

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

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MARK RENALDO LOWE,

Petitioner,

v.

MATTHEW FRANK, Secretary,  
Wisconsin Department of Corrections,

Respondent.  
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ORDER

03-C-0266-C

Petitioner Mark Renaldo Lowe has filed objections to the report and recommendation entered by the United States Magistrate Judge on January 9, 2004. The magistrate judge recommended denial of petitioner's petition for a writ of habeas corpus, brought pursuant to 28 U.S.C. § 2254, after he found that petitioner's first claim is barred by the rule of Stone v. Powell, 428 U.S. 465 (1976), and his second is barred procedurally.

After reviewing the report, the record and petitioner's objections, I conclude that the magistrate judge's recommendation is correct. Petitioner had a full and fair opportunity to contest the seizure of the drug evidence found in the stop of his car. Although petitioner contends that the hearing could not have been fair because the state courts relied on an

incomplete videotape of the traffic stop, he has failed to support this contention. (Actually, the portion is not missing in the sense of being physically detached from the original tape; it is “missing” because it was dubbed over inadvertently.) As the magistrate judge has explained, the missing portion of the videotape was only ten seconds of a twenty-minute tape; it is not credible that the missing portion contained admissions by one trooper that he had no reason to search petitioner’s vehicle; and petitioner never took the opportunity at his suppression hearing either to object to the missing portion or question the arresting officers about what had happened during the dubbed-over ten seconds. Furthermore, the trooper relied on visual evidence to search petitioner’s vehicle: he saw what he thought was a roach in the car’s ashtray. At that point, he had adequate suspicion to perform a search.

As to petitioner’s challenge to his conviction under Wisconsin’s tax stamp law, Wis. Stat. § 139.55, the magistrate judge has explained how petitioner’s default of the issue in state court bars him from challenging it in this court. In his objections, petitioner does not explain why he believes that the magistrate judge erred in finding that default had occurred. He merely argues that it is unclear when the legislature changed the law to avoid the earlier constitutional questions it had raised and that the state’s reliance on “a procedural state bar is just an attempt to up hold an unconstitutional violation.” Pet.’s Response, dkt. #29, at 11. This is not enough to overcome the evidence in the record that the Wisconsin Court of Appeals held that the challenge to the constitutionality was barred in that court because

petitioner had not raised it in his original appeal from his judgment of conviction. State v. Lowe, 02-1584 (Ct. App. Dec. 23, 2002) (unpublished opinion).

ORDER

IT IS ORDERED that the report and recommendation of the United States Magistrate Judge entered on January 9, 2004, is ADOPTED and the petition for a writ of habeas corpus filed by petitioner Mark Renaldo Lowe is DISMISSED, with prejudice.

Entered this 6th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge