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

JOHN LULLOFF,

Petitioner,

OPINION AND ORDER

v.

05-C-0288-C

JANE DIER-ZIMMEL, Superintendent,
Oregon Correctional Center,

Respondent.

Petitioner John Lulloff brings this habeas corpus petition under 28 U.S.C. § 2254 to collaterally attack a state court conviction for fifth-offense operating a motor vehicle while intoxicated. The sole ground he raises in support of his petition is that his conviction was obtained as a result of the state trial court's erroneous denial of his suppression motion, in violation of the Fourth Amendment. Because petitioner's claim is barred under the rule announced in Stone v. Powell, 428 U.S. 465 (1976), it must be dismissed.

As an initial administrative matter, petitioner has informed the court that he has recently been transferred from the Chippewa Valley Correctional Treatment Facility, where he was in custody at the time he filed his petition, to the Oregon Correctional Center. I have changed the caption to reflect that the superintendent of the Oregon Correctional Center, Jane Dier-Zimmel, is now the proper respondent in this action. See 28 U.S.C. § 2242 and

Rule 2(a) of the Rules Governing Section 2254 Cases (proper respondent is state officer who has custody over petitioner).

Under 28 U.S.C. § 2254(e)(1), this court is to presume that state court findings of fact are correct unless the petitioner presents clear and convincing evidence to the contrary. Petitioner has not presented any evidence. Accordingly, I draw most of the following facts from the decision by the Wisconsin Court of Appeals in State v. Lulloff, 2005 WI App 59, 280 Wis. 2d 556, 694 N.W. 2d 509 (Ct. App. Feb. 9, 2005) (unpublished decision):

FACTS

On or about November 2, 2001, petitioner was stopped on his motorcycle by a police officer while traveling on the highway. One thing led to another: petitioner was eventually charged with his fifth offense of operating a motor vehicle while intoxicated. He filed a suppression motion challenging the propriety of the traffic stop. The court of appeals summarized the hearing on that motion as follows:

> At the hearing on Lulloff's suppression motion, Officer Helm of the Ozaukee County Sheriff's Department, who has more than twenty-four years of experience as a traffic officer, testified that he was operating a vehicle with a certified speedometer and was trained in pacing a vehicle on the day he encountered Lulloff. Dispatch notified Helm that a local police department suspected an intoxicated driver on the highway. Helm had a description of the motorcycle, the driver and a license plate number. Helm encountered the motorcycle shortly thereafter and followed it. During that time, Helm observed the motorcycle move from one side of the lane to the other. Helm paced the motorcycle for approximately one mile and

> determined that the motorcycle was traveling at seventy-five miles per hour in a sixty-five mile per hour zone. When Helm pulled Lulloff's motorcycle over for a speeding violation, he discovered that Lulloff was intoxicated.
>
> On cross-examination, Helm testified that the speedometer on his vehicle was certified. He could not say when the speedometer was last certified, but he testified that the department certifies the speedometer on a regular basis and he would have been told if his vehicle had a faulty speedometer. He also testified that he has experience pacing vehicles, although he did not recall any formal training in that area.
>
> The court found that Helm had probable cause to stop Lulloff's vehicle because Lulloff was traveling in excess of the posted speed limit and the officer observed some erratic driving.

Lulloff, 2005 WI App at ¶¶ 2-4.

Shortly thereafter, petitioner entered a no-contest plea to the charge. Representing himself on appeal, petitioner argued that the circuit court should not have believed Helm's inconsistent testimony regarding his training to pace vehicles and should not have found probable cause for the stop.[1] The court of appeals rejected petitioner's arguments, finding that it was up to the trial court to evaluate the officer's credibility and that the trial court's findings satisfied the requirements for a lawful stop. *Id*. at ¶¶ 6, 10. Noting that the police officer could stop petitioner if the officer reasonably believed petitioner was committing a traffic violation, the court concluded that the officer had enough facts to suggest a speeding violation. *Id*. at ¶10.

[1] Under Wis. Stat. § 971.31(10), a defendant who enters a guilty or no contest plea does not waive his right to appellate review of an adverse suppression ruling.

The Wisconsin Supreme Court denied petitioner's petition for review on April 6, 2005.

OPINION

In Stone v. Powell, 428 U.S. 465, 493-95 (1976), the Supreme Court reasoned that because the exclusionary rule is a social device for deterring official wrongdoing, not a personal right of defendants, a person imprisoned following a trial that relies in part on unlawfully seized evidence is not *in custody* in violation of the Constitution even though the seizure might have been unlawful. Thus, federal courts will not consider Fourth Amendment claims on habeas corpus review in cases in which the state has provided the petitioner with "an opportunity for full and fair litigation" of the Fourth Amendment claim. Id. A defendant receives a full and fair opportunity to litigate if

> (1) he has clearly informed the state court of the factual basis for that claim and has argued that those facts constitute a violation of his fourth amendment rights and (2) the state court has carefully and thoroughly analyzed the facts and (3) applied the proper constitutional case law to the facts.

Hampton v. Wyant, 296 F.3d 560, 563 (7th Cir. 2002).

Under these criteria, "full and fair" means the right to *present* the Fourth Amendment claim. So long as the state court gives a claim adequate and unbiased consideration, it is irrelevant whether the court ultimately reaches the correct decision. Cabrera v. Hinsley, 324 F.3d 527, 531-32 (7th Cir. 2003). Therefore, to establish that his hearing was not full and

fair, a petitioner must show that it was a "sham" because it had been subverted in some obvious and disturbing way. Id.

Petitioner cannot make this difficult showing. The trial court held an evidentiary hearing at which petitioner's lawyer thoroughly questioned the officer who stopped petitioner's motorcycle. Nothing in the transcript suggests that the court interfered in any way with petitioner's efforts to establish grounds for suppression. In addition, petitioner had the opportunity to present the facts in support of his motion and to submit briefs in the appellate court outlining the legal basis for his claim.

The court of appeals issued a written decision in which it carefully analyzed the facts and properly applied the law. The state court of appeals, which issued the last reasoned decision in petitioner's case, set out the correct standard for the reasonableness of a stop when it cited State v. Jackson, 147 Wis. 2d 824, 834, 434 N.W. 2d 386 (1989), which relied on Terry v. Ohio, 392 U.S. 1, 22 (1968). That ends the inquiry under Stone.

Even if this court were to accept petitioner's argument that the state court of appeals incorrectly applied the law to the facts, this would not entitle petitioner to federal habeas relief. Even an egregious state court error on a Fourth Amendment claim is not enough to warrant habeas relief so long as court took seriously its obligation to adjudicate the claims. Hampton, 296 F.3d at 564. Here, the state courts gave careful attention to petitioner's arguments and applied the relevant legal principles. That is enough.

Apart from claiming that the state courts decided his suppression motion incorrectly, petitioner argues that the process was a "sham" because of alleged procedural irregularities that occurred post-conviction. See Pet.'s Br. in Opp. to Mot. to Dismiss, dkt. #10, at 1. However, none of these alleged irregularities subverted the evidentiary hearing process deprived petitioner of a fair and full opportunity to challenge the suppression motion on appeal. Because petitioner has not shown that he was denied a full and fair opportunity to litigate his Fourth Amendment claim in the state courts, his petition is barred under Stone.

ORDER

IT IS ORDERED that the petition of John Lulloff for a writ of habeas corpus is DISMISSED. The clerk of court should change the case caption to reflect that the proper respondent in this action is Jane Dier-Zimmel, Superintendent of the Oregon Correctional Center.

Entered this 25th day of October, 2005.

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