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

MARK RENALDO LOWE,

Petitioner,

OPINION AND ORDER

v.

03-C-0266-C

MATTHEW FRANK, Secretary, Wisconsin Department of Corrections,

Respondent.

Mark Renaldo Lowe seeks leave to proceed in forma pauperis on appeal from this court's judgment of February 6, 2004, dismissing his petition for a writ of habeas corpus. He also seeks a certificate granting him leave to appeal the following claims: 1) the state violated his rights to due process when it used a partially recorded-over videotape as evidence at a suppression hearing; 2) ineffective assistance of appellate counsel for failing to pursue certain issues on appeal; and 3) petitioner's conviction for violating Wisconsin's tax stamp law is void because the law is unconstitutional. Because I am unable to find that petitioner has made a substantial showing of the denial of a constitutional right, I must deny his request for a certificate of appealability. His request for leave to proceed informa pauperis must be denied as well because no reasonable person could suppose that there is any merit to his appeal.

OPINION

I. LEGAL STANDARDS

Because petitioner seeks leave to proceed in forma pauperis on appeal, this court must determine whether petitioner is taking his appeal in good faith. See 28 U.S.C. § 1915(a)(3). To find that an appeal is in good faith, a court need find only that a reasonable person could suppose the appeal has some merit. Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000). However, a petitioner seeking a certificate of appealability must show more than "the absence of frivolity' " or the existence of mere "good faith" on his or her part. Barefoot v. Estelle, 463 U.S. 880, 893 (1983). A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Id.; 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 v. McDaniel, 529 U.S. 473, 484 (2000) (quoting Barefoot, 463 U.S. at 893 n.4). Although the certificate of appealability determination is a threshold inquiry that is distinct from the underlying merits of the petition, it does require an overview of the claims in the habeas petition and a "general assessment" of their merits. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Further, when, as in this case, "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 (emphasis added).

II. ALTERED VIDEOTAPE

Petitioner seeks to pursue his claim that the state violated his constitutional rights when it dubbed over a portion of the videotape of his traffic stop and arrest. Petitioner argues that this court misconstrued his claim by considering it only insofar as it might show that he was denied a right to a full and fair suppression hearing. Petitioner contends that his claim about the adulterated videotape was meant also to be a stand-alone claim that the state had violated his constitutionally guaranteed right to potentially exculpatory evidence, as outlined in a line of cases beginning with Brady v. Maryland, 373 U.S. 83 (1963).

Contrary to petitioner's assertion, this court explicitly considered his alteration-of-evidence claim in due process terms. In an order dated July 16, 2003, I found that petitioner could not obtain federal habeas relief on his claim because there is no clearly established federal law that extends the Brady line of cases to suppression hearings. See Order, July 18, 2003, dkt. #5, at 2-3. This is not a conclusion with which reasonable jurists would disagree.

Petitioner now appears to be asserting that the missing portion of his videotape would have been helpful to him at trial. However, petitioner did not present that argument clearly

in any of the documents that he submitted previously in this case. As a result, he has waived this claim. In any event, petitioner has not explained how the original tape would have helped him at trial; all of his arguments concerning the tape's significance relate to whether it was proper for police to stop him and ask him to pass the ashtray in which the marijuana roach was found. That issue was litigated at the suppression hearing before the trial and addressed by this court. Petitioner is simply incorrect insofar as he appears to believe that he has established a constitutional violation merely by showing that the tape was "tainted"; he must also show that the tainted portion of the tape would have made a difference to the outcome of his case. Petitioner has not made that showing.

As explained in detail in the magistrate judge's report and recommendation, the dubbing over of 10 seconds of a 20-minute videotape did not prevent petitioner from obtaining a full and fair hearing on his suppression motion. Petitioner's arguments to the contrary are conclusory in nature and have no factual support in the record. No reasonable jurist who reviewed the transcript from the suppression hearing could disagree with the conclusion that petitioner's suppression hearing was anything other than full and fair, and hence his Fourth Amendment claim is barred by Stone v. Powell, 428 U.S. 465 (1976). Furthermore, in the absence of any facts to support petitioner's claim of prejudice, no reasonable person could suppose there is any merit to petitioner's appeal of this issue. Accordingly, I am denying petitioner's request for a certificate of appealability and his request for leave to proceed in forma pauperis with respect to this claim.

III. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In its order to show cause, this court found no basis for allowing petitioner to proceed on a claim of ineffective assistance of counsel, finding from the attachments to the petition that petitioner had represented himself on appeal. Although petitioner filed a motion for reconsideration in which he challenged certain aspects of the court's order, he did not challenge the dismissal of his ineffective assistance of appellate counsel claim or this court's finding that he proceeded *pro se* on appeal.

In his motion for a certificate of appealability, petitioner now suggests that his waiver of his right to counsel on appeal was invalid because his appellate lawyer never informed him of his right to have counsel file a "no merit" brief. See Wis. Stat. § 809.32; Anders v. California, 386 U.S. 738 (1967). Petitioner asserted this claim for the first time in his objections to the magistrate judge's report and recommendation. That was too late. See United States v. Melgar, 227 F.3d 1038, 1040 (7th Cir. 2000) (arguments not made before magistrate judge are normally waived). If this court misunderstood the nature of petitioner's ineffective assistance of appellate counsel claim, then petitioner should have raised that issue at the outset, as he did when he asked the court to reconsider the dismissal of some of his other claims. In any case, a review of the petition shows that petitioner's ineffective assistance of appellate counsel claim was based upon his lawyer's alleged refusal to raise certain issues on appeal, not on any failure to properly advise petitioner of his options

concerning representation. I will not grant petitioner permission to pursue on appeal an issue that he did not raise in his petition.

IV. CONSTITUTIONALITY OF TAX STAMP STATUTE

Finally, petitioner seeks to appeal this court's denial of his claim that his conviction under Wisconsin's tax stamp statute, Wis. Stat. § 139.95, is unconstitutional because the statute violates his Fifth Amendment right against self-incrimination. Petitioner's request for a certificate of appealability on this issue is denied. Reasonable jurists would not debate this court's conclusion that petitioner procedurally defaulted this claim by failing to raise it on direct appeal in the state courts or that he had not satisfied either of the exceptions to the default rule. Furthermore, even if that procedural finding was debatable, petitioner's interpretation of the tax stamp statute is simply at odds with the way in which the Wisconsin court of appeals has interpreted it. Because federal courts are bound by a state's interpretation of its own laws, and because Wisconsin has interpreted the statute in a way that avoids Fifth Amendment concerns, petitioner cannot make a substantial showing of the denial of a constitutional right with respect to his tax stamp claim. Indeed, his challenge to the tax stamp statute is so lacking in merit that I cannot find that his appeal of this claim is taken in good faith.

ORDER

IT IS ORDERED that Mark Renaldo Lowe's requests for leave to proceed in forma pauperis on appeal and for a certificate of appealability are DENIED as to all claims.

Dated this 9th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge