

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

---

TIMOTHY SCOTT BAILEY SMITH,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

---

ORDER

05-C-0653-C

Petitioner Timothy Scott Bailey Smith seeks to appeal this court's November 16, 2005 judgment dismissing his application for a writ of habeas corpus and its December 14, 2005 order denying his motions for reconsideration, appointment of counsel and a temporary restraining order or preliminary injunction. Because petitioner has not paid the \$255 filing fee, I construe his notice of appeal as a motion for leave to appeal in forma pauperis.

From the affidavit of indigency that is in the file, I find that petitioner is unable to prepay the fees and costs of the appeal or post security therefor and therefore is indigent for the purposes of 28 U.S.C. § 1915. However, petitioner is not entitled to proceed in forma pauperis on appeal unless this court finds that he is taking his appeal in good faith. 28 U.S.C. § 1915(a)(3). In addition, 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.

I find that petitioner is not entitled to a certificate of appealability or to proceed in forma pauperis on appeal.

To find that an appeal is in good faith, a court need find only that a reasonable person could suppose the appeal has some merit. Walker v. O'Brien, 216 F.3d 626, 631-32 (7th Cir. 2000). However, 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)).

In reviewing the petition, I discerned five potential bases for petitioner’s claim that his custody resulting from his state court conviction for failure to pay child support is unlawful: 1) errors were committed during state court extradition proceedings; 2) the evidence was insufficient to support his conviction because a copy of a Maine support order was not properly authenticated under 28 U.S.C. § 1738; 3) appellate counsel was ineffective for failing to adequately support his arguments with case law; 4) the trial court deprived petitioner of his right to have the jury determine guilt on all elements of the offense by virtue of its conclusion that whether the underlying child support order was issued by a “court of competent jurisdiction” was not an element of the crime of failure to pay child support; and

5) the trial court's refusal to allow petitioner to raise a collateral attack on the Maine support order or present evidence to the jury attacking its validity deprived petitioner of his right to present a defense. In the order dismissing his habeas petition and again in the order denying his motion for reconsideration, I explained at length why petitioner's challenges to his extradition from Florida to Wisconsin to face charges for failure to pay child support, the admission at trial of a child support order entered by a Maine court and the state supreme court's construction of its own child support statute were at most state law claims not cognizable in a petition for federal habeas relief. Having reviewed those orders, I am confident that no reasonable jurist would debate the conclusion that none of these three claims give rise to the denial of a constitutional right.

Although the remaining two claims have a constitutional core, the facts underlying each of those claims fail to establish substantially the denial of a constitutional right. As explained in the order denying the habeas petition, petitioner's claim of ineffective assistance of appellate counsel cannot succeed insofar as it does not rest on any alleged failure by counsel to raise any potentially meritorious issue, but rather on petitioner's disagreement with his lawyer about the manner in which he presented the issues that were raised. In fact, the record shows that appellate counsel was very effective, having obtained a reversal of petitioner's conviction from the state court of appeals. Petitioner's contention that he would have won again before the Wisconsin Supreme Court if only his lawyer had argued his case

better is too speculative to present a viable claim of ineffective assistance of appellate counsel. He has not alleged facts showing substantially the denial of a constitutional right.

As for petitioner's claim that he should have been allowed to attack the validity of the Maine support order, documents attached to the petition confirm that the state supreme court was correct when it found that petitioner had already waged such an attack in Maine. It was also correct when it found that petitioner was barred by *res judicata* from relitigating that issue in the context of the Wisconsin prosecution. Reasonable jurists would not disagree that *res judicata* applies to jurisdictional matters or that the record before the state supreme court showed that petitioner had litigated that matter in a prior proceeding. Like his other claims, petitioner's "collateral attack" claim is so lacking in merit that petitioner should not be encouraged to proceed further.

Having concluded that petitioner is not entitled to a certificate of appealability, I turn then to defendant's request for leave to proceed in forma pauperis on appeal. Applying the lower standard applicable to this request, I conclude that defendant is not proceeding in good faith. Although some of his claims might have been debatable in the state courts, they have no place in federal court for the reasons explained above and in previous orders of this court. Petitioner's insistence in pursuing claims that lack either a federal constitutional foundation or a plausible factual basis is not in good faith.

ORDER

IT IS ORDERED THAT:

1. Petitioner's request for a certificate of appealability is DENIED.
2. Petitioner's request for leave to proceed in forma pauperis on appeal is DENIED.

Entered this 2nd day of February, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB  
District Judge