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

ANDREW MATTHEW OBRIECHT,

Petitioner,

v.

BYRAN BARTOW, Director,
Wisconsin Resource Center,

Respondent.

REPORT AND
RECOMMENDATION

05-C-489-C

REPORT

Before the court for report and recommendation is Andrew Matthew Obriecht's petition for a writ of habeas corpus under 28 U.S.C. § 2254. Obriecht challenges his August 6, 2001 conviction in the Circuit Court for Dane County for escape. He contends that he is in custody in violation of the laws or Constitution of the United States because:

> 1) his trial attorney was ineffective for allowing Obriecht to be denied his rights to due process and equal protection;
>
> 2) his plea of no contest was not knowing and voluntary because the trial court failed to ascertain that he understood the nature of the charge;
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> 3) his plea was not knowing and voluntary because his trial attorney gave him inaccurate information, failed to explain the nature of the charge and failed to conduct any pretrial investigation;
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> 4) the criminal charge was void because it charged no offense and was jurisdictionally defective;

> 5) his post-conviction lawyer had a direct conflict of interest and failed to exercise due diligence; and
>
> 6) the state did not file a response to Obriecht's post-conviction motion as required by Wis. Stat. § 974.02.

I directed the state to respond to Obriecht's first five claims, noting that the sixth alleged at most a violation of state law that was not a basis for federal habeas relief. In its answer, the state concedes that Obriecht exhausted his state court remedies but contends that the petition should be denied on its merits because the state courts reasonably adjudicated Obriecht's claims. I agree: nearly all of Obriecht's claims stem from his unshakeable belief that he could have beaten the escape charge by showing that the sentence from which he escaped was unlawful. As explained below, this premise is just plain wrong. Therefore, I am recommending that this court deny the petition.

The following facts are drawn from documents attached to the petition and the state's response to it:

BACKGROUND

On September 22, 2000, Andrew Obriecht was incarcerated at the Dane County jail, serving a 240-day sentence imposed by Dane County Circuit Judge Michael Nowakoski following Obriecht's convictions of theft, trespass and criminal damage to property in Dane County Case 96-CF- 2331. Obriecht was furloughed from jail that day to attend a dental appointment; instead of returning to jail, he fled to Iowa, where he was later arrested and convicted for drug dealing.

As a result, Wisconsin charged Obriecht in case number 00-CF-2286 with violating Wis. Stat. § 946.42(3)(a), which provides:

> A person in custody who intentionally escapes from custody under any of the following circumstances is guilty of a Class H felony:
>
> (a) Pursuant to a legal arrest for, lawfully charged with or convicted of or sentenced for a crime.

The case was assigned to Dane County Circuit Judge Stuart Schwartz.

Obriecht entered a no-contest plea to the escape charge on June 6, 2001. At the plea hearing, Obriecht indicated that he had gone through a plea questionnaire with his lawyer and had had the opportunity to ask questions of his lawyer. Obriecht stated that he understood the maximum penalties, that the court would find guilt on the basis of the facts set forth in the criminal complaint and that the court was not bound to follow any sentencing recommendations by the parties. Obriecht also said he knew that by entering a plea, he was admitting that if the case had gone to trial, the state would have been able to prove that he intentionally escaped from custody having been sentenced for a crime. He denied that anyone had made any threats or promises to induce him to enter a plea and agreed that the facts set forth in the criminal complaint were a sufficient basis for the plea. Finally, when the court asked him if he had any questions, Obriecht responded "No, no, I don't." On the basis of the representations made by Obriecht and his attorney, the court found him guilty. About two months later, the court sentenced Obriecht to a term of one year confinement followed by four years' extended supervision.

A new lawyer was appointed to represent Obriecht on appeal. After a series of extensions and delays not relevant to the instant habeas petition, Obriecht ultimately filed a *pro se* postconviction motion. Among other things, Obriecht alleged that: his trial lawyer was ineffective for failing to object to procedural defects at the initial appearance and arraignment and for failing to explain the elements of the crime to him; his plea was not knowing or intelligent; and his sentence should be vacated because his lawyer had a conflict of interest and did not exercise due diligence. Obriecht claimed that if his lawyer had investigated, he would have discovered that Obriecht's conviction in 96-CF-2331 was invalid because of various defects and would have pursued a defense to the escape charge on this basis. Obriecht claimed that if he had known all this at the time, then he would not have pled guilty to escape but instead would have gone to trial.

The trial court rejected all of Obriecht's arguments and affirmed the conviction. Analyzing Obriecht's ineffective assistance of counsel claim under the two-part test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the court found that Obriecht had failed to allege any facts to support his claim that counsel had failed to conduct a proper investigation or had provided Obriecht with bad advice at the time of the plea hearing. The court noted that although Obriecht complained that his conviction in 96-CF-2331 was invalid and his lawyer should have discovered this, Obriecht had failed to specify what it was about the prior conviction that was defective. As for Obriecht's claims that irregularities in the initial appearance and arraignment had deprived the court of subject matter and personal

jurisdiction, the court found that he had waived his right to raise such challenges by failing to object during the proceedings.

The trial court also rejected Obriecht's claim that his plea was involuntary. The court reviewed the transcript from the plea hearing and concluded that the court's colloquy with Obriecht had been adequate and it showed that Obriecht understood the elements of the charge. As for Obriecht's contention that he should be allowed to withdraw his plea because his lawyer had failed to advise him that he could defend against the escape charge by showing that the underlying conviction was invalid, the court noted again that Obriecht had failed to specify why the prior conviction was inappropriate. Finally, the court found no basis for vacating Obriecht's sentence. The court noted that, like his other claims, Obriecht's challenge to his sentence was related to his "fixation" on his 96-CF-2331 conviction.

Obriecht appealed the denial of his postconviction motion. On May 12, 2005, the court of appeals issued a three-paragraph order summarily affirming the decision of the trial court and adopting that court's reasoning as its own. The state supreme court denied Obriecht's petition for review on July 28, 2005.

ANALYSIS

In his habeas petition, Obriecht reasserts the claims he made in the state courts. This court's adjudication of Obriecht's claims is governed by 28 U.S.C. § 2254(d), which states:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not

> be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (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).

A state court decision is contrary to Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases, or if the state court confronts a set of facts materially indistinguishable from a decision of the Supreme Court yet arrives at a different result. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). A state court decision is an unreasonable application of Supreme Court precedent if the state court identifies the correct governing legal rule but unreasonably applies it to the facts of its case. *Williams*, 529 U.S. at 407. An unreasonable application of federal law is different from an incorrect application of federal law. *Id*. at 410. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id*. at 411.

Obriecht has not shown–indeed, *cannot* show–that the state courts' adjudication of his claims was unreasonable or contrary to governing Supreme Court law. As the state courts recognized, Obriecht's claims have absolutely no merit.

Obriecht's first claim, that his lawyer failed to ensure that his rights to due process and equal protection were not violated, is a variation of his state court claim that his arraignment was defective because the district attorney handed a copy of the information not to Obriecht but to his lawyer and did not read the document aloud in court. This claim fails on habeas from the get-go because it alleges at most a violation of Wisconsin law; such claims are not the proper subject of a federal habeas petition. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"). Perhaps there might have been due process concerns if Obriecht's lawyer then and there had attempted to enter a guilty plea, but that did not happen. Counsel entered a not guilty plea on Obriecht's behalf. Obriecht does not contend that he was not informed of the charges against him at some point before he entered his plea. Obriecht's complaints of technical defects at the initial appearance and arraignment simply fail to allege facts giving rise to any due process or equal protection violation.

Obriecht's remaining claims all stem from his incorrect belief that in order to convict him of escape, the state had to prove the legality of the sentence for which he was in custody when he escaped. He contends that his plea to the escape charge was not voluntary because neither his lawyer nor the trial court informed him of this and that his postconviction lawyer was ineffective for failing to pursue a motion for plea withdrawal on this basis.

The state trial court found Obriecht's claim of defects in his predicate conviction too unspecific to warrant an evidentiary hearing on his plea withdrawal or ineffective assistance

of counsel claims. This was not an unreasonable conclusion: even now, Obriecht avers merely that he "never pled" to the charges in 96-CR-2331 and therefore "there was no conviction." Appendix to Pet., dkt. 1, at 39. Obriecht's vague and conclusory allegations fail to set out facts from which a court could discern the existence of a viable attack on the conviction in 96-CF-2331.

In any case, there is a more fundamental reason why the state courts were correct to deny Obriecht's claims: Obriecht's contention that his underlying conviction was subject to challenge in the escape prosecution is simply wrong. These are the elements of the escape charge that the state had to prove:

> 1) Obriecht was in custody;
>
> 2) the custody was the result of being sentenced for a crime:
>
> 3) Obriecht escaped from custody; and
>
> 4) the escape from custody was intentional.
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> Wisconsin Jury Instructions -- Criminal 1774 Escape From Custody: Jail or Prison Escape – § 946.42(3)(a).

Contrary to Obriecht's contention, the state did *not* have to prove that the custody from which he escaped was the result of a "lawful" conviction or sentence. In fact, Wisconsin's Jury Instruction Committee expressly rejected that notion, indicating that "the legality of the underlying conviction and sentence is not an issue where the charge is escape after conviction or sentence . . . it should be no defense that the defendant's underlying conviction is subject to challenge." Wis JI--Criminal 1774 n. 4.

This position is shared by the majority of federal and state courts. *See United States v. Cluck*, 542 F.2d 728, 732 (8th Cir. 1976) ("If an individual is in custody under process issued pursuant to the laws of the United States, he cannot test the underlying validity or propriety of his confinement by escaping from it")(citing federal cases); *State v. Pace*, 402 S.W.2d 351, 353 (Mo.1966) (defendant's innocence on original charge, invalidity of original information or indictment, acquittal, or reversal of conviction on appeal not defense to charge of escape) (citing cases); *People v. Hill*, 17 Ill.2d 112, 160 N.E.2d 779, 781 (1959) (same); and cases collected at 27A Am. Jur. 2d Escape 11, at 758 (1996); *but see People v. Alexander*, 39 Mich. App. 607, 197 N.W. 2d 831 (1972) (allowing prisoner to present evidence showing that at time he escaped from prison, sentence had expired); *State ex rel. Robison v. Boles*, 149 W. Va. 516, 142 S.E. 2d 55, 57 (1965) (escape from imprisonment under judgment void at its inception for failure of state to provide defendant with counsel did not constitute offense).

Therefore, Obriecht is wrong when he asserts that the legality of his underlying conviction was an element of the crime of escape about which he should have been informed by his lawyer and the trial court prior to entering his plea. Because this is the only aspect of the charge that Obriecht contends he did not understand, there is no foundation for his claim that his plea was not knowing or voluntary. Obriecht asserts that the trial court failed in other ways to adhere to the state's procedure for accepting guilty pleas, but those omissions do not, alone, establish a constitutional violation. *See State v. Bangert*, 131 Wis.

2d 246, 260, 389 N.W. 2d 12, 20 (1986) (protections afforded by Wis. Stat. § 971.08 not mandated by federal constitution); *McCarthy v. United States*, 394 U.S. 459, 465 (1969) (holding same with respect to Fed. R. Crim. P. 11). Similarly, neither trial nor postconviction counsel could have been ineffective for failing to pursue a frivolous defense.[1]

For what it's worth, even if it had been the state's burden to establish the legality of the conviction giving rise to the custody from which Obriecht escaped, the state easily could have proved this element beyond a reasonable doubt. Obriecht appealed his convictions in 96-CF-2331 on a number of grounds, including a claim that his plea was invalid. In a decision issued February 3, 2000, seven months before Obriecht absconded, the court of appeals rejected Obriecht's claims and affirmed the convictions. *State v. Obriecht*, no. 99-1626-CR (Dist. IV Feb. 3, 2000), *pet. for review denied* June 13, 2000, attached to State's Resp. to Pet., dkt. 9, Exh. J.

In sum, the state courts correctly determined that Obriecht had failed to show that his plea was involuntary or that his lawyers were ineffective. All that remains is Obriecht's claim that his conviction is void because the complaint failed to allege that he escaped from a "lawful" sentence, but this is simply another offshoot of his misunderstanding of the escape statute. Like his other claims, it has no merit. Obriecht is not entitled to habeas relief.

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[1] Obriecht contends that he should not have to show that he was prejudiced by his postconviction lawyer's conduct because that lawyer was operating under a "direct" conflict of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980) (defendant who shows that conflict of interest actually affected lawyer's performance need not demonstrate prejudice). The alleged conflict he identifies is his lawyer's alleged statement that he would not investigate Obriecht's claim because he was an atheist and Obriecht is not. Obriecht's unsworn, self-serving and inherently incredible declaration fails to establish an actual conflict of interest.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the petition of Andrew Obriecht for a writ of habeas corpus be DENIED.

Entered this 21st day of November, 2005.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge

November 21, 2005

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Re: Obriecht v. Bartow
Case No. 05-CR-489-C

Dear Mr. Obriecht and Ms. Moeller:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before December 9, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by December 9, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,
/s/
Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge