

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

KENNETH P. SARAUER,

Petitioner,

v.

MATTHEW FRANK, Secretary,
Wisconsin Department of Corrections,

Respondent.

ORDER

05-C-0057-C

Petitioner Kenneth P. Sarauer has filed objections to the report and recommendation entered by the United States Magistrate Judge on May 5, 2005. The magistrate judge recommended denial of petitioner Sarauer's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the ground that petitioner had not shown that when the state court of appeals denied his appeal from his conviction it relied on an unreasonable determination of the facts in light of the evidence presented in the state proceeding or that it made a decision that was contrary to Supreme Court precedent or involved an unreasonable application of that precedent. 28 U.S.C. § 2254(d)(1), (2). After reading the report and recommendation and petitioner's objections and reviewing the trial transcript, I agree with the magistrate

judge that the petition must be denied.

In the report, the magistrate judge discussed all of the issues that petitioner raised and explained in detail why none of them can succeed. In objecting to the magistrate judge's conclusions about the way the state trial court handled his trial, petitioner fails to keep in mind the restrictions on the federal court's review of state court proceedings. A federal court cannot substitute its own judgment for that of the trial court or the state appellate courts. It can grant habeas corpus relief only in the very limited circumstances set out above, that is, when the state courts have erred in applying Supreme Court precedent or have made a determination of the facts that is unreasonable. It is not enough for a federal court to say, for example, that most judges would disagree with the view of the facts that a state court took; it must be able to say that the state court's view was wholly unreasonable.

Any petitioner seeking to overturn a state court decision is at a disadvantage when he comes into federal court. He must overcome a very strong presumption that the state courts acted properly. Not only is the presumption at work but other policies add to the difficulty of prevailing. In this case, for example, petitioner is barred from challenging the prosecutor's comments on petitioner's pretrial silence by the rule that if a state court rests its decision on an "independent and adequate" state court, the federal court cannot review the merits of the state court's decision on that issue. When the state court found that petitioner had waived his right to challenge the prosecutorial comments on appeal by failing

to object to the comments at trial, that was an “independent and adequate” state ground of decision that bars the federal court from considering the merits of the claim.

I am persuaded that the magistrate judge analyzed each of petitioner’s claims properly and came to the correct legal conclusion. Therefore, I will adopt the report in full and deny the petition for a writ of habeas corpus.

ORDER

IT IS ORDERED that the report and recommendation of United States Magistrate Judge Stephen L. Crocker is ADOPTED and petitioner Kenneth P. Sarauer’s petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, is DENIED.

Entered this 19th day of May, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge