

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

BRIAN R. LOCKE,

Petitioner,

MEMORANDUM and ORDER

v.

06-C-196-S

GREGORY GRAMS,

Respondent.

Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States Court for the Eastern District of Wisconsin which was transferred to this Court. Respondent filed a response on May 12, 2006. Petitioner filed his reply on June 5, 2006.

On May 30, 2006 the Court issued an order for respondent to show cause why petitioner was not able to copy his documents. Respondent responded on June 5, 2006. Petitioner submitted the documents together with his reply.

FACTS

Petitioner Brian R. Locke is currently in custody at the Columbia Correctional Institution, Portage, Wisconsin. He was convicted in Dane County Circuit Court on December 23, 2002 of two

counts of battery, one count of battery to a law enforcement officer and two counts of resisting or obstructing an officer, all with habitual criminality penalty enhancers. He was sentenced to a total of 11 years in prison on these charges.

Petitioner appealed his convictions and his appellate counsel filed a no-merit report pursuant to Anders v. California, 386 U.S. 738 (1967). Petitioner responded to the report claiming that his trial counsel was ineffective. On April 7, 2004 the Wisconsin Court of Appeals affirmed petitioner's judgment of conviction. The Court specifically rejected petitioner's ineffective assistance of counsel claim.

In 22004 petitioner filed post-conviction motions in Dane County Circuit Court. They were denied. On September 28, 2004 the trial court concluded that petitioner's convictions did not violate the Double Jeopardy Clause.

Petitioner appealed the denial of his October 15, 2004 motion arguing that his two battery convictions and two resisting an officer convictions violated the constitutional prohibition against double jeopardy. The Wisconsin Court of Appeals affirmed the circuit court order concluding that petitioner's claims were barred by State v. Escalona-Naranjo, 185 Wis. 2d 168, 185, 517 N.W. 2d 157, 161 (1994), because he could have raised them on direct appeal and did not provide sufficient reason for failing to do so.

Petitioner's petition for review to the Wisconsin Supreme Court was dismissed as untimely.

MEMORANDUM

Petitioner claims that his counsel was ineffective and that his convictions violated the Double Jeopardy Clause.

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 counsel was ineffective. 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). The Court of Appeals found as follows:

Based on the record, Locke's statements at sentencing that he was satisfied with the representation afforded by trial counsel and the lack of merit to the contentions in Locke's response to counsel's no-merit report, we conclude that Locke has not shown that an ineffective assistance claim would have arguable merit.

The Court concludes after a review of the record that this decision was neither contrary to clearly established law nor based on an unreasonable determination of the facts. The Court also finds de novo that petitioner's counsel was not ineffective. Accordingly, petitioner's petition for a writ of habeas corpus on this claim will be dismissed with prejudice.

Petitioner claims that his convictions violated the Double Jeopardy Clause. The Wisconsin Court of Appeals held that this claim was barred by State v. Escalona-Naranjo, 185 Wis 2d at 185, because petitioner had not previously raised it in his appeal or provided a sufficient reason for failing to do so.

This Court cannot address the merits of petitioner's Double Jeopardy claim unless petitioner demonstrates cause for default and resulting prejudice. Page v. Frank, 343 F.3d 901., 905 (7th Cir. 2003). Petitioner has not demonstrated either cause or prejudice. Accordingly, petitioner's petition for a writ of habeas corpus on this claim will be dismissed with prejudice.

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).

Locke v. Grams, 06-C-196-S

ORDER

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

Entered this 13th day of June, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge