

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

ALGEN M. LAMON,

Petitioner,

MEMORANDUM and ORDER

v.

06-C-176-S

RICHARD SCHNEITER,

Respondent.

Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Respondent filed a response on May 19, 2006. Petitioner has filed his reply on May 31, 2006.

FACTS

Petitioner was convicted of kidnaping and operating a motor vehicle without the owner's consent, both counts as a party to a crime and as a repeat offender after a jury trial in Rock County on July 18, 2001. On September 11, 2001 he was sentenced to 15 years in prison and 10 years extended supervision on the kidnaping with a concurrent two years in prison and one year supervision for operating a motor vehicle without consent.

Petitioner filed an appeal claiming that his trial counsel was ineffective for not moving to sever a felon-in-possession of a firearm charge, of which petitioner was acquitted, from the remaining charges. The Court of Appeals affirmed petitioner's

conviction on April 22, 2004. The Wisconsin Supreme Court denied his petition for review on September 1, 2004.

Petitioner filed a post conviction motion in Rock County Circuit Court on November 16, 2004 claiming ineffective assistance of postconviction counsel. He contended that his counsel had failed to challenge the legality of his arrest because it had been based on a statement obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). The trial court denied the motion.

On June 3, 2005 petitioner filed another postconviction motion claiming that his appellate counsel was ineffective for not arguing that his trial counsel was ineffective for stipulating that petitioner had been convicted of a felony for the purposes of the felon-in-possession of a firearm charge. The trial court denied the motion. On December 22, 2005 the Court of Appeals summarily affirmed the order of the trial court.

On December 28, 2005 petitioner filed a petition for a writ of habeas corpus in the Wisconsin Supreme Court claiming that his arrest was the result of information obtained in violation of Miranda, that trial counsel was ineffective for not challenging the court's statement to the jury about his felony conviction, that trial counsel was ineffective for not calling an alibi witness, Jerome Terry, at trial and ths his postconviction appellate counsel was ineffective for not raising additional issues on direct appeal.

On February 28, 2006 the Wisconsin Supreme Court denied petitioner's petition for a writ of habeas corpus ex parte.

MEMORANDUM

Petitioner claims his arrest was obtained as a result of information obtained in violation of Miranda. He also claims that his trial counsel was ineffective for not calling an alibi witness and for introducing his previous conviction. In addition he claims that his appellate counsel was ineffective for not raising these issues on his direct appeal.

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).

Petitioner claims his arrest was obtained as a result of information obtained in violation of Miranda. The trial court suppressed petitioner's post-arrest custodial statement on the ground that the investigating officer failed to give petitioner his Miranda warnings. The trial Court also found in its January 5,

2005 decision that petitioner made incriminating statements to a Beloit police officer on the telephone which did not violate Miranda because the statements were non-custodial. The Court concludes after a review of the record that the state court's decision was 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 this claim will be dismissed with prejudice.

Petitioner also claims his trial counsel was ineffective because he failed to call an alibi witness and introduced petitioner's prior felony conviction. To establish ineffective assistance of counsel, petitioner must show that his counsel's performance was ineffective and that such performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984).

A review of the record indicates that these strategic decisions by petitioner's counsel were not deficient performances. To deny a felony conviction which is a matter of record would only have unduly prejudiced petitioner's case. Petitioner's petition for a writ of habeas corpus on this claim will be dismissed with prejudice.

Petitioner also argues that his appellate counsel was ineffective for failing to raise certain issues on appeal. It is appellate counsel's duty to decide what issues have merit for appeal. Jones v. Barnes, 463 U.S. 745, 751-753 (1983).

Accordingly, petitioner's appellate counsel's performance was not deficient. Petitioner's petition for a writ of habeas corpus on this claim will be dismissed.

Petitioner's petition for a writ of habeas corpus will be dismissed with 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 1st day of June, 2006.

BY THE COURT:
S/

JOHN C. SHABAZ
District Judge