

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

MICHAEL D. MASON,

Petitioner,

OPINION AND ORDER

v.

05-C-0615-C

DANIEL BENIK, Warden,
Stanley Correctional Institution,

Respondent.

Michael D. Mason, an inmate at the Stanley Correctional Institution, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is in custody pursuant to a December 11, 2002 judgment of conviction entered by the Circuit Court for Dane County on charges of armed burglary, two counts of armed robbery, possession of a firearm by a felon and second-degree recklessly endangering safety. He contends that his custody is in violation of the laws and Constitution of the United States because his lawyer was ineffective for failing to demand a speedy trial and failing to contest the state's use of a 1999 Illinois conviction as a basis for a "repeater" enhancement. In addition, petitioner contends that the trial court erred at sentencing by considering inaccurate information and by punishing him for exercising his right to a jury trial.

Petitioner has exhausted his state court remedies by presenting all of these claims to the state court of appeals and supreme court. The last state court to adjudicate the claims

on the merits was the court of appeals, which determined that the claims had no factual support in the record. Having reviewed that court's decision and the record of the proceedings in this case, I agree that petitioner's claims have no valid factual basis. Accordingly, I must dismiss the petition.

The following facts are drawn from the exhibits attached to respondent's answer.

FACTS

The crimes for which petitioner was convicted stem from a home invasion and armed burglary in the City of Madison on April 18, 2001. On that day, petitioner and an individual named Ronald Mahan entered the home of Ernest Brooks and Salone Purifoy wearing masks and carrying handguns. A third man, petitioner's brother, George Mason, waited outside in a car. Petitioner and Mahan cornered Brooks and Purifoy in the bedroom, struck them about the face and head with their pistols and demanded money. Petitioner dragged Purifoy down to the basement where he fired a shot into the floor, causing bullet fragments to lodge in Purifoy's legs. The burglary effort fizzled when Brooks escaped by jumping off a balcony, prompting petitioner and Mahan to exit the home and run to the car where George Mason was waiting. The car sped off, but not before Purifoy was able to get a look at it and describe it and its occupants to a 911 dispatcher. A police chase ensued and petitioner, George Mason and Mahan were caught.

The state charged petitioner with armed burglary, two counts of armed robbery, possession of a firearm by a felon, and second-degree recklessly endangering safety. The state also alleged that he was a “repeater” under Wis. Stat. § 939.62(2), which subjected him to an enhanced sentence on each charge if convicted. Petitioner and his brother went to trial; Mahan entered a plea and testified for the state at trial. The jury convicted petitioner of all five counts.

At sentencing, the state proved its repeater allegation with a certified copy of a 1999 judgment of conviction in Illinois for possession with intent to deliver cocaine. Petitioner’s lawyer did not challenge the conviction as a basis for the repeater enhancement. However, he did object to a comment in the presentence investigation report that described petitioner as a “sociopath,” noting that the comment had been made by a police detective not qualified to make psychiatric diagnoses. The court responded: “Okay. That is a he-said-she-said-they-said. But I appreciate where you are coming from.” Counsel also argued that petitioner had accepted responsibility for his crimes. He pointed out that although petitioner did not admit his guilt until after he was convicted, he had not testified or presented any evidence at trial but went to trial merely to make the state prove its case.

The court sentenced petitioner to concurrent terms of 25 years each on the armed burglary and robbery counts; five years concurrent on the felon-in-possession count; and six years concurrent on the recklessly endangering safety count. In its comments before announcing its sentence, the court stated: “I am not punishing you for going to trial. But

until a jury announced their verdict, which didn't take them very long to do, you didn't accept responsibility. And now you have."

The state public defender's office appointed a lawyer to represent petitioner on appeal. That lawyer determined that there were no meritorious issues for appeal and filed a "no-merit" brief in the state court of appeals. Petitioner filed a response to his attorney's no-merit report, in which he raised the following claims: 1) his first trial lawyer was ineffective for failing to file a speedy trial demand on his behalf; 2) his second trial lawyer was ineffective for failing to argue that petitioner's 1999 felony conviction in Illinois could not serve as a basis for convicting him as a repeater; 3) the trial court's sentence was based in part upon inaccurate information in the presentence report -- namely, the description of petitioner as a "sociopath" -- and on the fact that petitioner had exercised his right to a jury trial. With respect to the repeater claim, petitioner argued that the Illinois conviction could not support the repeater enhancement because the documents submitted by the state did not indicate that defendant had a lawyer during his plea and sentencing in that case and because possession with intent to deliver would not be a "serious felony" in Wisconsin.

In a decision issued January 10, 2005, the Wisconsin Court of Appeals rejected petitioner's claims and affirmed his conviction. With respect to petitioner's claim that his lawyer had not filed a speedy trial demand, the court found:

In his response to the no-merit report, Mason contends that his first trial counsel was ineffective because he failed to honor Mason's request to demand a speedy trial. The record shows that trial was scheduled to begin six months after the State first charged Mason. The reason Mason did not receive

a trial on the scheduled date was the fact that he choose [sic] to discharge his first trial counsel. It was that decision to seek replacement counsel that caused postponement of the trial until fourteen months after Mason was charged. A request for a speedy trial would not have avoided the delay between September 2001 and June 2002. Once Mason finally demanded a speedy trial in March 2002, he received one.

State v. Mason, 04-0471-CRNM (Jan. 10, 2005) (unpublished opinion), attached to Answer, dkt. #7, exh. E, at 5.

The court also found no merit to petitioner's claim that his lawyer should have objected to the 1999 Illinois conviction as the basis for the repeater enhancement on the ground that it was an "uncounseled" prior conviction. The court found that, contrary to petitioner's contention, "[t]he certified judgment of his Illinois conviction states that he was, in fact, represented during that proceeding, and identifies his attorney by name." Id., at 5. As for his claim that his Illinois conviction would not constitute a "serious felony" in Wisconsin, the court noted that proof of a "serious felony" was required only to establish "persistent repeater" status under Wis. Stat. § 939.62(2)(m)(b). It pointed out that petitioner was sentenced under the garden variety repeater statute, § 939.62(2), which required only that he had been convicted of a felony within five years of committing the charged offense. Id.

Finally, the court found no merit to petitioner's suggestion that the court's sentence depended upon either the "sociopath" remark in the presentence report or on petitioner's decision to go to trial. The court noted that the sociopath remark was a statement of opinion, not fact, and there was no evidence that the court had considered it. As for

petitioner's decision to go to trial, the appellate court acknowledged that the trial court had noted that petitioner had not taken responsibility for his crimes until after the jury found him guilty; however, the court found that the trial court's remarks were made in response to petitioner's argument that he should receive leniency because he had accepted responsibility for his crimes. The appellate court noted that the trial court had stated expressly that it was not punishing petitioner for going to trial. Id., at 6.

Petitioner filed a petition for review in the Wisconsin Supreme Court in which he raised the same four claims. The Wisconsin Supreme Court denied review. Petitioner then filed the instant habeas petition, in which he raises the same four claims he presented to the state court of appeals.

OPINION

Petitioner's claims require little discussion. The state court of appeals rejected each claim on the ground that it was not supported by the facts of record. Having independently reviewed the record of the state court proceedings, I agree with the conclusions reached by the court of appeals. Petitioner's decision to hire a new lawyer caused the lion's share of the delay between charging and trial; the trial court's sentence was not based upon consideration of any inaccurate or inappropriate facts; and proof of a "serious felony" was not required in order to establish petitioner's repeater status because he was not alleged to have been a "persistent repeater." Because the appellate court's factual determinations were correct, it

follows that they cannot be “unreasonable,” as they must be before petitioner can obtain habeas relief. 28 U.S.C. § 2254(d)(2) (federal court may not grant state prisoner’s habeas application unless state court’s adjudication of his claim resulted in decision that was based on unreasonable determination of facts in light of evidence presented in state court proceeding).

The only factual determination made by the state appellate court that I am unable to review is its finding that petitioner was represented by a lawyer during his plea and sentencing on the Illinois conviction. The court made its determination from a copy of the judgment of the Illinois conviction, which has not been included in the record provided to this court. However, pursuant to § 2254(e)(1), the state court’s findings of fact are presumed correct, and it is the petitioner’s burden to show by clear and convincing evidence that the state court’s factual determinations were incorrect. Harding v. Walls, 300 F.3d 824, 828 (7th Cir. 2002). Petitioner has not adduced any evidence to show that the court of appeals was wrong when it found that he had been represented by a lawyer when he was convicted of the crime that formed the basis of the state’s repeater allegation. In his response to the state’s answer, petitioner avers generally that the state court’s factual determinations are contradicted by “clear and convincing evidence” in the record, but he has not identified that evidence or even marshaled a single argument in opposition to the state court’s findings. His failure to identify or adduce any evidence to rebut the state appellate

court's factual findings means that this court must accept those findings, including its finding that petitioner was represented in connection with the 1999 Illinois conviction.

Having shown no valid factual basis for any of his claims, much less that the findings of the state court of appeals were "unreasonable," petitioner is not entitled to a writ of habeas corpus.

ORDER

IT IS ORDERED that the petition of Michael Mason for a writ of habeas corpus is DISMISSED WITH PREJUDICE.

Entered this 17th day of March, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

UNITED STATES DISTRICT COURT
Western District of Wisconsin

MICHAEL D. MASON,

JUDGMENT IN A CIVIL CASE

Petitioner,

05-C-615-C

v.

**DANIEL BENIK, Warden,
Stanley Correctional Institution,**

Respondent.

This action came for consideration before the court with U. S. District Judge Barbara B. Crabb presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the petition of Michael Mason for a writ of habeas corpus is DISMISSED WITH PREJUDICE.

THERESA M. OWENS

Theresa M. Owens, Clerk

Connie A. Korth

03/17/06

by Deputy Clerk

Date