IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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AMANCIO REYES-CRUZ, OPINION and ORDER

Petitioner, 11-cv-465-bbc

v.

RANDALL HEPP, Warden
Jackson Correctional Institution,

Respondent.

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Amancio Reyes-Cruz's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is before the court for a decision on its merits. In his petition, petitioner challenges his March 2009 conviction in the Circuit Court for Brown County, Wisconsin, in case number 2008CF983 on one count of second-degree sexual assault with a threat of force in violation of Wis. Stat. § 940.225(2)(a). He contends that his trial counsel was ineffective for failing to supplement the expert's report to include additional opinions and evidence. The Wisconsin Court of Appeals considered and rejected petitioner's arguments regarding the effectiveness of his counsel in an opinion dated January 4, 2011. State v. Reyes-Cruz, 2011 WI App 27, 331 Wis. 2d 730, 795 N.W.2d 493 (unpublished).

After reviewing the parties' arguments and the record, I conclude that petitioner's

claim lacks merit because the state court of appeals' conclusion that petitioner received effective assistance of counsel was reasonable. Accordingly, I will deny the petition.

From the state court of appeals' opinion and documents attached to the parties' submissions, I find the following facts.

RECORD FACTS

In September 2008, petitioner was charged with sexually assaulting his ex-girlfriend. At a jury trial held in March 2009, the jury heard testimony from the sexual assault nurse examiner who had examined the victim after the alleged assault. The nurse stated that the victim was "very upset, tearful, crying" and had high blood pressure. Trial Trans., dkt. #12-8, at 168. She noted abrasions on the victim's left shoulder, redness around her left wrist and abrasions and bleeding to the cervical area consistent with blunt force trauma. Id. at 171-76. She testified that in her opinion, because the victim was postmenopausal, the bleeding in the cervix was not caused by menstruation. Id. at 179. She also testified that ability to lubricate the vagina after menopause varies from person to person. Id. at 183. The victim's daughter and a responding police officer also testified that the victim displayed emotional trauma.

Petitioner's position at trial was that the sexual intercourse was consensual. He called a sexual assault nurse examiner as an expert witness in support of his defense. Petitioner

intended to elicit an opinion from the expert that the victim's injuries were consistent with consensual sex. In particular, petitioner intended for the expert to testify that because the victim was postmenopausal, she was more susceptible to injuries during sex because of decreased lubrication. However, because petitioner's counsel failed to provide the prosecutor an updated expert report, the trial court prohibited the expert from testifying that the victim's injuries were consistent with consensual sex. Petitioner's expert was permitted to testify that vaginal lubrication decreases after menopause, but conceded that the amount of lubrication varies depending on the individual. Id. at 195.

On November 23, 2009, petitioner filed a motion for post conviction relief, arguing that his trial counsel was ineffective for failing to file an updated expert report. At the post conviction hearing, petitioner made an offer of proof that his expert would have testified that the victim's injuries were consistent with consensual sex and that petitioner's inability to achieve an erection made it highly unlikely that he caused any kind of blunt force trauma injuries. Dkt. #12-10 at 27, 29. The trial court denied the post conviction motion, concluding that the proffered testimony involved mere speculation because petitioner's expert did not examine the victim and had no knowledge of the victim's ability to produce lubricant during intercourse. Id. at 28. The trial court held that even if petitioner's counsel had filed an updated expert report, the court would not have allowed the expert to speculate on this issue. Id.

On February 2, 2010, petitioner appealed his conviction to the Wisconsin Court of Appeals. The court of appeals affirmed the conviction on January 4, 2011, concluding that petitioner had not shown that his counsel was deficient under the standards set forth in Strickland v. Washington, 466 U.S. 668, 687 (1984). In particular, the court of appeals held that petitioner had failed to demonstrate any prejudice from his counsel's failure to file a supplemental expert report. Reyes-Cruz, 2011 WI App 27, ¶ 8. On May 25, 2011, the Wisconsin Supreme Court denied petitioner's petition for review.

OPINION

Petitioner contends that his counsel was ineffective for failing to give the prosecutor an updated expert report that would have allowed petitioner's expert to testify that the victim's injuries were consistent with consensual sex. Whether counsel was ineffective is governed by the two part test set out in Strickland, 466 U.S. 668. First, petitioner must show that his lawyer's performance "fell below an objective standard of reasonableness." Id. at 687-88. Second, he must show he was prejudiced by counsel's errors. Id. at 694. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.; see also Gross v. Knight, 560 F.3d 668, 671-73 (7th Cir. 2009) ("reasonable

probability" is a "better than negligible" chance).

On habeas review, the bar for a successful Sixth Amendment claim is even higher: Federal courts may grant a state prisoner habeas relief only if the state courts' rejection of his Sixth Amendment claim was (1) "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). See also Knowles v. Mirzayance, 556 U.S. 111, 123 (2009) ("the question is not whether a federal court believes that the state court's determination under the Strickland standard was incorrect but whether that determination was unreasonable—a substantially higher threshold") (citation and quotation omitted).

The determination of the Wisconsin Court of Appeals that petitioner failed to demonstrate prejudice was not based on an unreasonable application of federal law or determination of the facts. Rather, the court of appeals applied the principles enunciated in Strickland properly and concluded reasonably that petitioner suffered no prejudice from his counsel's failure to provide the prosecutor with an updated report from his expert. Reyes-Cruz, 2011 WI App 27, ¶ 9. The state court's finding that the expert's testimony would have been speculative and of minimal probative value was reasonable. The expert had not examined the victim and could offer no testimony or evidence to contradict the

examining sexual assault nurse's report. Additionally, as the court of appeals noted, the testimony of other witnesses at trial regarding the victim's emotional trauma supported the conviction. Thus, it was reasonable for the court of appeals to conclude that the jury's verdict would have likely been the same regardless whether petitioner's trial counsel had filed a supplemental expert report.

In sum, the state court's decision that petitioner failed to show that his counsel acted deficiently was reasonable. Therefore, I will deny petitioner's motion for a writ of habeas corpus.

C. Certificate of Appealability

The only question remaining is whether to grant a certificate of appealability to petitioner. Under Rule 11 of the Rules Governing Section 2254 Cases, I 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 close. Reasonable jurists would not disagree that the state court's application of Strickland was reasonable. Nor would reasonable jurists debate that in failing to file a supplemental expert report, petitioner's trial counsel made an error so grievous as to fall outside the realm of professionally competent assistance. Petitioner has failed to make a substantial showing of the denial of a constitutional right.

ORDER

IT IS ORDERED that the petition of Amancio Reyes-Cruz for a writ of habeas corpus under 28 U.S.C. § 2254 is DENIED and petitioner is DENIED a certificate of appealability. Petitioner may seek a certificate from the court of appeals under Fed. R. App. P. 22.

Entered this 2d day of February, 2012.

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