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

BRAD HOLDER,

Petitioner,

v.

ANA BOATWRIGHT, Warden,
New Lisbon Correctional Institution.

Respondent.

OPINION AND ORDER

10-cv-702-wmc

Brad Holder has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and paid the $5 filing fee. He is challenging his 2007 conviction of two counts of child enticement and two counts of second-degree sexual assault of a child, contending that his trial counsel was ineffective when he failed to advise him and adequately prepare him for the intensive sex offender presentence investigation process. The petition is before the court for preliminary review pursuant to Rule 4 of the Rules Governing Section 2254 Cases. Because it is plain from the petition that Holder is not entitled to relief, the petition will be dismissed.

FACTS

The following facts are drawn from the petition and the Wisconsin Court of Appeals' decision in *State of Wisconsin v. Holder*, 2009-AP-0315-CR(Wis. Ct. App. February 3, 2010) (unpublished decision).

Holder pled guilty to two counts each of child enticement and second-degree sexual assault of a child and the state agreed to dismiss and read in the remaining ten counts in

Washington County Circuit Court. (Case No. 2006-CF-0431). Holder had touched the genitals of teenage boys while performing "physicals" on them before hiring them to work in his carpentry business. The presentence investigation process required Holder to complete a 21 page "Sex Offender Disclosure Questionnaire" and to be interviewed by a Department of Corrections probation officer. Holder's retained counsel, Attorney Daniel Mitchell, did not go over the questionnaire with him, advise him how to answer the questions, seek to accompany him to the interview or stress to him the importance of the interviewer believing that he fully accepted responsibility.

According to the presentence report, Holder denied that his touching of teenage boys' genitals was sexually motivated and that the police must have "paraphrased or contorted" his words. The probation officer concluded that Holder was in "complete and utter denial" about his assualts, was not being honest with himself and had no insight about the effect of the assaults on his victims.

Mitchell presented the court with numerous letters of support and materials documenting Holder's volunteer and civic activities. At the sentencing hearing, the state emphasized the probation officer's impression and requested twenty years imprisonment. Mitchell argued for imposition of12 to 15 months straight jail time with release only for treatment or work, and an imposed but stayed prison sentence. The court weighed Holder's positive personal attributes, clean record and devotion to civic activities against the severity of the charges, his need for treatment and his failure to accept responsibility as noted in the presentence investigation report. The court sentenced Holder to concurrent sentences of eight years in prison and four years on extended supervision on the two child-enticement

counts, withheld sentences on the two second-degree sexual assault charges and placed him on fifteen years' probation consecutive to his child-enticement sentences. A judgment of conviction was entered on July 20, 2007.

Holder moved for postconviction relief in the trial court, alleging ineffective assistance of counsel on the grounds that his attorney failed to adequately prepare him for the presentence investigation. At a December 2, 2008 hearing on the motion, Attorney Mitchell confirmed that (1) he knew the state's sentencing recommendation, and ultimately the sentence, would be based to some degree on the presentence investigation findings; and (2) he told Holder the judge would not look favorably on his maintaining during the sentencing phase that touching a teenager's genitals was not for sexual gratification. Mitchell acknowledged that he did not emphasis the importance of the *probation officer* doing the presentence investigation report believing him. Mitchell and Holder both testified that Mitchell advised Holder to tell the truth and not to "overthink." The trial court denied Holder's motion, finding that Mitchell's performance was not deficient. Also, the court found no prejudice because it had already imposed the minimum sentence it could have imposed.

On February 3, 2009, Holder appealed the conviction and the order of the trial court to the Wisconsin Court of Appeals. (Case no. 2009-AP-0315). In a February 3, 2010 opinion, the Court affirmed both Holder's judgment of conviction and the denial of his post-conviction motion. Holder again argued on appeal that his attorney rendered ineffective assistance by failing to prepare him for the "intensive" sex offender presentence process, but also by failing to talk to him about the need to acknowledge a sexual motivation. Heolder

argued that the deficient advice was prejudicial because it resulted in an unreliable sentencing process and an overly harsh sentence.

Relying on *Strickland v. Washington,* 466 U.S. 668, 698 (1984) in rejecting Holder's argument, the court of appeals first addressed whether Holder's counsel's performance was deficient and, second, whether Holder was prejudiced by such performance. The court found that Mitchell's advice to Holder to tell the truth was good advice and that his performance was not deficient. The court further found that, even if counsel's performance was deficient, Holder was not prejudiced because the trial court judge made clear that he had ordered "the minimum sentence I could have imposed" regardless of Holder's failure to admit a sexual motivation.

The Wisconsin Supreme Court denied Holder's petition for review on March 5, 2010.

OPINION

A federal court may grant a writ of habeas corpus only if the petitioner shows that he is in custody in violation of the laws, treaties or Constitution of the United States. 28 U.S.C. § 2254. If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief, the district court must dismiss the petition. Rule 4 of the Rules Governing Section 2254 Cases.

Under Rule 4, the district court may dismiss a petition summarily, without requiring respondent to produce the relevant state court records, if the petition "raises a legal theory that is indisputably without merit" or contains factual allegations that are "palpably incredible." *Small v. Endicott*, 998 F.2d 411, 414 (7th Cir. 1993). Even if the petitioner

clears these hurdles, the court still need not examine the trial records "so long as the petitioner does not dispute that the facts reported in the state court opinions faithfully and accurately reflect the record." *Id*. When the state courts have adjudicated the merits of a petitioner's federal claim, a federal court must defer to that ruling unless the state courts applied the wrong federal standard, applied the correct federal standard in an unreasonable manner or reached a determination that is based upon an unreasonable determination of fact. 28 U.S.C. § 2254(d).

In his petition, Holder does not dispute the facts found by the court of appeals, nor challenged the reasonableness of that decision, nor referred to any incorrect application of federal law. After a review of the court of appeals' thorough legal analysis that Holder's trial counsel was not ineffective under *Strickland*, this court concludes that the decision was not an unreasonable application of federal law, nor based on an unreasonable determination of the facts. Thus, this court must defer to that decision and will dismiss Holder's petition for a writ of habeas corpus.

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Tennard v. Dretke*, 542 U.S. 274, 282 (2004). This means 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." *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one. Reasonable jurists would not debate the decision that Holder has failed to state a colorable claim to federal habeas relief. Accordingly, the court will not issue a certificate of appealability.

ORDER

IT IS ORDERED THAT:

1. The petition of Brad Holder for a writ of habeas corpus is DISMISSED WITH PREJUDICE.

2. Holder is DENIED a certificate of appealability. Petitioner may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 24th day of October, 2011.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge