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

ANDREW MATTHEW OBRIECHT,

Petitioner,

ORDER

v.

05-C-230-C

BYRAN BARTOW, Director, Wisconsin Resource Center,

Respondent.

Pursuant to this court's order entered June 10, 2005, petitioner Andrew Matthew Obriecht has filed an application for leave to proceed in forma pauperis on appeal from this court's order entered April 26, 2005 dismissing his petition for a writ of habeas corpus. For the reasons stated below, I am denying petitioner's application and declining to issue him a certificate of appealability.

Petitioner's habeas application challenged two state court judgments, both of which were entered by the Circuit Court for Dane County. The first, Case No. 96-CF-2331, is a judgment of conviction imposed in Branch 13 of that court on August 7, 1998 for criminal damage to property, theft and criminal trespass to a dwelling. The second, Case No. 00-CF-2286, is a judgment of conviction imposed in Branch 15 on August 6, 2001 for escape. In orders entered April 21, 2005 and April 26, 2005, I found that petitioner's challenge to 00-CF-2286 had to be dismissed because petitioner had not yet exhausted his state court

remedies with respect to that judgment. I found that petitioner's challenge to the earlier judgment, 96-CF-2331, had to be dismissed for lack of jurisdiction because petitioner had served the entirety of the sentence imposed pursuant to that judgment. Petitioner has not specified whether he wants to appeal from the dismissal of his challenge to 96-CF-2331, 00-CF-2286 or both. I will assume that petitioner wants to appeal both.

To be entitled to proceed in forma pauperis on appeal, petitioner's appeal must be taken in good faith. See 28 U.S.C. § 1915(a)(3). To find that an appeal is in good faith, a court need only find that a reasonable person could suppose the appeal has some merit. Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000). Then, pursuant to 28 U.S.C. § 2253(c)(1)(A) and Fed. R. App. P. 22, this court must determine whether to issue a certificate of appealability to petitioner. 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)).

"When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition

states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at484. Thus, "[d]etermining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." Id. at 484-85.

Although I find from petitioner's affidavit of indigency that he is unable to prepay the costs of the appellate filing fee or post security therefor, I am denying his application for leave to proceed in forma pauperis on appeal. Reasonable persons would not suppose there is any merit to his appeal of the dismissal of his attack on the judgment in 00-CF-2286 in light of petitioner's admission that that case is currently pending in the state court of appeals. As for 96-CF-2331, there is no dispute that petitioner has already served the entirety of that sentence, meaning that he can no longer collaterally attack that sentence under the Supreme Court's elucidation of the "in custody" requirement in Maleng v. Cook, 490 U.S. 488, 492 (1989). Because the law and the facts of this case leave no room for argument on this issue, petitioner's appeal is patently without merit.

For the same reasons, petitioner is not entitled to a certificate of appealability. Reasonable jurists would not debate the correctness of this court's procedural rulings that formed the basis of the dismissal of the petition.

ORDER

Petitioner's application for leave to proceed in forma pauperis on appeal and his request for a certificate of appealability are both DENIED.

Entered this 16th day of June, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge