley*, 141 F.3d 728, 738 (7th Cir. 1998) (finding that petitioner had procedurally defaulted challenge to constitutionality of Illinois Death Penalty Act); *McDonald v. Page*, 2001 WL 747570 (June 27, 2001) (applying procedural default to petitioner's claim that application of Illinois's

habitual offender sentencing provision violated Equal Protection Clause) (unpublished opinion).

In any case, it is not necessary in this case to decide whether Lowe satisfies either of the exceptions to the procedural default rule. Even if he had not procedurally defaulted his constitutional claim, it still would fail. As the court of appeals noted, the Wisconsin legislature amended the tax stamp statute to cure its constitutional infirmities. The Wisconsin Court of Appeals upheld the constitutionality of the new law in *State v. Jones*, 257 Wis. 2d 319, 651 N.W. 2d 305 (Ct. App. 2002), *pet. for rev. dismissed,* 257 Wis. 2d 122, 653 N.W. 2d 893 (2002). In doing so, the court interpreted the statute's confidentiality provision, Wis. Stat. § 139.91, as intending to "prohibit[] both the direct and derivative use of information compelled by the stamp law." *Id.*, 257 Wis. 2d at 340, 651 N.W.2d at 315. Thus, *Jones* refutes Lowe's contention that the amended statute does not include such a prohibition. Because Lowe has not offered any other reasons for his contention that the amended statute violates his privilege against compelled self-incrimination, his claim should be dismissed on the merits.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I respectfully recommend that the petition of Mark Renaldo Lowe for a writ of habeas corpus be dismissed with prejudice.

Entered this 9th day of January, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge