

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

DUANE CARPENTER,

Petitioner,

v.

OPINION AND ORDER

07-C-0259-C

GREG GRAMS, Warden,
Columbia Correctional Institution,

Respondent.

Duane Carpenter, an inmate at the Columbia Correctional Institution in Portage, Wisconsin, has petitioned the court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on May 8, 2007. Petitioner alleges that 1) the trial court erred in allowing the state to introduce evidence of petitioner's prior convictions for impeachment purposes because the convictions were too old; and 2) his right to confrontation was violated by the state's introduction of Jodi Carpenter's preliminary hearing testimony.

Before the court is the state's motion to dismiss the petition in its entirety under 28 U.S.C. § 2244(b) on the ground of procedural default. Respondent contends that petitioner's first claim is procedurally defaulted because petitioner failed to fairly present that claim to the state appellate court and because no avenues now exist in state court by which petitioner could present the claim. Respondent objects to petitioner's second claim

on the ground of procedural default because petitioner failed to preserve it for state appellate review. Because I agree that petitioner has procedurally defaulted both of his claims and because he has not shown that he has satisfied either exception to the default rule, I am granting the motion to dismiss.

From the petition, attachments to the petition, respondent's motion to dismiss and state court records available electronically, I find the following facts.

FACTS

On May 2, 2002, a criminal complaint was filed charging petitioner with one count of kidnapping in violation of Wis. Stat. § 940.31(1)(a) and one count of false imprisonment in violation of Wis. Stat. § 940.30. At the preliminary hearing on May 13, 2002, Jodi Carpenter, the alleged victim and estranged wife of petitioner, testified about events that had occurred on April 29, 2002. After the preliminary hearing, one count of a felon possessing a firearm in violation of Wis. Stat. § 941.29(2)(a) was added as a charge against petitioner. Jodi Carpenter died of natural causes before petitioner's trial.

Trial commenced on February 4, 2004 in the Circuit Court for Shawano County. Jodi Carpenter's preliminary hearing testimony was read into the record at trial without objection. At the request of the defense, Jodi Carpenter's May 2, 2002 police statement also was admitted into evidence at trial for the sake of completeness. Petitioner testified on his own behalf, and other witnesses gave varying accounts of the incident. Because the trial

court denied petitioner's motion in limine to exclude evidence of his prior convictions, petitioner testified on direct examination that he had been convicted of six crimes. On February 5, 2004, the jury found petitioner guilty on all three counts.

On March 8, 2004, the Supreme Court issued its decision in Crawford v. Washington, 541 U.S. 36 (2004), holding that any testimonial out-of-court statements, including prior preliminary hearing testimony, were inadmissible if the accused did not have the opportunity to cross-examine that accuser. Id. at 68. Crawford expanded the scope of the confrontation clause and overruled long-standing precedent. Previously, the statement of an unavailable witness was admissible if it had an adequate "indicia of reliability," a test that was met if the evidence either fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66 (1980).

With the assistance of counsel, petitioner filed a motion for post conviction relief pursuant to Wis. Stat. § 809.30 on December 6, 2004, arguing only that his sentence was unduly harsh. The trial court denied that motion on March 4, 2005. On March 22, 2005, petitioner through counsel filed a notice of appeal of his conviction and the denial of his post conviction motion. On appeal, petitioner argued that the trial court erred by 1) admitting his prior convictions into evidence because they were too old and unfairly prejudicial; 2) admitting into evidence Jodi Carpenter's preliminary hearing testimony in violation of the confrontation clause of the Sixth Amendment; and 3) imposing an unduly harsh sentence. In support of his first argument, petitioner did not raise a federal due process claim or cite

any federal case law in his brief to the state court of appeals or in his subsequent petition for review to the Wisconsin Supreme Court.

On November 15, 2005, the court of appeals affirmed petitioner's conviction, holding that the trial court properly exercised its discretion pursuant to state law in admitting evidence of petitioner's prior convictions. State v. Carpenter, No. 2005AP740-CR, dkt. #1, Attachment 6 at 1-3 (citing State v. Smith, 203 Wis. 2d 288, 295, 553 N.W.2d 824 (Ct. App. 1996); Wis. Stat. § 906.09)). The court of appeals did not determine whether the preliminary hearing testimony was properly admitted, finding that regardless of the new rule announced in Crawford, petitioner did not preserve the issue for appeal because he did not raise an objection at trial as required under Wis. Stat. § 901.03(1)(a). Carpenter, No. 2005AP740-CR at ¶ 5. The Wisconsin Supreme Court denied petitioner's petition for review on February 27, 2006.

OPINION

A. Admission of Prior Convictions

The state's procedural default defense is based upon the "fair presentment" corollary to the federal exhaustion doctrine. The exhaustion doctrine is designed to further federal-state comity by giving the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). For the state courts to have a "full and fair"

opportunity to resolve a federal claim, the petitioner must “fairly present” it, which means that he must “place[] both the operative facts and the controlling legal principles before the state courts.” Chambers v. McCaughtry, 264 F.3d 732, 737 (7th Cir. 2001). To determine whether petitioner has accomplished this, this court must consider whether petitioner’s argument to the state court: 1) relied on pertinent federal cases employing constitutional analysis; 2) relied on state cases applying constitutional analysis to a similar factual situation; 3) asserted the claim in terms so particular as to call to mind a specific constitutional right; or 4) alleged a pattern of facts that is well within the mainstream of constitutional litigation. Verdin v. O’Leary, 972 F.2d 1467, 1473-74 (7th Cir. 1992). This is not a rigid formulation but an approach designed to determine whether the petitioner identified the substance of the federal claim clearly enough for the state court to have adjudicated it. Id. at 1474.

Petitioner apparently does not refute the fact that he procedurally defaulted his claim. In his response brief, he concedes that he did not rely on federal cases in his state appellate brief. Dkt. #10 at 2. Petitioner also does not assert that he relied on state cases applying a constitutional analysis, asserted the claim in terms that would call to mind his due process rights or alleged a pattern of facts that is necessarily indicative of constitutional litigation. Id. In its decision, the court of appeals denied petitioner’s claim solely on the basis of state law. Accordingly, I find that petitioner procedurally defaulted his claim related to the admission of his prior convictions.

Where a petitioner commits state court procedural default, the federal court must deny the defaulted claim with prejudice, thereby foreclosing petitioner's opportunity for federal review of the claim, unless the petitioner can show (1) cause for the default and prejudice resulting therefrom; or (2) a miscarriage of justice would result if the claim were not entertained on the merits. Perruquet v. Briley, 390 F.3d 505, 514 (7th Cir. 2004) (citing Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Murray v. Carrier, 477 U.S. 478, 495-96 (1986)). To establish cause, "a petitioner ordinarily must show that some external impediment blocked him from asserting his federal claim in state court"; to establish prejudice, he must show that the errors "worked to his actual and substantial disadvantage, infecting his entire trial." Id. at 514-15. Alternatively, to show a miscarriage of justice, a petitioner "must demonstrate that he is actually innocent of the crime for which he is convicted—that is, he must convince the court that no reasonable juror would have found him guilty but for the error(s) allegedly committed by the state court." Id. at 515 (citing Schlup v. Delo, 513 U.S. 298, 327-29 (1995)). To make such a showing, a petitioner must support his allegations with powerful evidence, such as new reliable evidence that was not presented at trial. Schlup, 513 U.S. at 324 (noting that claims of actual innocence rarely succeed because such evidence is unavailable in vast majority of cases); Hayes v. Battaglia, 403 F.3d 935, 938 (7th Cir. 2005).

Petitioner's sole argument is that it would be a miscarriage of justice to dismiss his claim on the ground of procedural default. However, petitioner does not provide any

support for his argument, stating only that he is relying on “the previous submission in order to support the contention.” Dkt. #10 at 2. The only other submission from petitioner was his habeas petition, which did not discuss the miscarriage of justice exception and contains nothing more than general assertions of his innocence and his own version of the events. Dkt. #1. As a result, petitioner has not made the requisite showing to establish that a miscarriage of justice would result if his claim was not decided on the merits.

B. Admission of Preliminary Hearing Testimony

Respondent argues that petitioner procedurally defaulted his confrontation clause claim by not objecting at trial to the introduction of Jodi Carpenter’s preliminary hearing testimony or police statement. Under the procedural default doctrine, a federal court cannot review a question of federal law decided by a state court if the decision of the state court rests on a state procedural ground that is independent of the federal question and adequate to support the judgment. Perruquet, 390 F.3d at 514; Moore v. Bryant, 295 F.3d 771, 774 (7th Cir. 2002). A state ground is “independent” of the federal claim if the state court “actually relied on a state rule sufficient to justify its decision.” Prihoda v. McCaughtry, 910 F.2d 1379, 1382 (7th Cir. 1990). “A state ground is ‘adequate’ only if the state court acts in a consistent or principled way.” Id. at 1383.

The court of appeals did not adjudicate petitioner’s federal claim, instead relying on Wis. Stat. § 901.03(1)(a) to deny it. Section 901.03(1)(a), which provides that an

evidentiary ruling cannot be found erroneous unless the party makes a timely objection or motion to strike, is both independent and adequate to support the court of appeals' decision. The court of appeals clearly noted that "[m]aking objections that are overruled is a prerequisite for challenging evidentiary rulings on appeal." Carpenter, No. 2005AP740-CR at ¶ 5. As respondent notes, Wisconsin courts have consistently enforced the contemporaneous objection rule since it became part of the state rules of evidence in 1974. E.g., State v. Erickson, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999); State v. Agnello, 226 Wis. 2d 164, 172-73, 593 N.W.2d 427, 430 (1999); State v. Gove, 148 Wis. 2d 936, 940-41, 437 N.W.2d 218, 220 (1989) (even constitutional claims waived unless timely raised in trial court).

Petitioner points out that a Wisconsin court of appeals recently heard a defendant's confrontation clause claim on direct appeal even though the defendant had not objected to the admission of the statement at trial. See State v. Savanh, 287 Wis. 2d 876, 883 n.2, 707 N.W.2d 549, 552 n.2. In Savanh, the court of appeals noted in a footnote that defendant could not have raised a confrontation clause claim under Crawford at trial because that case had not yet been decided. Id. The court then stated that "[e]ven so, we may consider a constitutional issue raised for the first time on appeal if it is in the best interests of justice to do so, both parties have had the opportunity to brief the issue and there are no factual issues to resolve."

Wisconsin courts have the discretion to overlook a defendant's failure to object at trial under the "plain error" doctrine or in the interests of justice, particularly when a defendant is *pro se*. State v. Neuser, 191 Wis.2d 131, 140, 528 N.W.2d 49 (Ct. App. 1995) (court may overlook waiver where error is so plain or fundamental as to affect defendant's substantial rights); Wis. Stat. § 752.35 (court of appeals may grant new trial in interests of justice where real controversy has not been fully tried or there is substantial degree of probability that miscarriage of justice has occurred). However, the willingness of the state courts to excuse compliance with state procedural rules on some occasions but not others does not alone render the state rule inadequate. Prihoda, 910 F.2d at 1383-84; see also Miranda v. Leibach, 394 F.3d 984, 996-97 (7th Cir. 2005) (discussing Prihoda and holding that appellate court did not blind-side defendant or invoke state waiver rule in unprincipled or discriminatory way). Even if not strictly followed, a state ground will be respected if it is "solidly established," in other words, if it is not regularly disregarded or manufactured seemingly for the occasion. Prihoda, 910 F.2d at 1384. As the court explained in Prihoda, "[a]ny other approach would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disable the state from enforcing its procedural rules with respect to many others." Id. Thus, where, as in this case, "the *only* ground given is procedural the federal court must respect it, even though in some other cases the state court ignores the potential procedural basis and addresses the merits." Id. (emphasis in original).

As respondent notes, in the recent cases of State v. Hale, 277 Wis. 2d 593, 610, 691 N.W.2d 637, 646 (2005) and State v. Stuart, 279 Wis. 2d 659, 672, 659 N.W.2d 259, 265 (2005), the Wisconsin supreme court noted that the criminal defendant could retroactively benefit from Crawford *because he properly preserved the confrontation issue* and his case was still on direct appeal. Although, as petitioner argues, the Wisconsin supreme court decided these cases after petitioner's trial, its holdings show that the contemporaneous objection rule is solidly established even in cases where a defendant did not have the benefit of Crawford at trial.

Petitioner's primary argument is that he had cause for procedurally defaulting his claim because Crawford had not yet been decided. According to petitioner, any objection to the introduction of the preliminary hearing testimony would have been frivolous because there was "no basis in law to object." Dkt. #10 at 3. The court of appeals rejected this excuse, stating that "[a] subsequent change in the law does not relieve a party of his obligation to make a contemporaneous objection to preserve an issue for appeal." Carpenter, No. 2005AP740-CR at ¶ 5.

The court of appeals' ruling was correct. A change in the law relating to the test for admissibility of hearsay evidence does not excuse a petitioner's duty to object to the admission of it at trial. In order to establish cause, petitioner must show that an external impediment blocked him from asserting his federal claim in state court. Even though Crawford had not been decided, nothing prevented petitioner from objecting at trial to the

introduction of the preliminary hearing testimony on the grounds that it violated his rights under the confrontation clause. Moore v. Casperson, 345 F.3d 474, 487-88 (7th Cir. 2003) (holding that reliance on erroneous federal circuit law was not cause to excuse failure to comply with new rule that was applied retrospectively because petitioner could have raised claim under old law). Accord Hale, 277 Wis. 2d at 610, 691 N.W.2d at 646 (noting criminal defendant could retroactively benefit from Crawford *because* conviction not yet final and constitutional issue properly preserved); Stuart, 279 Wis. 2d at 672, 659 N.W.2d at 265 (same). Contrary to petitioner's assertions, there was a basis in law for objecting to the admission of a statement of an unavailable witness. Even if he was unlikely to prevail, petitioner could have argued that Jodi Carpenter's testimony did not have adequate indicia of reliability under Ohio v. Roberts. State v. Bauer, 109 Wis. 2d 204, 212, 325 N.W.2d 857 (1983), abrogation recognized by Stuart, 279 Wis. 2d at 671, 695 N.W.2d at 265 (although reliability of evidence firmly rooted in hearsay exception can be inferred, evidence is not admissible per se; court must still evaluate trustworthiness on case-by-case basis). Because petitioner has not offered any other reason for his default, he has failed to establish cause.

Finally, petitioner asserts that Crawford abolished the procedure applied at trial in his case, and to overlook that fact would lead to a fundamental miscarriage of justice. However, as with his first claim, petitioner does not cite any evidence to support a determination that he is actually innocent of the crimes of which he was convicted.

Accordingly, I find that petitioner has not satisfied either exception to the procedural default doctrine with respect to his confrontation clause claim.

ORDER

IT IS ORDERED that the petition of Duane Carpenter for a writ of habeas corpus under 28 U.S.C. § 2254 is DISMISSED WITH PREJUDICE on grounds of procedural default.

Entered this 22nd day of August, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge