

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MICHAEL B. LUFKIN,)
)
 Petitioner)
)
v.) Civil No. 99-0240-B
)
DEPUTY WARDEN DOUGHTY,)
)
 Respondent)

RECOMMENDED DECISION

Petitioner has filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. section 2254. Petitioner challenges his conviction in June, 1997 of several driving offenses, the most serious of which was for operating a motor vehicle after revocation of his driver’s license in violation of 29-A M.R.S.A. section 2557. Petitioner raises four grounds for relief in the Petition, to which the Respondent filed an Answer on November 15, 1999. Petitioner was granted leave to file a Reply brief, and did so on January 13, 2000.

The Petitioner first asserts that he was denied the effective assistance of trial counsel. Specifically, he asserts counsel was ineffective for his failure to call witnesses on Petitioner’s behalf, his absence from jury selection, his stipulation to Petitioner’s status as an habitual offender, his failure to obtain Petitioner’s criminal record, his failure to inform Petitioner that Petitioner’s motion for a

judgment of acquittal was denied, his acquiescence in the prosecuting attorney's use of leading questions, and his failure to seek a mistrial on the basis of an improper comment by the prosecuting attorney. Petitioner raised the ineffective assistance of counsel on these same bases in a state post-conviction review proceeding, in which a hearing was had on March 4, 1999, and a decision issued on May 26.

Petitioner may prevail on his Petition with respect to claims raised and resolved by the state courts only upon a showing that the state court adjudication:

(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). Further, a state court's factual determination is presumed to be correct. 28 U.S.C. § 2254(e). Where there is Supreme Court precedent governing Petitioner's claim, he may obtain relief only upon a showing that the precedent "requires an outcome contrary to that reached by the relevant state court." *O'Brien v. Dubois*, 145 F.3d 16, 24-25 (1st Cir. 1998). In this case, the state court analyzed Petitioner's claim under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and concluded that

Petitioner had not met his burden of showing either deficient performance on the part of trial counsel, or resulting prejudice. Petitioner has made no attempt to show that a different result was required on the facts as found by the state court. Nor has he argued that those facts were unreasonable in light of the evidence presented at the hearing. Accordingly, Petitioner is not entitled to relief on his first ground.

Petitioner next argues that he was denied the effective assistance of counsel on appeal. This claim was never presented to the state court in the post-conviction review petition, and Petitioner has offered no reason to believe he would now be permitted to raise it in a subsequent state petition. *See*, 15 M.R.S.A. § 2128(3) (setting forth limited exceptions to the general rule that grounds not raised in a single post-conviction proceeding are waived). Accordingly, Petitioner may not obtain relief on this ground in this Court unless he “can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Brewer v. Marshall*, 119 F.3d 993, 999 (1st Cir. 1997), *cert. denied*, 522 U.S. 1151 (1998) (quoting *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991)). Petitioner has made no attempt to do so in this Petition for Writ of Habeas Corpus. Relief is appropriately denied on this ground.

Petitioner's third and fourth arguments assert claims arising only as a matter of state law. First, he asserts that the indictment charging him with operating after habitual offender revocation failed to charge a crime under Maine law. Second, he argues that a civil adjudication was improperly used as one of the predicate offenses forming the basis for the revocation. These assertions do not attack the constitutionality of Petitioner's conviction for operating after habitual offender revocation. They are therefore not cognizable on this Petition for Writ of Habeas Corpus. *Burks v. Dubois*, 55 F.3d 712 (1st Cir. 1993).

Conclusion

For the foregoing reasons, I hereby recommend the Petition for Writ of Habeas Corpus be DISMISSED and the Writ DENIED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
United States Magistrate Judge

Dated on: January 31, 2000