

FILED
NOV 17 2008
By PATRICK E. DUFFY
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

GERALD FOSTER,) CV 08-130-M-DWM
)
Petitioner,)
)
vs.) ORDER
)
MIKE MAHONEY, ATTORNEY GENERAL)
OF THE STATE OF MONTANA,)
)
Respondents.)

United States Magistrate Judge Jeremiah C. Lynch entered Findings and Recommendation in this matter on October 30, 2008. Judge Lynch recommended denying on the merits Petitioner's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner timely objected on November 13, 2008. Therefore, Petitioner is entitled to de novo review of those portions of the Findings and Recommendation to which he objected. 28 U.S.C. § 636(b)(1). The portions of the Findings and Recommendation not specifically objected to will be reviewed for clear error. McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981).

Foster's petition alleges that the State of Montana withheld and/or falsified evidence that would have allowed him to challenge a 2005 felony DUI conviction. He also alleges he was improperly refused a blood test at the time of his arrest for the DUI. Judge Lynch found that Foster's petition had no merit and that there was no reasonable ground for him to challenge his 2005 DUI conviction. Foster objects to Judge Lynch's findings that evidence of his driving record or prior convictions was not withheld or falsified. He also argues that the record shows one or more of his earlier DUI convictions should have been expunged.

As Judge Lynch notes, there is no indication the State withheld or falsified any evidence regarding Foster's driving record, particularly since Foster attached a certified copy of his driving record to his petition. In addition, Foster provides no evidence that one or more of his DUI conviction should have been expunged. The state district court records attached to his petition show that his 1998 conviction was reduced from a felony to a misdemeanor. However, as Judge Lynch correctly found, this has no bearing on his 2005 felony DUI conviction.

Foster does not object to any other findings by Judge Lynch. I find no clear error in Judge Lynch's remaining findings and recommendations. Accordingly,

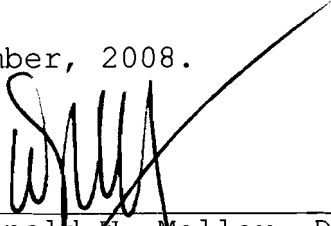
IT IS HEREBY ORDERED that Judge Lynch's Findings and Recommendation (dkt #6) are adopted in full. Foster's Petition

(dkt #1) is DENIED on the merits.

The Clerk of Court is directed to enter, by separate document, a judgment in favor of Respondents and against Foster.

IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

Dated this 17th day of November, 2008.



Donald W. Molloy, District Judge
United States District Court

