

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

MIQUEL BROWN,

Petitioner,

v.

CATHERINE FARREY, Warden,
New Lisbon Correctional Institution,

Respondent.

ORDER

05-C-0624-C

Petitioner Miquel Brown has filed objections to the February 21, 2006 report and recommendation entered by the United States Magistrate Judge, in which the magistrate judge recommended denial of petitioner's petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Having reviewed the objections and the report, I am persuaded that the magistrate judge's recommendation should be adopted. Petitioner has failed to show that the state courts erred in their determination of his post-conviction challenges to his conviction.

Petitioner begins by objecting to the magistrate judge's decision to take up the issue of petitioner's procedural default of his due process challenge to the state's amendment of

the information against him. Petitioner was charged with two counts of delivery of cocaine; after a preliminary hearing on the two counts, the state court found probable cause to believe that he had committed the crimes charged. Later, the state added a count of possession with intent to deliver more than 100 grams of cocaine without providing defendant a preliminary hearing on the new count. Petitioner contends that the magistrate judge should not have even considered the issue because it was not one that respondent raised the issue in her answer. It was not improper for the magistrate judge to take up the issue even if the state did not raise it. As the Court of Appeals for the Seventh Circuit has held, considerations of comity and federalism weigh strongly against permitting a petitioner to assert a claim in federal court that the state courts have not had an opportunity to consider. Perruquet v. Briley, 390 F.3d 505, 516-519 (7th Cir. 2004).

After deciding that he should address the issue of procedural default, the magistrate judge determined that petitioner raised his due process claim in his petition to the state court of appeals solely in terms of state law and never mentioned federal law or constitutional provisions. Therefore, he did not give the state courts a fair opportunity to decide the federal constitutional issue and for that reason, should not be permitted to raise the issue for the first time in federal court.

In response, petitioner says that the magistrate judge misunderstood the argument he was raising. He is not arguing that it was improper for the state to amend the

information to include counts wholly unrelated to the original ones. Instead, as I understand it, he is saying that the prosecutor cannot amend an information to include charges that are not supported by the showing of probable cause made at the preliminary hearing. Furthermore, he argues, the court of appeals would have known that this was the argument being raised on his behalf. Also, he contends that he still has an opportunity to pursue a post-conviction motion under Wis. Stat. § 974.06 alleging ineffective assistance of post-conviction counsel for not raising his due process claim properly.

If, as petitioner contends, his real claim was that it was improper for the state to add a charge against him that had not been the subject of a preliminary hearing, there is another reason besides procedural default for not entertaining his claim in this court. The claim raises only state law concerns; it does not implicate the United States Constitution and thus would present no ground for granting petitioner post-conviction relief. State v. Williams, 198 Wis. 2d 516, 525, 544 N.W.2d 406, 410 (1996) (preliminary examination is purely statutory creation, not constitutional right). If petitioner intended to challenge the state's failure to provide him a preliminary hearing on the new charge, the only place he could do so was in the state courts. This court cannot grant him relief on a state law claim. Therefore, it would not matter whether he had exhausted his state court remedies with respect to this claim or had defaulted them procedurally because the claim was not one that could be brought in this court.

Insofar as the magistrate judge thought that petitioner's due process claim was the state's improper joinder of claims, he was correct when he concluded that petitioner could not establish that no reasonable juror would have found him guilty but for the trial court's allegedly erroneous joinder of charges.

As for petitioner's assertion that he still has an opportunity to exhaust his due process claim, it seems highly unlikely. The state court records show that he has raised his claim of ineffective assistance of appellate counsel claim to the state courts once; I see no reason why the state courts would entertain the same claim in a different kind of post-conviction motion. Even if the state courts would do so, petitioner would not be able to come back to this court, except under unusual circumstances. He is allowed only one opportunity to file a post-conviction petition unless he can persuade a panel of the court of appeals that he comes within one of the narrow exceptions to the general rule against second or successive petitions.

It is unnecessary to discuss petitioner's remaining objections, which relate to the magistrate judge's disposition of petitioner's claims of denial of his constitutional right to a speedy trial and lack of sufficient evidence to find him guilty. The magistrate judge explained persuasively and thoroughly why the state courts' denial of these claims was not unreasonable under 28 U.S.C. § 2254(d).

ORDER

IT IS ORDERED that the report and recommendation entered by the United States Magistrate Judge on February 21, 2006, is ADOPTED as the court's own and petitioner Miquel Brown's petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 is DENIED.

Entered this 6th day of March, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge