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

TODD DAGNALL,

Petitioner, ORDER

v. 06-C-0433-C

PHILLIP KINGSTON, Warden,
Waupun Correctional Institution,

Respondent.

Todd Dagnall has filed a notice of appeal from this court's judgment entered January 10, 2007 and order denying reconsideration entered February 1, 2007. Petitioner requests the issuance of a certificate of appealability and for permission to proceed in forma pauperis.

When reviewing a state habeas petitioner's request for leave to proceed in forma pauperis on appeal, this court must determine whether petitioner is taking his appeal in good faith. 28 U.S.C. § 1915(a)(3). Then, 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. 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)).

"When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at 484. Thus, "[d]etermining whether a COA should issue where the petition was dismissed on procedural grounds has two components, one directed at the underlying constitutional claims and one directed at the district court's procedural holding." Id. at 484-85.

Petitioner's claim in this case has been a moving target. When petitioner initially filed his petition on August 10, 2007, he alleged that his trial lawyer gave him bad advice when he told him not to testify at trial; failed to interview state witnesses Kendra Shulfer and Helen Pullen; and failed to find, interview and subpoena potential defense witnesses Jamie Thompson, Mark Stebbens, Christine Hack, Mike [Doe] and Eric Frosch. Petitioner reiterated these allegations in his amended petition filed September 5, 2006. In both his original and amended petitions, petitioner argued that he was actually innocent of murdering

Norman Gross. To support his claim of actual innocence, petitioner pointed to his putative testimony and that of the above-named witnesses whom counsel allegedly did not call or question properly.

In response to the state's motion to dismiss the petition on the ground that it was untimely or alternatively, that the claims presented were procedurally defaulted, petitioner reiterated his claim of actual innocence. In this submission, however, petitioner for the first time supported his innocence claim with police reports indicating that before petitioner was murdered, Sheila Trentin had approached one and perhaps two men individually and asked them if they would murder Gross for a price. I concluded that petitioner's new claim of innocence was insufficient to toll the one-year limitations period because the Trentin evidence had been available since the time of the murder investigation. Accordingly, I dismissed the petition as untimely.

Petitioner filed a motion for reconsideration in which he claimed that petitioner's lawyer had been ineffective for failing to obtain the Trentin evidence during trial and that petitioner had not obtained the police reports until August 2006. I rejected as incredible petitioner's unsworn assertion that he had been unaware of the content of the reports until August 2006. In addition, I noted that petitioner had failed to explain why he could not have obtained the reports long before August 2006. Finally, I found that petitioner's claim of actual innocence based upon the Trentin evidence was "fanciful at best" in light of the evidence presented at trial, including petitioner's boots with Gross's blood on them and

petitioner's post-arrest statements admitting that he struck Gross in the head several times with a baseball bat.

In support of his request for a certificate of appealability, petitioner has now recast his ineffective assistance of counsel claim as a claim that both his trial and appellate lawyers violated petitioner's right to due process by denying him access to the Trentin reports, which constituted potentially favorable evidence. However, petitioner has presented no evidence showing that either his trial lawyer or appellate lawyer was aware of these reports. More critically, however, petitioner failed to present this claim of ineffective assistance of counsel in any of his prior submissions to this court. Petitioner acknowledges that he had the police reports in August 2006, right around the time he filed his petition, yet he did not articulate this claim of ineffective assistance of counsel until after this court twice rejected his original claim. Accordingly, in deciding whether to grant petitioner's request for a certificate of appealability, I have not considered the new arguments that petitioner makes for the first time in his affidavit.

Considering the record as it existed at the time I denied the petition and petitioner's subsequent motion for reconsideration, I am confident that no reasonable jurist would debate my conclusion that the petition is untimely. The fact that petitioner might not have realized until 2006 that he could obtain reports from the police department does not establish that with due diligence, he could not have discovered the evidence earlier than he did. Further, although the Trentin evidence certainly raises the question whether Trentin

played some role in Gross's death, it does not exonerate petitioner. Indeed, petitioner's claim that the evidence is exculpatory rests on his theory that Trentin hired Murray to kill Gross, and that Murray and Trentin both tricked petitioner into accompanying Murray. However, petitioner has adduced no evidence showing that Trentin actually hired Murray as her hit man and he has not averred that either Trentin or Murray coaxed or coerced him into accompanying Murray to Gross's residence. Indeed, a jury hearing nothing more than that Trentin had been looking to hire a hit man might reasonably infer that *petitioner* had accepted her offer. Further, the fact that Trentin might have wanted Gross dead does not explain away petitioner's post-arrest admissions to a fellow inmate and others that he had killed Gross by striking him several times in the head with a baseball bat.

In sum, reasonable jurists reviewing the evidence would not debate either the conclusion that the Trentin evidence was not exculpatory or the conclusion that petitioner had failed to show that he had been exercising his rights diligently, and that therefore the petition was untimely. In light of this conclusion, it is unnecessary to consider whether petitioner has made a substantial showing of the denial of a constitutional right.

Turning to the question whether petitioner should be allowed to proceed in forma pauperis, I conclude that petitioner is not bringing his appeal in good faith. In light of the substantial if not overwhelming evidence of petitioner's guilt presented at trial and the relative insignificance of the Trentin evidence, reasonable persons could not suppose

petitioner's appeal has any merit. Accordingly, petitioner's request to proceed in forma pauperis will be denied.

ORDER

IT IS ORDERED that:

1. Petitioner's request for a certificate of appealability is DENIED. Pursuant to Fed. R. App. P. 22(b), if a district judge denies an application for a certificate of appealability, the defendant may request a circuit judge to issue the certificate.

2. Petitioner's request for leave to proceed in forma pauperis is DENIED because I certify that his appeal is not taken in good faith. If petitioner wishes to appeal this decision, he must follow the procedure set out in Fed. R. App. P. 24(a)(5).

Entered this 19th day of March, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge