

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

ALBERT L. HOWARD,

ORDER

Petitioner,

11-cv-793-bbc

v.

WILLIAM POLLARD, Warden
Waupun Correctional Institution,

Respondent.

Albert Howard, an inmate at the Waupun Correctional Institution, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, as well as a motion to stay the habeas petition while he exhausts certain claims in state court. He has paid the \$5 filing fee. The petition is before the court for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases.

I will direct the state to respond to petitioner's claims regarding the ineffective assistance of his trial counsel and the sufficiency of the evidence adduced at trial. Petitioner's remaining claims will be dismissed because they are not constitutional claims that may be raised in a federal habeas petition. Also, I will deny petitioner's motion to stay this habeas petition while he exhausts additional claims in state court. Petitioner says in his

petition that the only claim he has not exhausted is a claim regarding the trial court's improper evidentiary ruling. However, because I am dismissing this state law claim, it appears that petitioner has exhausted all of the claims on which he will proceed.

BACKGROUND

Petitioner challenges his November 2005 conviction in the Circuit Court for Dane County on one count of first-degree sexual assault of a child in violation of Wis. Stat. § 948.02(1). Petitioner appealed the conviction, contending that the evidence was insufficient to convict him, the prosecutor had engaged in misconduct and his counsel had been ineffective for a number of reasons. The court of appeals rejected petitioner's arguments and affirmed the conviction on October 24, 2008. The Wisconsin Supreme Court denied petitioner's request for review on February 11, 2009.

Petitioner filed a motion for post-conviction relief under Wis. Stat. § 974.06, which the state trial court denied on July 20, 2009. The court of appeals affirmed denial of the § 974.06 motion on October 13, 2010 and the Wisconsin Supreme Court denied petitioner's request for review on January 13, 2011.

Petitioner filed the present habeas petition on November 28, 2011, raising six general grounds for relief:

- (1) the evidence adduced at trial was insufficient to support the conviction;
- (2) the trial court erred by refusing to strike testimony, grant a mistrial or dismiss the

case in light of the medical evidence;

(3) his trial lawyer was ineffective in numerous ways;

(4) the “preliminary evidence” was insufficient to bind petitioner over for trial;

(5) the prosecutor engaged in misconduct in numerous ways; and

(6) the trial court erred by refusing to grant the jury’s request to review the police report.

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 or 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 if it determines that 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).

OPINION

A. Claim 1: Insufficient Evidence to Support Conviction

Respondent will be ordered to respond to claim 1. Petitioner’s claims that the evidence was insufficient to support a conviction is a constitutional ground for habeas relief under Jackson v. Virginia, 443 U.S. 307, 316 (1979), and petitioner has alleged facts

sufficient to make out a colorable claim.

B. Claims 2 and 6: Trial Court Evidentiary Errors

Respondent will not be ordered to respond to claims 2 and 6. Federal habeas relief is available only if a state prisoner can show that he is in custody in violation of a constitutional right. Martin v. Evans, 384 F.3d 848, 852 (7th Cir. 2004); 28 U.S.C. § 2254(a). Because a state trial court's evidentiary rulings turn on state law, these are matters "beyond the scope of federal habeas review" unless they implicate some independent constitutional right. Perruquet v. Briley, 390 F.3d 505, 511 (7th Cir. 2004). See also Montgomery v. Meloy, 90 F.3d 1200, 1206 (7th Cir. 1996) (federal habeas corpus relief "is not a remedy for errors of state law"); Haas v. Abrahamson, 910 F.2d 384, 389 (7th Cir. 1990) (holding that state court evidentiary rulings generally not proper basis for granting writ of habeas corpus).

Petitioner's claims that the state circuit court made improper evidentiary rulings do not appear to implicate any constitutional right that could be raised in a federal habeas proceeding and petitioner has not attempted to argue that any of his constitutional rights were violated by the trial court's rulings. Accordingly, this claim will be dismissed for failure to state a constitutional violation.

C. Claim 3: Ineffective Assistance of Trial Counsel

In claim 3, petitioner accuses his trial counsel of providing constitutionally ineffective assistance. Specifically, he contends that his counsel was ineffective for failing to:

- (a) use a peremptory strike to remove a juror that counsel knew could not be fair and impartial;
- (b) call an alibi witness;
- (c) call a medical expert witness;
- (d) challenge the government's motion to suppress evidence that a registered "sex offender" had access to the victim;
- (e) file a motion to challenge the evidence relating to the timing of the assault;
- (f) object to information in the charging document regarding the location of the assault;
- (g) object to improper statements in the prosecutor's closing remarks;
- (h) prepare petitioner for questioning about his probationer status; and
- (i) file a motion to suppress evidence regarding the victim's sexually transmitted disease.

To make out a claim of ineffective assistance of counsel, a defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness; and (2) that he was prejudiced by counsel's errors. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). 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. at 694.

Although petitioner’s claims of ineffective assistance of counsel are not well developed, I will give petitioner the benefit of the doubt and order the state to respond to them.

D. Claim 4: Insufficient Evidence to Bind Plaintiff Over for Trial

Petitioner challenges the sufficiency of the evidence at the preliminary hearing at which the trial court found probable cause to believe that he had committed a felony and should be bound over for trial. This is not a constitutional claim that can be brought in a petition for a writ of habeas corpus. Although the Fourth Amendment “requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest, . . . [an] illegal arrest or detention does not void a subsequent conviction.” Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (“[A] conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause”); see also Matta-Ballesteros v. Henman, 896 F.2d 255, 260 (7th Cir. 1990) (holding that an illegal arrest, without more, is not a bar to prosecution or a defense to a valid conviction); Sanders v. Israel, 717 F.2d 422, 423 (7th Cir. 1983) (same). In other words, although petitioner may have been able to challenge the probable cause for his pre-trial detention, while he was in pre-trial detention, he may not now challenge his pre-trial detention as a means to overturn his conviction. Therefore, this claim will be dismissed.

E. Claim 5: Prosecutorial Misconduct

In claim 3, petitioner accuses the prosecutor of engaging in the following acts of misconduct:

- (a) making statements in his closing arguments regarding the victim's and petitioner's comparative credibility and arguing that the evidence established petitioner's guilt;
- (b) introducing the charging document even though it had the wrong address for the victim's home;
- (c) arguing that the assault occurred on a date different from the date used at the preliminary hearing;
- (d) asking petitioner to clarify what he meant by "P.O. hold," thereby alerting the jury that petitioner was picked up on a "probation hold."

Petitioner's allegations do not state a claim for prosecutorial misconduct. Prosecutorial misconduct gives rise to federal habeas corpus relief only when the misconduct either violated a specific constitutional right or "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). See also Greer v. Miller, 483 U.S. 756, 765 (1987) (to constitute due process violation, prosecutor's misconduct must be of sufficient significance to result in denial of a defendant's right to fair trial). The prosecutor's arguments about the evidence in his closing statement, his introduction of the charging document and asking petitioner to clarify his own statements about being picked up on a "P.O. hold," do not suggest any improper behavior by the prosecutor and do not suggest that petitioner's trial was unfair. Thus,

petitioner's claims do not implicate his right to due process and they cannot be raised in a federal habeas corpus proceeding.

F. Motion to Stay

In conjunction with his habeas petition, petitioner filed a motion to hold his petition "in abeyance" while he finishes exhausting his claims in state court. However, he states in his petition that he has exhausted all of his claims with the exception of his claim that the trial court refused to give the police report to the jury during their deliberations. As explained above, this is not a constitutional claim that can be raised in a federal habeas petition and will be dismissed. Thus, there is no need to stay consideration of petitioner's habeas petition.

ORDER

IT IS ORDERED that

1. Petitioner Albert Howard's motion to hold his petition in abeyance, dkt. #2, is DENIED.

2. The following claims of the petition are DISMISSED:

a. The trial court erred by refusing to strike testimony, grant a mistrial or dismiss the case in light of the medical evidence;

b. The "preliminary evidence" was insufficient to bind plaintiff over for trial;

c. The prosecutor engaged in misconduct in numerous ways; and

d. The trial court erred by refusing to grant the jury's request to review the police report.

3. Pursuant to an informal service agreement between the Attorney General for the State of Wisconsin and the court, copies of the petition and this order are being sent today to the Attorney General for service on Warden Pollard.

4. Within 30 days of the date of service of this order, respondent must file an answer to petitioner Albert Howard's claims that the evidence adduced at trial was insufficient to convict him and his trial counsel was ineffective for the reasons identified in this order.

The answer must comply with Rule 5 of the Rules Governing Section 2254 Cases and must show cause, if any, why this writ should not issue.

5. **Dispositive motions.** If the state contends that the petition is subject to dismissal on grounds such as the statute of limitations, an unauthorized successive petition, lack of exhaustion or procedural default, it is authorized to file a motion to dismiss, a supporting brief and any documents relevant to the motion, within 30 days of this order, either with or in lieu of an answer. Petitioner shall have 20 days following service of any dismissal motion within which to file and serve his responsive brief and any supporting documents. The state shall have 10 days following service of the response within which to file a reply.

If the court denies the motion to dismiss in whole or in part, it will set a deadline

within which the state must file an answer, if necessary, and establish a briefing schedule regarding any claims that have not been dismissed.

6. When no dispositive motion is filed. If respondent does not file a dispositive motion, then the parties shall adhere to the following briefing schedule regarding the merits of petitioner's claims:

- Petitioner shall file a brief in support of the petition within 30 days of the date of service of respondent's answer. Petitioner bears the burden to show that his conviction or sentence violates the federal Constitution, United States Supreme Court case law, federal law or a treaty of the United States. With respect to any claims that were adjudicated on the merits in a state court proceeding, petitioner bears the burden to show that the state court's adjudication of the claim:
 1. resulted in a decision that was 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). Petitioner should keep in mind that in a habeas proceeding, a federal court is required to accept the state court's determination of factual issues as correct, unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

- Respondent shall file a brief in opposition within 30 days of the date of service of petitioner's brief.
- Petitioner shall have 20 days after service of respondent's brief in which to file a reply brief.

7. For the time being, petitioner must serve by mail a copy of every letter, brief,

exhibit, motion or other submission that he files with this court upon the assistant attorney general who appears on the state's behalf. The court will not consider any submission that has not been served upon the state. Petitioner should note on each of his submissions whether he has served a copy of that document upon the state.

Entered this 13th day of January, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge