

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

BARRY L. BALL,

Petitioner,

ORDER

v.

07-cv-670-bbc

RICHARD J. RAEMISCH, Secretary of
the Wisconsin Department of Corrections,

Respondent.

Before the court is Barry Ball's request for leave to proceed *in forma pauperis* on appeal and request for a certificate of appealability from this court's judgment entered June 19, 2008 denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254.

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)).

Petitioner seeks a certificate of appealability with respect to his claim that in bringing disciplinary charges against him, prison officials relied on information from confidential informants and did not identify the date, time or location of his alleged misconduct in violation of his right to fundamental due process. This court reviewed the claim on the merits. I adopted the magistrate judge's report, finding that the state court of appeals did not make an unreasonable decision when it found that the disciplinary committee provided petitioner due process in the particular circumstances before it. Although the committee did not identify the informants or the times and places of the alleged sexual encounters between petitioner and his cellmate, it did not have to. In Ponte v. Real, 471 U.S. 491 (1985), the Supreme Court approved the withholding of inmate identities if prison security interests required it. I found that Ponte plainly would allow the withholding of dates and locations of alleged misconduct if the inmate had sufficient information to enable him to contest the charges against him. As noted by the state court of appeals, the disciplinary committee provided petitioner with summaries of the informants' statements about the assault of his cellmate, Shawn Weaver. Further, because petitioner knew how long and when he had celled with Weaver, he knew the time period in which the acts would have occurred.

Having reviewed the report and recommendation and my order adopting it, I am convinced that petitioner has not made a substantial showing of the denial of a constitutional right with respect to his claim. Although in state court the outcome of

petitioner's claims might have been debatable, on federal habeas review the standard is much stricter: petitioner bears the burden of showing that the state supreme court's decision on his claims was unreasonable. 28 U.S.C. § 2254(d). Reasonable jurists reviewing petitioner's claims through the lens of § 2254(d) would not debate that the state supreme court took petitioner's claims seriously, applied the proper Supreme Court rule and reached a decision that was "within the range of defensible positions," in other words, that it reached a decision that was reasonable. Mendiola v. Schomig, 224 F.3d 589, 591 (7th Cir. 2000). Accordingly, petitioner's request for a certificate of appealability will be denied.

The next question is whether petitioner is entitled to proceed *in forma pauperis* on appeal. In determining whether petitioner may proceed *in forma pauperis*, this court must find that petitioner is indigent and taking his appeal in good faith. 28 U.S.C. § 1915(a)(3). 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). This is a less demanding standard than that for determining whether to issue a certificate of appealability. Because a reasonable person could suppose that petitioner's appeal has some merit, I find that it is taken in good faith.

The remaining question is whether petitioner is indigent for purposes of appeal or whether he must prepay all or a portion of the appellate filing fee. This court uses the following formula to determine whether a prisoner is indigent. First, the court determines

petitioner's average monthly deposits and his average monthly balances for the six-month period mentioned above. If 20% of the greater of these two figures is \$455 or more, the petitioner is not eligible for indigent status and will have to prepay all of the \$455 filing fee. If 20% of the greater of these two figures is less than \$455, he will be required to prepay whatever portion less than \$455 has been calculated. Applying this formula to petitioner, I find that he is able to pay at least a portion of the appellate filing fee. According to the trust account statement, in the past six months petitioner's monthly balance has averaged \$119.39 and his average monthly deposits are \$82.26. Twenty percent of the greater of these two figures is \$23.88. Accordingly, I will grant petitioner's application for leave to proceed *in forma pauperis* on the condition that he prepay \$23.88 by August 21, 2008.

ORDER

IT IS ORDERED that:

I. 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; and

2. Petitioner's request for leave to proceed *in forma pauperis* is GRANTED on the condition that he prepay the amount of \$23.88 on or before August 21, 2008.

Entered this 24th day of July, 2008.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge