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

NATHANIEL ALLEN LINDELL,

Petitioner, ORDER

v. 04-C-249-C

GERALD BERGE, Warden, Wisconsin Secure Program Facility,

Respondent.

Petitioner Nathaniel Lindell seeks permission to appeal the judgment entered November 29, 2004 adopting the report and recommendation of the magistrate judge and denying the petition for a writ of habeas corpus and from the order of December 30, 2004 denying petitioner's motion to alter or amend the judgment. Petitioner seeks to pursue on appeal all the claims decided by this court, as identified and analyzed by the magistrate judge in his report and recommendation. In addition, petitioner raises the following two issues:

1) whether the court erred in not considering all the issues raised in his petition; and

2) whether the court erred in "not securing nor considering transcripts, testimony and other records concerning issues" raised in the petition.

Because petitioner seeks leave to proceed in forma pauperis on appeal, the court must determine whether petitioner is taking his appeal in good faith. See 28 U.S.C. § 1915(a)(3). Then, pursuant to 28 U.S.C. § 2253(c)(1)(A) and Fed. R. App. P. 22, the court must determine whether to issue a certificate of appealability to petitioner. 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, in other words, that the appeal is not frivolous. Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000). However, 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)).

Although I conclude that petitioner's appeal is not frivolous, I decline to grant him a certificate of appealability on any of his claims. Petitioner's strongest chance of overturning his conviction rested upon convincing the state courts first, that juror D.F. was biased; and second, that they should adhere to their rule that the trial court's failure to strike a biased juror for cause was an error requiring automatic reversal. Although petitioner succeeded on part one of his argument, he lost on part two, when the state supreme court

overruled its precedents and held that the trial court's failure to strike a biased juror required reversal only if the jury that ultimately sat was impartial.

Although petitioner's claim had substantial merit in the state courts, there is no reason to allow him to pursue it further in federal court. As explained in detail in the report and recommendation, the state supreme court's decision in Lindell's case brought Wisconsin law into conformity with federal law concerning a defendant's right to peremptory challenges. Even if the state supreme court's decision rested on a misreading of its past cases or the meaning of the state's statutes, that would be at most an error of state law, not a constitutional violation warranting federal habeas relief. Petitioner simply has failed to make a substantial showing of a violation of a constitutional right with respect to this claim.

Nor can he make this showing with respect to any of his remaining claims. Petitioner's claims of ineffective assistance, denial of his right to confront witnesses, prosecutorial misconduct, denial of due process at sentencing, denial of impartial jury because of pretrial publicity and general bias of the trial judge were not close questions that deserve further review on appeal. Several of these claims, including petitioner's allegations about the content of juror Connie Pratt's letter and his claim that the prosecutor suborned perjury, were devoid of any factual support. None of the claims were such that jurists of reason could debate the correctness of this court's ruling that petitioner had suffered no denial of his right to a fair trial or any other constitutional right.

Finally, petitioner should not be encouraged to proceed further on his objections to this court's characterization of his claims and its ability to decide them on the existing record. As explained in my order adopting the magistrate judge's report and recommendation, the claims that petitioner says this court overlooked "are merely variations on a theme that cannot succeed on their own" in light of the failure of petitioner's other claims. No reasonable jurist would debate that conclusion. As for petitioner's contention that the court should have had additional transcripts before deciding his claims, petitioner has failed to identify the records that he contends were missing. I infer from his previous submissions that petitioner is referring to a transcript from a January 9, 1998, hearing that he contends would support his conflict of interest claim by confirming that the LaCrosse public defender's office represented an individual named Michael Zajac, who petitioner alleges gave statements against him to police. The presence of this transcript would make no difference to the outcome because petitioner has failed to show how, even assuming the alleged conflict of interest existed, it affected the performance of petitioner's lawyers. Petitioner is not entitled to a certificate of appealability on this claim.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis on appeal is GRANTED. His request for a certificate of appealability is DENIED in its entirety.

Dated this 10th day of January, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge