United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 29, 2021
Decided February 3, 2021

Before

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

No. 20-3302

WALLACE HAMMERLE,
Petitioner-Appellant,

v.

DYLON RADTKE,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 2:19-cv-01773-WED

William E. Duffin,
Magistrate Judge.

ORDER

Wallace Hammerle has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254. We construe this filing as an application for a certificate of appealability. After reviewing the final order of the district court and the record on appeal, we find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, Hammerle's request for a certificate of appealability is **DENIED.**

United States District Court
Eastern District of Wisconsin

JUDGMENT IN A CIVIL ACTION

WALLACE HAMMERLE,

Petitioner,

v.

Case No. 19-CV-1773

DYLON RADTKE,

Respondent.

☒ **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS THEREFORE ORDERED that petitioner Wallace Hammerle's petition for a writ of habeas corpus is **DISMISSED.**

IT IS FURTHER ORDERED petitioner's certificate of appealability is **DENIED.**

IT IS FURTHER ORDERED this case is **DISMISSED.**

Date: October 21, 2020.

Gina M. Colletti, Clerk of Court
EASTERN DISTRICT OF WISCONSIN
(By) Deputy Clerk, s/Mary Murawski
Approved this 21st day of October, 2020.

William E. Duffin
WILLIAM E. DUFFIN
United States Magistrate Judge

COURT OF APPEALS
DECISION
DATED AND FILED

March 4, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-0594-CR **Cir. Ct. No. 01CF000144**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

WALLACE J. HAMMERLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Wood County: EDWARD F. ZAPPEN, Judge. *Affirmed.*

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Wallace Hammerle appeals from a judgment convicting him of first-degree reckless homicide, and from an order denying him postconviction relief. He raises several issues concerning the proceedings. We reject his arguments and affirm.

¶2 Hammerle's eight-week-old daughter, Devon Kuehl, died of a fractured skull. Based on the information provided by the child's mother, Dawn Kuehl, and an informant named Edwin Estep, the State charged Hammerle with first-degree reckless homicide. At trial, Dawn testified that the morning after a night when she and Hammerle engaged in heavy drinking, Devon and Hammerle were in a room together, and Devon was crying. The crying then abruptly stopped. The child was dead within several hours. Dawn admitted that she initially provided a completely different version of the events leading to Devon's death, one that completely omitted Hammerle's involvement. However, she explained that she did so to protect him because he was wanted by the police as a probation absconder, but decided to tell the truth after she learned that Devon died a violent death.

¶3 The State's other principal witness was Estep, who met Hammerle in prison several months after Devon's death. (Hammerle was imprisoned after his arrest and probation revocation). According to Estep, Hammerle described in detail how he beat Devon to death.

¶4 Estep had at least thirteen criminal convictions on his record. The State disclosed eight, the number of his Wisconsin convictions, but did not inform defense counsel of five Illinois convictions. When asked at trial about his convictions, Estep admitted to an unspecified number of bad check and retail theft convictions. He also testified that he had absconded from parole to avoid testifying against Hammerle, because of threats to his imprisoned brother from other inmates.

¶5 In his defense, Hammerle testified that Devon's injuries occurred when Dawn accidentally banged Devon's head against a doorway. His mother

testified that he told her the same story on the day of Devon's death. He also emphasized the inconsistencies in Dawn's statements about the death, and testified that he never discussed the matter with Estep.

¶6 After Hammerle's conviction he sought postconviction relief based on newly discovered evidence. The trial court denied relief, resulting in this appeal. The issues are: (1) whether the evidence was sufficient to convict Hammerle; (2) whether the trial court erroneously limited defense counsel's closing argument; (3) whether the prosecutor violated Hammerle's constitutional rights by failing to disclose exculpatory evidence; (4) whether newly discovered evidence mandates a new trial; and (5) whether the trial court demonstrated a bias toward Hammerle.

¶7 We conclude the jury heard sufficient evidence to convict Hammerle. We address this issue first, even though Hammerle contends that errors occurred during the evidentiary portion of the proceeding. In considering the sufficiency of the evidence, this court must consider all of the evidence submitted, including erroneously admitted evidence. *See* ***Lockhart v. Nelson***, 488 U.S. 33, 40-42 (1988). Dawn identified Hammerle as the only person present when Devon suffered the fatal blow or blows to her head. Estep provided testimony about Hammerle's detailed admission of guilt. There were reasons to doubt the testimony of either or both of these witnesses. However, the jury clearly chose to believe their version of the fatal events, rather than Hammerle's. That was its prerogative. *See* ***Whitaker v. State***, 83 Wis. 2d 368, 377, 265 N.W.2d 575 (1978). Having chosen to believe the State's witnesses, the jury could reasonably find guilt beyond a reasonable doubt from their testimony. On appeal, we reverse a conviction for insufficient evidence only if that evidence "viewed most favorably to the State and the conviction, is so insufficient in probative value and

force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We cannot say that here.

¶8 Hammerle waived his argument that the trial court improperly limited his counsel's closing statement. The trial court allowed Hammerle's mother to testify that Hammerle gave a consistent, exculpatory version of events shortly after they occurred, to rebut an implication that he recently fabricated his defense. *See* WIS. STAT. § 908.01(4). However, the trial court instructed counsel that he could not argue that what Hammerle said to his mother proved that what he said occurred. Counsel did not object to this limitation on his use of the evidence, and instead agreed that the statement was offered to prove its making rather than the truth of the matter asserted. Consequently, the argument is waived on appeal. *See* ***State v. Nielsen***, 2001 WI App 192, ¶11, 247 Wis. 2d 466, 634 N.W.2d 325. In any event, Hammerle suffered no prejudice from the court's limitation. There was no limiting instruction. The jury heard the testimony and, as the trial court observed, was able to draw whatever inference it chose.

¶9 Hammerle has not shown that the prosecutor suppressed exculpatory evidence. A defendant is constitutionally entitled to material exculpatory evidence from the prosecutor. ***Brady v. Maryland***, 373 U.S. 83, 86 (1963). In this case, the undisclosed exculpatory information was Estep's five Illinois convictions. However, the court found that the State was never aware of those convictions, despite a diligent, good faith investigation. Hammerle does not challenge that ruling, and that resolves the issue. He concedes in his brief that the duty to disclose only extends to information that the State actually possesses or controls.

¶10 Hammerle has not satisfied the newly discovered evidence test. His new evidence consisted of: (1) testimony from Estep's brother denying that other inmates had threatened him over Estep's testimony against Hammerle, and (2) the full extent of Estep's criminal history. His burden required a showing that this evidence would make a different result on retrial reasonably probable. ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). The trial court's determination on that question is discretionary. ***State v. Eckert***, 203 Wis. 2d 497, 516, 553 N.W.2d 539 (Ct. App. 1996). Here, Estep's motive for absconding, and his willingness or unwillingness to testify against Hammerle, were peripheral issues. Estep had no apparent motive to lie. The trial court reasonably concluded that an attempt to impeach Estep on these matters would not measurably affect the outcome of a retrial. Additionally, the same is true of the evidence of Estep's five Illinois convictions. It is only speculation that the difference between eight convictions and thirteen convictions would change a jury's credibility determination. In any event, the jury never learned that Estep had even eight convictions. He admitted to an unspecified number.

¶11 Hammerle's claim of the judge's bias is unsupported by the record. Hammerle had a constitutional right to an impartial judge. ***State v. Hollingsworth***, 160 Wis. 2d 883, 893, 467 N.W.2d 555 (Ct. App. 1991). The judge violates that right by actually treating the defendant unfairly. ***Id.*** at 894. Merely the appearance of partiality, or of circumstances allowing speculation as to impartiality, is not sufficient. ***Id.*** In this case, Hammerle points to an instance where the judge allegedly signaled the prosecutor to object to a question. The judge admitted an observable reaction to the question, which he considered plainly objectionable, but adamantly denied signaling the prosecutor. This court has no basis to review the trial court's description of its subjective state of mind.

¶12 Additionally, Hammerle points to other comments the judge made concerning the weakness of Hammerle's case and the performance of his attorney. Even if these comments about the case suggested bias, which is a conclusion we do not share, the judge made them outside the jury's presence. They did not amount to, nor indicate, unfair treatment in fact.

¶13 Finally, Hammerle complains that the judge referred to his decision to impose the maximum sentence as "a no brainer." The judge made the comment after sentencing, and we construe it as a comment on the numerous very aggravating factors present in this case, and not as an indication of prejudgment or other bias.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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You are hereby notified that the Court has entered the following order:

No. 03-0594-CR State v. Hammerle L.C. #01CF000144

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Wallace J. Hammerle, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Cornelia G. Clark
Clerk of Supreme Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WALLACE HAMMERLE,

Petitioner,

v. **Case No. 19-CV-1773**

DYLON RADTKE,

Respondent.

DECISION AND ORDER DISMISSING THE PETITION FOR A WRIT OF HABEAS CORPUS

Wallace Hammerle, who is incarcerated pursuant to the judgment of a Wisconsin Circuit Court, filed a petition for a writ of habeas corpus. (ECF No. 1.) The court screened the petition and noted that it appeared untimely and contained claims for which he had not exhausted his state court remedies. (ECF No. 5.) Therefore, the court ordered Hammerle to show cause why his petition should not be dismissed. (ECF No. 5.) After granting Hammerle's request for more time in which to show cause, the deadline for a response was May 21, 2020. (ECF No. 12.)

On May 19, 2020, the court received a letter from a person identified as Ronald Rieckhoff, who describes himself as a close friend of Hammerle. (ECF No. 13.) Attached

to Rieckhoff's letter are numerous exhibits that he purports to be submitting on behalf of Hammerle and in response to the court's order. (ECF No. 13.) The court has not received any further submission from Hammerle. All parties have consented to the full jurisdiction of this court. (ECF Nos. 4, 8.)

The court has carefully reviewed the letter and exhibits submitted on behalf of Hammerle. (ECF No. 13.) The documents generally relate to Hammerle's complaints with his prior attorneys and his efforts to retain subsequent counsel. They do not address the defects that the court identified with his petition--specifically, that it is untimely and contains claims that Hammerle has not presented to one full round of review by the Wisconsin state courts.

As noted in the court's prior order (ECF No. 5), Hammerle was sentenced on March 11, 2002. (ECF No. 1 at 2.) He appealed his conviction, *see State v. Hammerle*, 2004 WI App 88, 272 Wis. 2d 854, 679 N.W.2d 926, 2004 Wisc. App. LEXIS 206, and ultimately the Supreme Court of Wisconsin denied his petition for review on August 2, 2004 (ECF No. 1-1 at 11). Hammerle had ninety days from that date—until November 1, 2004—in which to file a petition for a writ of certiorari with the Supreme Court of the United States. Sup. Ct. R. 13. He then had one year from that date—until November 1, 2005—to file a habeas petition. *See* 28 U.S.C. § 2244(d)(1)(A). Hammerle did not file his habeas petition until December 4, 2019, more than 14 years too late. (ECF No. 1.)

The records of the circuit court, *see State v. Hammerle* (Wood Cnty. Case No. 2001CF000144), available at https://wcca.wicourts.gov, and appellate court, *see State v. Hammerle* (Case No. 2003AP000594–CR), available at https://wscca.wicourts.gov, do not indicate any intervening proceeding that would have stopped the running of the one-year clock, *see* 28 U.S.C. § 2244(d)(2). Nor is the court able to discern any other reason for concluding that Hammerle's petition is timely. *See* 28 U.S.C. § 2244(d)(1); *Holland v. Florida*, 560 U.S. 631, 645, 130 S. Ct. 2549, 2560 (2010).

Only one plausible argument regarding equitable tolling of the statute of limitations merits discussion. Hammerle asserts that he is actually innocent of the crime. (ECF Nos. 1 at 32; 13-2 at 1, 5.) "In order to demonstrate actual innocence in a collateral proceeding, a petitioner must present 'new reliable evidence that was not presented at trial' and 'show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.'" *Balsewicz v. Kingston*, 425 F.3d 1029, 1033 (7th Cir. 2005) (quoting *Schlup v. Delo*, 513 U.S. 298, 299, 327-28, 130 L. Ed. 2d 808, 115 S. Ct. 851 (1995)).

The conviction for which Hammerle seeks federal habeas relief relates to the death of his eight-week-old daughter. *Hammerle*, 2004 WI App 88, ¶2. His conviction was based on the testimony of the girl's mother, Dawn Kuehl, and a jailhouse informant, Edwin Estep, to whom Hammerle allegedly confessed. *Id.* Hammerle asserts that Kuehl was actually responsible for the girl's death, and that he never spoke about the case with

Estep. (ECF No. 13-2 at 1.) He alleges that Estep's knowledge of the crime came from notes that Hammerle, at the advice of his attorney on an unrelated matter, wrote to record Kuehl's involvement in the murder. (ECF No. 13-2 at 1.) While Estep and Hammerle were incarcerated together, Estep allegedly broke into Hammerle's locker, reviewed Hammerle's notes, used those details to create a story inculpating Hammerle, and in exchange received some unidentified benefit from the state. (ECF No. 13-2 at 1.)

However, this is not new information. Much of it has been known since at least October of 2002 (ECF No. 13-4 (report of private investigator's interview with Estep's brother)) and was addressed in Hammerle's appeal, *Hammerle*, 2004 WI App 88, ¶10. Other details are contained in an undated letter submitted by Rieckhoff (ECF No. 13-2), which appears to have been written by Hammerle but, according to Rieckhoff, "was typed by Hammerle's mother and submitted to all attorneys requesting outside counsel." (ECF No. 13 at 4.) According to correspondence Hammerle submitted to the court, it appears that the relevant efforts to retain counsel date to at least 2007. (ECF No. 13-7.) If Hammerle's letter (ECF No. 13-2) was submitted in conjunction with his efforts to retain counsel, then Hammerle knew of the relevant facts since at least 2007. But details in the letter suggest that it was drafted later. The letter refers to a complaint Hammerle made to the Office of Lawyer Regulation. The court has been provided with a copy of such a complaint dated April 28, 2014. (ECF No. 13-1.) The letter also refers to Gregory Potter and Todd Wolf being judges in Wood County. Wolf did not become a judge until 2009.

But regardless of whether the letter was written in 2007, 2009, or 2014, what is material for present purposes is that there is no evidence that it was after December 4, 2018, *i.e.* within one year of him filing his habeas petition, that Hammerle first learned of the information contained in the letter. Therefore, the court must conclude that Hammerle's petition is untimely and must be dismissed. *See Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005).

The fact that Hammerle's petition is untimely is only one reason why it must be dismissed. As the court noted previously, Hammerle's habeas petition raises thirty-three grounds for relief, fourteen of which relate to ineffective assistance of his trial counsel (ECF No. 1 at 6-15) and nineteen grounds that relate to ineffective assistance of his appellate counsel (*id.* at 16-29). Hammerle acknowledges that he has failed to exhaust his state court remedies with respect to all but one of his claims. Because his petition is "mixed" in that it contains both exhausted and unexhausted claims, the court is precluded from granting him relief as to any claim. *Rose v. Lundy*, 455 U.S. 509, 522 (1982).

His explanations for having failed to exhaust thirty-two of his claims is that an attorney, either trial or appellate counsel, was ineffective and he (Hammerle) lacks knowledge of the law. Although ineffective assistance of counsel can, under some circumstances, "serve as cause to excuse the procedural default of another habeas claim," *Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 1591 (2000), such a claim must usually first be "presented to the state courts as an independent claim before it may be

used to establish cause for a procedural default," *Murray v. Carrier*, 477 U.S. 478, 489 (1986). Hammerle has made no effort to present his claims of ineffective assistance of counsel to the state court. Therefore, those claims cannot serve to excuse his failure to exhaust any claim he now seeks to present.

Nor can Hammerle's lack of familiarity with the law, without more, serve as a basis to excuse his failure to exhaust his claims. *Smith v. McKee*, 598 F.3d 374, 385 (7th Cir. 2010) ("This court has specifically rejected the argument that a petitioner's *pro se* status alone constitutes cause in a cause-and-prejudice analysis.") (citing *Harris v. McAdory*, 334 F.3d 665, 668 (7th Cir. 2003); *Barksdale v. Lane*, 957 F.2d 379, 385-86 (7th Cir. 1992)).

Dismissal of the unexhausted and procedurally defaulted claims would not permit the court to consider Hammerle's lone exhausted claim because, as noted above, the petition is untimely. Therefore, the court must dismiss the petition in its entirety.

Insofar as Hammerle's submission might be interpreted as a renewed request for the appointment of counsel, the request is denied. The defects in Hammerle's petition are not remediable through legal acumen. With no indication that Hammerle has a plausible claim for relief, the court cannot say that the interests of justice require the appointment of counsel. *See* 18 U.S.C. § 3006A(a)(2).

Finally, because the court must dismiss Hammerle's petition for a writ of habeas corpus, pursuant to Federal Rule of Appellate Procedure 22(b), Rule 11(a) of the Rules Governing § 2254 Proceedings, and 28 U.S.C. § 2253(c), the court must consider whether

to grant Hammerle a certificate of appealability. Because the court is dismissing the petition on procedural grounds, a certificate of appealability is appropriate only if reasonable jurists would find it "debatable whether the petition states a valid claim of the denial of a constitutional right" and it is "debatable whether [this court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The court concludes that its decision that Hammerle's petition is both mixed and untimely is not fairly debatable. The court therefore denies a certificate of appealability.

IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus is dismissed. The Clerk shall enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 21st day of October, 2020.

WILLIAM E. DUFFIN
U.S. Magistrate Judge