

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

LEE A. KNOWLIN, JR.,

Petitioner,

ORDER

v.

03-C-577-C

DANIEL BENIK, Warden, Stanley
Correctional Institution,

Respondent.

Petitioner Lee Knowlin, Jr. has filed a motion for a certificate of appealability so that he may challenge this court's dismissal of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Petitioner also seeks leave to proceed in forma pauperis on appeal. For the reasons stated below, I am denying both motions.

Petitioner's habeas petition presented the following nine claims: 1) trial counsel was ineffective for failing to seek reconsideration of the court's pretrial suppression ruling; 2) trial counsel was ineffective for failing to hire an expert to examine a chair containing incriminating shoe prints to determine whether the prints had been planted or tampered with; 3) trial counsel was ineffective for failing to hire an expert to determine the nature of the substance that left the shoe print impressions on the chair; 4) trial counsel was ineffective for failing during questioning of a defense witness to prevent the witness from testifying in a manner that hurt petitioner's defense; 5) the state violated petitioner's Sixth

Amendment right to the effective assistance of counsel by failing to produce discovery and a witness that were important to establish the chain of custody of evidence that implicated petitioner; 6) the trial court admitted erroneously into evidence a rag and a chair seat containing shoe prints, in violation of petitioner's right to a fair trial; 7) the evidence adduced at trial was insufficient to support the conviction for burglary while armed; 8) the prosecutor relied on testimony that she knew was false regarding where certain photographs of shoe prints had been taken; and 9) the prosecutor violated petitioner's right to a fair trial by making improper remarks during closing arguments. Petitioner also filed a motion for discovery to have the chair tested for tampering, a motion to preserve evidence and a motion to amend the return to include physical and documentary evidence that the state did not include in its answer. This court denied all of petitioner's claims on their merits and declined to grant his evidentiary motions. Petitioner now seeks a certificate of appealability granting him permission to appeal all of his claims as well as the denial of his evidentiary motions.

Petitioner's motion for a certificate of appealability will be denied. 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 v. Estelle, 463 U.S. 880, 893, n.4 (1983)). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack, 529 U.S. at 484. However, a certificate of appealability determination is a threshold inquiry that is distinct from the underlying merits of the petition. "The question [when deciding whether to issue a certificate of appealability] is the debatability of the underlying constitutional claim, not the resolution of that debate." Miller-El v. Cockrell, 537 U.S. 322, 342 (2003).

Having re-reviewed the magistrate judge's report and recommendation, I am convinced that no reasonable jurist would find this court's assessment of petitioner's constitutional claims to be debatable or wrong. None of petitioner's constitutional claims presented a close call: in fact, several of them lacked any factual support. For example, petitioner's claims of ineffective assistance of counsel hinged on his contention that police had tampered with crime scene evidence, but testimony presented by petitioner at the post-conviction hearing showed that no such tampering had occurred. The magistrate judge had little trouble concluding that the state courts had addressed each of petitioner's claims, applied the proper constitutional standard to them and reached a determination that was reasonable given the facts and existing Supreme Court precedents. There is simply no room for debate on petitioner's claims.

This goes for petitioner's evidentiary motions as well. Petitioner's attempts to supplement the record and conduct more discovery amounted to an attempt to relitigate his claims in this court. However, the state courts allowed petitioner ample opportunity to develop

and present the factual basis for his claims both before, during and after trial. Reasonable jurists would not disagree that petitioner had not shown good cause for more discovery.

In sum, there is no basis to grant petitioner's request for a certificate of appealability on any of his claims. Furthermore, petitioner's claims are so lacking in merit that I cannot find that his appeal is taken in good faith. Accordingly, I must also deny his request for leave to proceed in forma pauperis on appeal. See 28 U.S.C. § 1915(a)(3).

ORDER

IT IS ORDERED that the motions of petitioner Lee A. Knowlin for a certificate of appealability and for leave to proceed in forma pauperis on appeal are both DENIED.

Dated this 19th day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge