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

DOUGLAS T. MEYER,

Petitioner,

v.

REPORT AND RECOMMENDATION

MATTHEW J. FRANK, Secretary, Wisconsin Department of Corrections,

03-C-0238-C

Respondent.

REPORT

Petitioner Douglas T. Meyer, a Wisconsin inmate incarcerated at the Prairie Correctional Facility in Appleton, Minnesota, has filed a timely application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his June 7, 2000 judgment of conviction in the Circuit Court for Pierce County for one count of retail theft as a repeater and one count of possession of burglary tools as a repeater. Petitioner contends that he is in custody in violation of the Constitution or laws of the United States because his guilty pleas to the charges were not made knowingly and intelligently. More specifically, petitioner contends that he was not aware at the time he entered his plea that the trial court was not bound by the parties' joint sentencing recommendation.

The state concedes that petitioner fairly presented his claims to the state courts, which ruled against him. Because the state courts reasonably determined the facts and applied controlling Supreme Court precedent when they concluded that petitioner had

entered his plea knowingly and intelligently, I am recommending that this court deny the petition on its merits.

From the records of the state court proceedings attached to the state's answer, I find the following facts.

FACTS

In early 1999, petitioner went on a retail theft spree in the city of River Falls, Wisconsin. He eventually was caught by local law enforcement officials. River Falls lies in two counties, Pierce and St. Croix. As a result of petitioner's having stolen from stores located in both counties, he was charged with crimes in both counties. The District Attorney for Pierce County filed charges against petitioner for felony theft, burglary and misdemeanor theft. The District Attorney for St. Croix County charged petitioner with possession of burglary tools, receiving stolen property and retail theft.

As a result of negotiations with both district attorneys, petitioner reached a plea agreement consolidating all charges in Pierce County. Petitioner agreed to plead guilty to one count of felony theft and one count of possessing of burglary tools, both as a repeater. In exchange, the state agreed to dismiss the remaining charges and to recommend four years in prison on the theft charge and a consecutive term of probation on the burglary tools charge.

A plea hearing was held on September 28, 1999. At that hearing, the prosecutor stated the terms of the plea agreement on the record, including that it "involves a

recommendation of four years prison on the charge in Pierce County." After obtaining verification from petitioner that the lawyers accurately had stated the terms of the plea agreement, the court informed petitioner of each of the charges against him and explained the maximum penalties he faced on each. Petitioner indicated that he wished to plead guilty to the charges. After concluding its plea colloquy, the court ordered a presentence investigation.

The subsequently-filed presentence report recommended a moderate-to-maximum sentence. Sentencing was scheduled for December 1, 1999, but by then petitioner was imprisoned in Minnesota as a result of crimes he had committed after he entered his pleas in Pierce County. The sentencing hearing was eventually held on May 1, 2000. The state hewed to the plea agreement and recommended four years in prison with a consecutive term of probation; petitioner's trial attorney joined in that recommendation. Unpersuaded that the amount of prison time recommended by the parties adequately reflected the substantial nature of petitioner's crimes or his 20-year criminal history, the court sentenced petitioner on the felony theft count to the maximum sentence of 16 years. The court imposed a two-year concurrent sentence on the possession of burglary tools count.

Petitioner subsequently filed a motion for postconviction relief, contending among other things that he should be allowed to withdraw his plea because neither the court during its plea colloquy nor his lawyer at any time had advised him that the court was not bound by the parties' plea agreement. After an evidentiary hearing at which petitioner and his trial lawyer testified, the court denied the motion. Although it acknowledged that the plea

colloquy was deficient, the court found that petitioner had told a "bold-face lie" when he testified that he thought the court was bound to impose no more than the four-year prison term recommended by the state. The court credited the testimony of petitioner's trial lawyer, who testified that she had told petitioner that the court did not have to follow the plea agreement and that it could impose any penalty up to the statutory maximum. In addition, the court noted that the parties had referred to their agreement as a "recommended" sentence and the court had ordered a presentence investigation, both of which were inconsistent with any suggestion that the plea agreement was binding. Finally, the court found that petitioner had not testified that he would not have pleaded guilty if the court had informed him that it was not bound by the terms of the plea agreement.

Petitioner appealed the judgment of conviction and the denial of his postconviction motion to the state court of appeals. In a decision issued January 15, 2002, the court of appeals rejected petitioner's claims and affirmed his conviction. The court wasted little time on petitioner's inadequate plea colloquy claim, ruling as follows:

> Meyer has not established any prejudice from the trial court's failure to inform him that the court was not bound by the parties' agreed-upon sentencing recommendation. As the trial court noted, the language of the plea agreement itself suggests that the court was not bound by the parties' agreement. The agreement uses the terms "recommended sentence" and "sentence recommendation," suggesting that the trial court was not bound to accept the parties' recommendation. The word "recommendation" itself suggests the possibility that the sentencing court might not follow the parties' advice.

Mem. Decision and Order, January 15, 2002, dkt.#, exh. g, at 5.

On May 21, 2002, the Wisconsin Supreme Court denied petitioner's petition for review.

ANALYSIS

Pursuant to 28 U.S.C. § 2254(d), this court must accord special deference to the conclusion reached by the Wisconsin state courts. Specifically, this court may not grant petitioner's application for a writ of habeas corpus unless the state court's adjudication of his claim

> (1) 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; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The relevant Supreme Court precedent that controls this case is well-settled: a defendant's plea of guilty is unconstitutional if it was not made voluntarily and intelligently. *See Boykin v. Alabama*, 395 U.S. 238, 242- 44 (1969). As petitioner recognizes, mere defects in the plea colloquy are insufficient to establish a due process violation; rather, voluntariness is determined by "considering all of the relevant circumstances surrounding" the guilty plea. *Brady v. United States*, 397 U.S. 742, 749 (1970). Although the state courts did not cite the applicable case law, they applied it correctly by examining the transcript from the plea hearing and other relevant circumstances to determine whether petitioner had pled guilty

voluntarily and intelligently. After performing this examination, the Wisconsin courts concluded that petitioner's plea was valid. The only question before this court is whether the state courts "unreasonably" applied federal law in reaching their conclusion.

It is very difficult to establish that a state court unreasonably applied federal law. A state court decision can be reasonable even if it is wrong. *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (unreasonable application of federal law is different from incorrect application of federal law). "[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. In a case like this that involves a flexible constitutional standard, a state court determination is not unreasonable if the court "takes the rule seriously and produces an answer within the range of defensible positions." *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000). *See also Lindh v. Murphy*, 96 F.3d 856, 871 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997) ("[W]hen the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored."). The reasonableness inquiry focuses on the outcome and not the reasoning provided by the state court. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). A decision that is at least minimally consistent with the facts and circumstances of the case is not unreasonable. *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002).

It was not unreasonable for the Wisconsin courts to have concluded from the circumstances surrounding the plea that petitioner had made it knowingly and intelligently.

Although the court of appeals' analysis is a bit terse, its decision was "in the range of defensible positions," especially where the trial court also had explained to petitioner the maximum potential sentence that he faced on each charge and had ordered a presentence investigation. Moreover, the trial court explicitly found that petitioner had been advised by his lawyer that the court could impose a harsher sentence, and that petitioner was lying when he said that he was not aware of this. The court's credibility finding is a factual determination that this court must presume is correct unless petitioner produces "clear and convincing" evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1); *Murrell v. Frank*, 332 F.3d 1102, 1112 (7th Cir. 2003). Petitioner has not produced such evidence, but merely argues that the court wrongly discredited his testimony. This is insufficient to overcome the presumed correctness of the trial court's credibility finding.

Because petitioner has provided nothing that would allow this court to disturb the trial court's finding that petitioner knew that the court could impose a prison term that exceeded the term recommended by the parties, petitioner cannot show that the state courts unreasonably decided his claim. Accordingly, his petition for a writ of habeas corpus must be denied.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the petition of Douglas T. Meyer for a writ of habeas corpus under 28 U.S.C. § 2254 be DENIED on the merits.

Dated this 2nd day of September, 2003.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge