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

LARRY SPENCER,

Petitioner, ORDER

v. 05-C-0666-C

CATHY FARREY, Warden,
New Lisbon Correctional Institution,

Respondent.

Larry Spencer has filed a notice of appeal and a request for a certificate of appealability from this court's judgment entered March 14, 2007 and the court's March 21, 2007 order denying petitioner's first motion for reconsideration. (I will presume that petitioner also seeks to appeal this court's April 24, 2007 order denying petitioner's second motion for reconsideration.) He has not paid the $455 fee for filing his notice of appeal which is required if he is to take an appeal from the denial of a § 2254 motion. Therefore, I construe petitioner's notice as including a request for leave to proceed in forma pauperis on appeal pursuant to 28 U.S.C. § 1915.

Pursuant to Fed. R. App. P. 22, a petitioner in a habeas action who complains of detention arising from process issued by a state court cannot take an appeal unless a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). A certificate of appealability shall issue "only if the applicant has made a substantial showing of the denial

of a constitutional right." § 2253(c)(2). Before issuing a certificate of appealability, a district court must find that the issues the applicant wishes to raise are ones that "are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." Barefoot v. Estelle, 463 U.S 880, 893 n.4 (1983). When the district court denies a claim on procedural grounds without reaching the merits of the underlying claim, the district court may decline to issue a certificate of appealability on that claim without considering whether the claim stated a valid claim of the denial of a constitutional right if the court concludes that jurists of reason would not debate the correctness of the court's procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484-85 (2000).

In his request for a certificate of appealability, which appears to have been prepared by a paralegal at the institution, petitioner asserts that he seeks to appeal only his claim that the trial court violated petitioner's right to self-representation under the Sixth Amendment when it denied petitioner's request to represent himself at trial on nine counts of forgery. In an "amendment" to the request for a certificate of appealability, however, petitioner adds that he is "reserving" his right to join his two Dane County cases that were the subject of his petition, 01-CF-1125 and 01-CF-1242. He also continues to make arguments related to the merits of his petition, including a claim that his Alford plea was "coerced" as a result of the court's denial of his right to self-representation.

In light of petitioner's amendment to the certificate of appealability and the fact that petitioner's Alford plea stands in the way of his ability to challenge the trial court's denial of his request to represent himself at trial, I will construe petitioner's request for a certificate of appealability as seeking a certificate with respect to both the court's denial of his right to self-representation and the voluntariness of the Alford plea. I found that both of these claims were barred by the procedural default doctrine as a result of petitioner's failure to present the claims to the Wisconsin Court of Appeals on direct appeal from his conviction, and that petitioner's allegation of ineffective-appellate-counsel-as-cause for the default had no merit. Accordingly, because a certificate may not issue unless I find that jurists of reason could debate the correctness of my procedural ruling, I will also presume that petitioner seeks to appeal my ruling on the claim of ineffective assistance of postconviction/appellate counsel.

I begin with the ineffective assistance of postconviction/appellate counsel claim, for it is the potential gateway to petitioner's other claims. I found that petitioner could not show that Tim Edwards, the lawyer who represented petitioner during postconviction and appellate proceedings, was ineffective for failing to raise petitioner's involuntary plea and denial of self-representation claims on direct appeal because petitioner had failed to allege facts sufficient to establish that his plea was not entered knowingly or voluntarily. Reasonable jurists would not debate this conclusion. The sole evidence on which petitioner relies to support his claim that his trial lawyer, Paul Nesson, told him that an Alford plea was

only a “temporary” plea is a statement from the plea hearing where petitioner is recorded as saying that Nesson had told him something about a plea “where I’m claiming that I’m still innocent and until I believe I can come forward.” I explained in the March 14 opinion and order why this sole recorded statement was insufficient to support petitioner’s inherently incredible assertion about what Nesson allegedly told him regarding the nature of an Alford plea, and I incorporate that reasoning herein by reference. Having reviewed the March 14 opinion and my orders denying petitioner’s motions for reconsideration, I am convinced that jurists of reason would not debate my conclusion that petitioner failed to show any putative merit in his claim that he did not know when he entered an Alford plea that he was waiving his right to attempt to prove his innocence to a jury. It follows that jurists of reason would not debate my conclusion that Edwards was not ineffective for failing to raise the invalid plea issue on appeal. Further, absent any valid ground for challenging the validity of petitioner’s plea, it is not reasonably debatable that Edwards was not ineffective for failing to challenge on appeal the trial court’s denial of petitioner’s request to represent himself. Gomez v. Berge, 434 F.3d 940, 942 (7th Cir. 2006) (with entry of knowing and voluntary plea, defendant waives right to contest alleged constitutional violations that occurred before plea, including alleged denial of right to self-representation); State v. Jens, WI App 38, ¶ 18, 279 Wis. 2d 517,693 N.W. 2d 146 (Ct. App. Jan. 25, 2005) (unpublished opinion).

My conclusion that petitioner has failed to make a substantial showing of the denial of a constitutional right with respect to his claim that Edwards provided ineffective

assistance of postconviction/appellate counsel leads necessarily to the conclusion that jurists of reason would not debate that petitioner cannot establish cause for his procedural default. This leaves the question whether jurists of reason would debate whether petitioner could satisfy the fundamental miscarriage of justice exception to the procedural default rule. In the March 14 opinion and order, I found that petitioner did not come close to making the showing necessary to satisfy the demanding "actual innocence" exception in light of the strong evidence of guilt presented by the state at the plea hearing. This was not a close question and would not be debatable among reasonable jurists.

In sum, because the conclusion that petitioner procedurally defaulted his invalid plea and denial of self-representation claims is not debatable among reasonable jurists, petitioner is not entitled to a certificate of appealability on those claims with respect to his challenge to his forgery conviction.

It is unclear whether petitioner seeks to appeal this court's denial of his challenge to his conviction on drug charges. For the sake of completeness, I find that petitioner is not entitled to a certificate of appealability from my order concerning that state court judgment. I found that petitioner was not entitled to relief from that judgment because all of his claims were procedurally defaulted as a result of his failure to file a petition for review in the Wisconsin Supreme Court. Reasonable jurists would not debate that conclusion or my conclusion that petitioner could not satisfy either exception to the procedural default rule.

I move on to petitioner's request for leave to proceed in forma pauperis. Under Fed. R. App. P. 24(a)(3), a party who was permitted to proceed in forma pauperis in the district court action may proceed on appeal in forma pauperis without further authorization "unless the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed. . . ." This court authorized petitioner to proceed in forma pauperis in the proceedings before this court. Therefore, he can proceed in forma pauperis on appeal unless I find that his appeal is taken in bad faith. The standard for determining whether an appeal is taken in bad faith is less demanding than the standard for deciding whether to issue a certificate of appealability. Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000). An appeal is not taken in bad faith so long as a reasonable person could suppose the appeal has merit. Id.

I conclude that petitioner is not taking his appeal in good faith. Petitioner has not adduced any credible evidence to support his contention that he did not enter his Alford plea knowingly or voluntarily. Instead, he continues to harp upon his belief that Joseph Sommers, the lawyer who represented him long before he entered his plea, somehow "poisoned" petitioner's ability to receive a fair trial on the forgery charges and that the trial court, prosecutor, Sommers and Nesson were part of a grand conspiracy to secure petitioner's conviction. As explained in prior orders, however, Sommers was not representing petitioner at the time of the plea and petitioner's conspiracy theory is unsupported. Further, although petitioner raises various complaints about Nesson's

performance leading up to trial and argues that he had no choice but to enter a plea after the trial court declined to allow him to represent himself, petitioner did have a choice: he could have proceeded to trial with Nesson and then, assuming the jury returned a guilty verdict, could have brought an appeal challenging Nesson's performance and the court's denial of petitioner's request to represent himself. By entering a no contest plea, however, petitioner waived that opportunity. Absent any credible evidence to support petitioner's claim that he did not enter his plea knowingly or voluntarily, I must certify that his appeal is not brought in good faith.

Finally, I note that petitioner has indicated that he would like the court to appoint a lawyer to represent him on appeal. Petitioner should direct that request to the court of appeals.

ORDER

IT IS ORDERED that:

1. Petitioner's request for a certificate of appealability is DENIED. Pursuant to Fed. R. App. P. 22(b), if a district judge denies an application for a certificate of appealability, the defendant may request a circuit judge to issue the certificate.

2. Petitioner's request for leave to proceed in forma pauperis is DENIED because I certify that his appeal is not taken in good faith. If petitioner wishes to appeal this decision, he must follow the procedure set out in Fed. R. App. P. 24(a)(5).

Entered this 30th day of April, 2007.

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