

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

BOBBIE TORRY,

Petitioner,

MEMORANDUM and ORDER

v.

05-C-314-S

GREGORY GRAMS,

Respondent.

Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Respondent filed a response on August 19, 2005. Petitioner has failed to file a traverse.

FACTS

On January 18, 2002 petitioner was convicted after a jury trial of attempted first-degree intentional homicide by use of a dangerous weapon, false imprisonment, second degree sexual assault by use of force and substantial battery all as a habitual criminal.

The trial court barred evidence at trial about the victim's prior acts of prostitution. The trial court also prohibited the defense from cross-examining the victim about her alleged prior violent act.

On December 11, 2003 the Wisconsin Court of Appeals affirmed petitioner's judgment of conviction. Petitioner claimed on appeal

that he was deprived of his right to a fair trial because of the jury's racial composition and that many of the jurors knew each other before jury service. The Court found as follows:

Torry argues that he was deprived of a fair trial because there were no black members of the venire panel. However, Torry points to no evidence in the record of the racial composition of the jury, except for a statement by defense counsel during voir dire that "none of you are black. I can tell by looking." Torry does not claim that any motion on this issue was presented to the circuit court, or that the court made any decision on this issue. There is simply no factual record, of either the composition of this panel or the community from which it was drawn, to which we can apply the legal standards that are raised by this argument.

The Court further found that although two people served on the jury that previously knew each other, petitioner's right to a fair trial was not impaired. The Court also found that petitioner's claim of ineffective assistance of counsel was waived because he had not previously raised it in a post conviction motion. The Court of Appeals also concluded that the trial court properly barred evidence of the victim's prior prostitution activities under Wis. Stat., §972.11(2) and prohibited cross examining her about a prior act of violence.

On February 24, 2004 the Wisconsin Supreme Court denied petitioner's petition for review. Petitioner subsequently filed a post conviction motion in the Dane County Circuit Court which was denied on May 10, 2004. The Wisconsin Court of Appeals affirmed

the trial court's decision on November 30, 2004 and on April 6, 2005 the Wisconsin Supreme Court denied petitioner's petition for review. Petitioner filed a petition for a writ of habeas corpus in this Court on July 31, 2005.

MEMORANDUM

Petitioner claims that there were no black jurors on the jury panel, that he was denied his right to effective assistance of counsel, that the trial court failed to admit prior acts of prostitution by the victim and that the trial court prohibited the defense from cross examining the victim about a prior act of violence.

A federal court may grant relief on a petition for a writ of habeas corpus of a person in state custody only if the state court's adjudication of the claim was on the merits and:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

28 U.S.C. §§ 2254(d)(1) and (2).

Plaintiff claims that the racial composition of the jury violated his right to a fair trial. The Court of Appeals found that there was no evidentiary basis to support this claim.

Petitioner also claims that because two jurors previously knew each other he was deprived a fair trial. The Court of Appeals held that the fact that the jurors had met previously did not impede his right to a fair trial.

The Court of Appeals' decisions concerning the jury composition were neither contrary to clearly established law nor based on an unreasonable determination of the facts. Accordingly, petitioner's petition for a writ of habeas corpus on these claims will be dismissed with prejudice.

Petitioner claims that he was denied effective assistance of counsel. The Court of Appeals found that he had waived this claim because he had not raised it in a post conviction motion. Petitioner is procedurally defaulted from bringing this claim in this court because he has not shown cause nor prejudice for failing to raise it in state court. Coleman v. Thompson, 501 U.S. 722, 750 (1991). Petitioner's petition for a writ of habeas corpus on his ineffective assistance of counsel claim will be dismissed with prejudice.

Petitioner claims the trial court erred in failing to allow evidence of the victim's prior acts of prostitution and failing to allow cross examination of the victim on a prior act of violence. These claims involve rulings of state evidence law and do not rise to the level of federal constitutional violations which are cognizable in federal petitions for writs of habeas corpus.

Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Accordingly, petitioner's petition for a writ of habeas corpus on these grounds will be dismissed without prejudice.

Petitioner is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his petition must be dismissed. See Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that petitioner's petition for a writ of habeas corpus is DISMISSED with prejudice.

Entered this 16th day of August, 2005.

BY THE COURT:
S/

JOHN C. SHABAZ
District Judge