

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

NATHANIEL LINDELL,

Petitioner,

v.

GERALD BERGE, Warden,
Wisconsin Secure Program Facility,

Respondent.

ORDER

04-C-0249-C

Petitioner Nathaniel Lindell has filed objections to the report entered by the United States Magistrate Judge on October 26, 2004, recommending denial of the petition for a writ of habeas corpus that petitioner filed pursuant to 28 U.S.C. § 2254. Petitioner objects to almost everything in the report as erroneous but few of his objections stand up to scrutiny.

Initially, petitioner objects to the magistrate judge's statement that he did not dispute the underlying facts of the case, saying that he had pointed out in his state post-conviction motion that he was framed and that the witnesses lied about him at trial. Technically, petitioner is correct; he does dispute the state supreme court's version of the events of the crime and his involvement in it. I note this dispute but I conclude that correcting the record

to show that petitioner objects to the statement of the case does not change the outcome of the petition.

Petitioner objects to the magistrate judge's summary of petitioner's claims, saying that the magistrate judge should have given him a chance to be heard on the completeness of the summary, rather than holding that he had waived his chance by failing to object to the summary until the state had filed its response to the petition. Petitioner does not acknowledge the magistrate judge's explanation that despite the finding of waiver, the magistrate judge reviewed the summary after petitioner had objected to it, compared it to the claims that petitioner had raised in his petition and concluded that the summary captured all of those claims. To check the magistrate judge's explanation, I have reviewed the traverse in which petitioner set out the claims that he believed had been omitted improperly from the magistrate judge's summary. I agree with the magistrate judge that his summary is complete. Although petitioner lists a number of additional claims, they are merely variations on a theme that cannot succeed on their own if the claims the magistrate judge reviewed are unsuccessful. For example, petitioner says that the magistrate judge should have included his claim that he was denied his Fourteenth Amendment right to due process as well as his Sixth Amendment right to confront witnesses by the trial court's refusal to allow him to impeach Robert Hanson. The magistrate judge included in his summary the claim that "[t]he trial court deprived Lindell of his Sixth Amendment right to confront

witnesses when it refused to allow his lawyer to impeach witness Robert Hanson.” Rep. & Rec., dkt. #16, at 11. This was sufficient to insure that the claim was addressed. Adding one more amendment to the mix does not affect the analysis of the constitutionality of the trial court’s actions.

Petitioner devotes many pages of his objections to the Wisconsin Supreme Court’s decision to overrule its own precedent in his case and deny him relief on his claim that the trial court violated his rights when it made him exercise one of his peremptory challenges to remove a prospective juror who should have been excused for cause. The magistrate judge explained comprehensively and correctly why the state court’s decision is neither unconstitutional, contrary to federal law nor an unreasonable application of clearly established federal law. Nothing I can add to that explanation would convince petitioner that the supreme court acted correctly; other readers do not need any more explanation than the magistrate judge has provided.

One point should be mentioned, however. Petitioner maintains that he raised in state court his claim that when the trial court deliberately refused to strike a juror to whom petitioner had objected, it acted “out of caprice and to cause Lindell the loss of a peremptory strike and difficulty in securing an impartial party.” Pet.’s objs., dkt. #18, at 7. In support of his contention, he cites portions of his pro se motion for post-conviction relief, his appellate brief and his appellate reply brief. However, a review of the citations fails to

uncover any support for petitioner's contention that he raised this issue in state court. Nothing in the materials indicates that he ever alleged that the trial court had acted purposefully to deny petitioner a peremptory strike and an impartial jury.

Petitioner argues that as a pro se litigant, he was not required to specify each and every aspect of his claim for post-conviction relief. In his view, it was enough to challenge the trial judge's decisions as biased, to ask for an evidentiary hearing on his claims and to point out that the trial judge had supplied no reasons for his denial of petitioner's post-conviction motion. He adds that he has cause and prejudice for his failure to identify each claim on appeal because he was never told that he had to raise each claim in his appeals at the risk of default and he was prejudiced by being denied a fair trial. Petitioner acknowledged in his traverse that he had to provide the operative facts and controlling legal principles to the state courts in order to give them a full and fair opportunity to resolve the issues he was raising. Pet.'s Traverse, dkt. # 11, at 7. It is not credible that he was not aware of this when he filed his post-conviction motion. In any event, his alleged lack of knowledge does not relieve him of the procedural bar to his pursuit of his claims in federal court. If he did not raise a particular claim in state court with sufficient clarity and specificity to allow the state courts to decide it, he cannot raise that claim here.

As to petitioner's claim that the trial court denied him his constitutional rights when it limited his impeachment of witness Robert Hanson, I can find nothing in his objections

that the magistrate judge did not address and analyze correctly. Petitioner was not denied the right to impeach Hanson when the court required petitioner's counsel to set out the grounds for the impeachment.

The magistrate judge analyzed each of petitioner's remaining claims (prosecutorial misconduct, denial of due process at sentencing, denial of impartial jury because of pretrial publicity, general bias of the trial judge and ineffective assistance of counsel). His analysis is thorough, careful and convincing. It is not necessary to add to it.

ORDER

IT IS ORDERED that the report and recommendation of United States Magistrate Judge Stephen L. Crocker is ADOPTED as the court's own. FURTHER, IT IS ORDERED that petitioner Nathaniel Lindell's petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 is DENIED.

Entered this 26th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge