

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

JOSEPH BONG,

Petitioner,

v.

MICHAEL THURMER, Warden,
Waupun Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

08-cv-731-bbc

REPORT

Petitioner Joseph Bong is serving a 40 year prison sentence at Waupun Correctional Institution following his 2004 conviction in Dane County Circuit Court of sexual assault, armed robbery and related charges. Bong has filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in which he contends that his trial attorney was ineffective and the court's evidentiary rulings undermined his right to present a defense. For the reasons stated below, I am recommending that the court deny Bong's petition and dismiss this case.

On September 4, 1997, a 38-year old, sight-impaired woman named Patricia was raped at knifepoint in her Madison home while her teenaged, pregnant daughter slept in a room across the hall. After the intruder left, Patricia called 911 and reported the crime, which spurred a police investigation. About a month later, Patricia recanted her statement after the investigating officers accused her of lying. Soon after, however, Patricia declared publicly that she had recanted only because she had been coerced into doing so by the investigating officers who refused to believe that she had been raped and threatened.¹

¹ Patricia's case garnered significant local attention and was extensively chronicled in the *Isthmus*. See <http://www.cryrapebook.com/Articles.html>.

State investigators took over the case in 1998 but developed no leads until 2001, when a new DNA indexing database matched semen stains found on Patricia's sheets to petitioner Joseph Bong, a convicted felon and a cousin of someone Patricia's daughter had dated. Bong was charged and found guilty at trial of five felony counts in connection with Patricia's rape. The Wisconsin Court of Appeals upheld the conviction on appeal.

Having exhausted his state court remedies, Bong now seeks federal relief. In his § 2254 petition, Bong contends that his right to present a defense was undermined when the trial court excluded a statement by Patricia's daughter admitting sexual contact with Bong prior to her mother's rape. Bong also contends that he was deprived of his Sixth Amendment right to the effective assistance of counsel at trial because his attorney did not adequately explain the ramifications of Bong's decision not to testify. Having considered Bong's arguments in light of the record, the state appellate court's analysis and the controlling Supreme Court precedent, I conclude that Bong has not met his burden of showing that the state appellate court made any objectively unreasonable determinations when it rejected his constitutional claims and affirmed his conviction. Accordingly, Bong is not entitled to federal habeas relief.

FACTS

The state court of appeals set out the operative facts in its decision denying Bong's direct appeal. Bong has not presented any clear and convincing evidence to refute these facts, *see* 28 U.S.C. § 2254(e)(1), so I adopt them and recite them here for the reader's convenience::

The charges arose out of allegations that an intruder entered the bedroom of Patricia M., a visually impaired person, while she was sleeping on September 4, 1997, and sexually assaulted her at knife point in several ways. Patricia testified that she retreated into a

closet after the assaults. She testified that the intruder removed the bottom fitted sheet from her bed, disabled the bedroom phone, and stole money from her backpack. Patricia said the intruder indicated during the assault that he already knew Patricia was visually impaired, asked about her teenaged daughter, and appeared to have known the door would be unlocked, which led Patricia to believe that her assailant knew either her or her daughter.

Patricia called 911. The police took the remaining top bed sheet and other items, and transported Patricia to a hospital to have a sexual assault examination and get stitches for a knife cut on her hand. The nurse observed two cuts on Patricia's face, one on her neck, one on her hand, and a red bruise on her inner thigh close to the vagina, and noted that Patricia was "controlled, cooperative, quiet, trembling, and tearful." There was also a one-centimeter abrasion on the outer edge of her anus, but no discernible trauma to Patricia's vaginal tissue and no seminal fluid. The police did not recover any fingerprints from any of the items Patricia said the intruder had touched. The bed sheet taken from Patricia's house was not tested for DNA until June of the following year.

About a month after the reported assault, the investigating detective informed Patricia that he believed she made up the entire story. According to Patricia, during a two-hour interview, the detective repeatedly asked Patricia why she made up the story and told her she would be detained on suicide watch unless she admitted making up the story. Patricia testified that she finally agreed that she made it all up. She testified that she did not think the police would let her leave until she did. Over time, Patricia became increasingly certain that her assailant was a person named Dominic Pena, her daughter's boyfriend at the time and the former boyfriend of her sister.

Over three and a half years after the reported assault, the police discovered a "match" to Bong from the biological samples on Patricia's bed sheet. Patricia's daughter Misty recognized Bong as someone she had known since high school. Misty had dated Bong's cousin Lonnie Elvord at one time and was also a friend of another

one of Bong's cousins, John Quamme. Elvord testified he was aware that Patricia collected money from vending machines and kept it in a vinyl bag. He also said he had either brought Bong along with him or picked him up from Misty's house once or twice while Bong was living with him. Misty told investigators that Quamme had mentioned to her that Bong was someone she should consider a suspect, although Quamme denied making any such comment.

The defense theory at trial was that either Pena committed the assault or Patricia fabricated the incident to gain attention or sympathy and blamed Pena to try to undermine his relationship with her daughter. FNI. A critical element of the defense strategy was to show that Bong's DNA got onto Patricia's bed sheet as the result of an alleged sexual encounter he had with Misty in her mother's bedroom. Bong did not testify, however, and Misty denied that she had ever been in her mother's bedroom with Bong. In fact, Misty said that she had only met Bong twice and, to her knowledge, he was never at her house.

FNI. Initially, Patricia told police she suspected Pena.

Bong countered Misty's testimony with the testimony of Ben Donahue, who had been a good friend of Bong for fourteen years. Donahue said that sometime toward the end of summer in 1997, he saw Misty performing fellatio on Bong in a "back room" at Misty's house, apparently in exchange for marijuana. Donahue did not further describe the room where this alleged incident occurred.

Bong unsuccessfully sought to introduce a prior statement Misty made to one of the investigating agents. Misty told Special Agent Elizabeth Feagles that she had intercourse with Bong on one occasion at the residence Bong shared with Quamme. Misty was still in high school and Bong was on "the bracelet" at the time. Thus, counsel explained, the sexual encounter between Bong and Misty at Quamme's house could have been as late as three and a half months before Patricia's assault.

State v. Bong, 2007 WI App 216, ¶¶2-8, 305 Wis. 2d 654, 739 N.W. 2d 490 (unpublished opinion).

Karen Doerfer Daily, a forensic scientist at the Wisconsin Crime Laboratory, testified that she analyzed Patty's top bed sheet in June 1998. Daily was able to see two small stains consistent in appearance with semen stains. The stains were located toward the top of the sheet, where the band of stitching is located. From the stains, Daily was able to isolate sperm cells from which she extracted DNA and a non-sperm portion that contained both male and female DNA. Trial Transcript, March 11, 2004, dkt. #10, exh. L.-2, at 74-76, 93-96. Subsequent DNA testing of the extractions performed by another crime lab scientist, Curtis Knox, determined to a reasonable degree of scientific certainty that the DNA extracted from the sperm portion of the stains had come from Bong and that the non-sperm portion of the stains contained a mixture of DNA from two individuals: Patricia and Bong. *Id.* at 117. Knox testified that only identical twins have the same DNA. *Id.* at 107.

The jury convicted Bong on all counts. After trial, Bong, now represented by a new lawyer, filed a motion for a new trial on the ground that the trial court had denied his right to present a defense by barring him from eliciting evidence that Misty had admitted to Agent Feagles that she had had sex with Bong on one occasion approximately three months before Patricia was sexually assaulted. This evidence was crucial to his theory of defense, argued Bong, which was that he and Misty had a relatively ongoing intimate relationship, which explained how his semen got deposited on Patricia's bed sheets. According to Bong, evidence of Misty's past sex with Bong would have undermined Misty's credibility by demonstrating that she had a stronger relationship with Bong than she had admitted. Second, it would have bolstered Donahue's contention that Misty had had sex with Bong at her mother's home towards the end

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