UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-1195
Summary Calendar

CHARLES E. BAKER,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas
(CA-5-89-0135)

(February 5, 1993)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.*

GARWOOD, Circuit Judge:

Petitioner-appellant Charles Earl Baker (Baker) appeals the district court's denial of his petition for habeas relief under 28 U.S.C. § 2254. Baker contends that his 1983 Texas conviction for aggravated kidnapping was constitutionally invalid because: (1)

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

the state failed to turn over exculpatory evidence in violation of *Brady v. Maryland*, 83 S.Ct. 1194 (1963); and (2) he was denied effective assistance of counsel in that his attorney (a) failed to move to suppress a lineup resulting from an unlawful arrest; (b) offered in evidence a mug shot with the notation "Police Department Lubbock, Texas"; (c) failed to object to the police officer's identification of the person on the blurry bank videotape and failed to procure an expert witness to compare a videotape of the suspect to the defendant; (d) failed to procure the testimony of the victim's treating doctor who found no medical evidence of the victim's rape allegation; (e) failed to procure additional alibi witnesses for the defendant; and (f) failed to interview the female victim and the police officer prior to trial. We affirm.

Facts and Proceedings Below

Charles E. Baker was convicted in Texas state court of aggravated kidnapping. Holding a gun, Baker accosted a man and a woman in the parking lot of a bar on April 17, 1980. He demanded money and ordered the man to get in the driver's seat of the man's car while Baker and the female victim got into the back seat. Baker allegedly forced the woman to disrobe, raped her twice, and committed an act of oral sex on her. Baker then instructed the man to stop the car at an automatic teller machine where all three of them got out of the car. When a policeman drove into the bank machine parking lot, Baker, the man, and the woman all returned to the car. Though they failed to get any money, a videotape of them was taken at the bank machine. After leaving the parking lot, the man jumped out of the car and fled. Baker got in the front seat

and began driving. Several blocks later, the woman also jumped out of the car and fled.

In police interviews shortly after the crime, the victims' only description of the assailant was that he was a black male wearing surgical gloves. The woman viewed two photographic lineups. She identified no one as her assailant in the first lineup. A few days later, after police officer Britt identified the man in the bank video as Baker from a blurry picture, the woman identified Baker in a second photographic lineup containing six pictures. The victim said she was very sure, but not positive, that Baker was the assailant. A grand jury indicted Baker on May 9, 1980.

On May 25, 1982, two years later, Baker, who had been living in California for ten years, called the police to report that his car was in the process of being robbed. On arrival, the police arrested Baker instead under the mistaken belief that he was a drug dealer named Steel. The California police detained Baker after a computer check revealed that he was wanted in Lubbock, Texas. Through extradition, Baker was returned to Texas. In Lubbock, Baker was placed in a live lineup where the female victim identified him.

Baker appealed his conviction, brought four state habeas petitions, a state court petition for grievances, and filed this habeas petition in federal district court. The federal district court appointed an attorney to represent Baker and held an evidentiary hearing before dismissing the habeas petition on the merits. Baker has appealed to this Court, *pro se*, after the

district court issued a certificate of probable cause for appeal and declined to appoint counsel for this appeal.

Discussion

I. *Brady* Violation

Baker contends that the state's failure to turn over exculpatory evidence violated *Brady v. Maryland,* 83 S.Ct. 1194 (1963). Under *Brady*, the prosecution's suppression of evidence "favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 83 S.Ct. at 1196-97 (suppression, favorable evidence, materiality). Evidence is material when a reasonable probability exists that its disclosure would create a serious possibility of a different result at trial. *United States v. Bagley*, 105 S.Ct. 3375 (1985). Under *Brady*, the prosecution is responsible for disclosing information contained in police records including impeachment evidence. *See id.; Williams v. Whitley*, 940 F.2d 132, 133 (5th Cir. 1991).

The state failed to turn over a statement given by the victim to the police the day after the crime, April 18, 1980. This statement, though in the police records, was not in the prosecution's file, nor given to the defendant. In this statement, the victim described her attacker only as a "black male." Yet, three years after the crime, the victim described her assailant's size and clothes giving the same details as one of the police officers involved. Baker argues that this statement could have been used to impeach the victim's subsequent identification of himSQthe sole issue at trial.

Though the prosecution erred in failing to disclose this statement, we find that no *Brady* violation occurred because no reasonable probability of acquittal existed merely from the disclosure of the statement. Specifically, Officer Combs testified, without contradiction, that the victim's only description was that her assailant was "a black male." Thus, the statement was merely cumulative of Officer Combs' undisputed testimony. Both Officer Combs and the victim were cross-examined on the assailant's identification. Baker's trial attorney testified at the federal evidentiary hearing that the statement would not have aided him in cross-examination of the victim or otherwise altered the trial "because the information was already there" and the statement "basically tracked the police offense report." Finally, the victim was able to generate enough details for a composite. These facts and other evidence of identification outweigh any marginal further impeachment value of the statement.

II. Ineffective Assistance of Counsel

Baker alleged that numerous instances of asserted ineffective assistance of counsel at trial entitle him to a new trial with adequate representation. *Strickland v. Washington*, 104 S.Ct. 2052 (1984), set out a two-pronged test for determining the adequacy of counsel. First, did counsel's performance fall below an objective standard of reasonableness? Second, did the deficient performance result in prejudice?

A. Pre-trial lineup

Baker contends that counsel should have moved to suppress the identification from the live lineup because he was unlawfully

arrested without probable causesQthat his arrest warrant was invalid since the affiant lacked personal knowledge.[1] Under *Kimelman v. Morrison*, 106 S.Ct. 2574 (1986), the court may consider in a habeas proceeding whether counsel was ineffective in failing to move to suppress evidence obtained in violation of the Fourth Amendment, even though the Fourth Amendment claim itself may not be raised on habeas. *See Stone v. Powell*, 96 S.Ct. 3037 (1976). A valid indictment supersedes an arrest warrant as the basis for detention and establishes probable cause for an arrest. *Rodriguez v. Ritchey*, 556 F.2d 1185, 1191 (5th Cir. 1977), *cert. denied*, 98 S.Ct. 894 (1978); *Wicker v. State*, 667 S.W.2d 137, 139-40 & n.1 (Tex. Crim. App. 1984) (en banc). The fact that one is not prosecuted for the charge for which one is extradited does not suggest any deficiency in arrest, indictment, or prosecution. *Lascelles v. Georgia*, 13 S.Ct. 687 (1893).

In April of 1980 an arrest warrant was issued for Baker. Then, on May 9, 1980, a Texas grand jury indicted Baker on charges of aggravated rape. A separate indictment on kidnapping charges was issued the same day. In 1982, Baker was mistakenly arrested on the theory that he was a California drug dealer named Steel. While arrested, a police check on his true identity revealed the outstanding rape indictment and led to his detention and

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[1] Baker recognized in his reply brief that *Stone v. Powell*, 96 S.Ct. 3037 (1976), bars a challenge to the legality of the arrest in a habeas case. Baker also presents facts suggesting that the lineup was unduly suggestive. He did not raise this issue in the district court and we refuse to consider it now.

extradition. Upon his return to Texas, he was placed in a lineup in which the victim identified him.

Baker's mistaken initial arrest in California as a drug dealer named Steel was valid if the police had probable cause to arrest Steel. *See United States v. McEachern*, 675 F.2d 618, 621 (4th Cir. 1982), citing *Hill v. California*, 91 S.Ct. 1106, 1110 (1971) ("If the police have a valid arrest warrant for one person and they reasonably and in good faith arrest another, . . . the arrest of the `wrong person' is proper" and fruits of the arrest are admissible.). Regardless of whether Baker's arrest was proper, the challenged alleged fruits of Baker's arrest were obtained from a lineup conducted months later. This lineup occurred after the California police discovered the valid indictment against Baker and after Baker's extradition to Texas. Even if the initial arrest were illegal, any nexus to the lineup is simply too attenuated. *See, e.g., Rawlings v. Kentucky*, 100 S.Ct. 2556, 2562-64 (1980).

Baker's removal to Texas was based on a valid indictment and Baker has not shown that the lineup resulted from an illegal arrest, that the arrest lacked probable cause, or that his counsel was deficient for failing to move to suppress the lineup as the fruit of an unlawful arrest. This claim is without merit.

B. The mug shot

Baker contends that his attorney was deficient because the attorney offered into evidence a "mug shot" of the defendant with the notation "Police Department Lubbock, Texas." During the habeas hearing, Baker's trial attorney stated that he did not think the

notation on the photo was objectionable hearsay. During deliberation, the jury asked to see the mug shot.

In *Richardson v. State*, 536 S.W.2d 221, 223 (Tex. Crim. App. 1976), the Texas Court of Criminal Appeals reversed the defendant's conviction based on a similar mug shot because the picture implied the commission of an extraneous offense. *But see Harlan v. State*, 416 S.W.2d 422, 423 (Tex. Crim. App. 1967) (mug shot not reversible error). Baker's picture did not refer to an extraneous offense; nor did either defense counsel or the prosecution, and neither referred to the police markings on the picture. Though defense counsel erred by not cropping the picture to remove the police department notation before offering the picture into evidence, the error was harmless in light of all the other evidence.

C. Lay identification based on videotape

Baker contends that his attorney erred by failing to object to the police officer's identification of the person in the blurry bank videotape and by failing to procure an expert witness to enhance the bank video and compare the videotape of the suspect to Baker to rebut the officer's testimony.

The officer gave his opinion that the person in the bank videotape was Baker, a man he had known for ten years. Baker contends that this testimony was inadmissible inasmuch as lay persons are incapable of making identifications based on videotapes. However, no case law requires identification witnesses to have expert training. *See generally United States v. Alexander*, 816 F.2d 164, 169 (5th Cir. 1987) (juries competent to evaluate eye witness testimony on identification). The jury saw the videotape

and was able to decide whether the person in the videotape looked like the defendant. During deliberations, the jury asked to have the videotape replayed. Most importantly, on cross-examination, the attorney tried to discredit the officer's identification of Baker. Thus, Baker's counsel was not unreasonable in failing to object to admissible testimony.

Baker wanted an expert to testify that the police officer could not make a valid identification of the defendant based on the videotape and to testify that the physical characteristics of the person in the videotape are different from Baker's. The district court denied Baker's motion requesting permission to send the videotape to an expert and the money to pay for it.

In *Alexander*, 816 F.2d at 169, a direct criminal appeal, this Court held that expert identification witnesses are unnecessary merely to challenge the identification testimony of eyewitnesses. However, the *Alexander* court held that expert comparisons of the physical characteristics of the accused and pictures of the suspect were admissible under the "particular circumstances" of that case. *Id.* at 168-69. The *Alexander* court granted a new trial because of the error in excluding such expert evidence. However, we did "not hold that such evidence will always be admissible in every case." *Id.*

At the habeas hearing, Baker's trial counsel testified that his strategy was not to enhance the videotape because blurry photos might better discredit the testimony, but counsel admitted that he had not considered procuring an identification expert. This

strategy, while perhaps less effective than calling an expert, is not unreasonable.

While Baker's attorney could have objected to the officer's lay opinion testimony and could have procured an expert witness to compare the identification, Baker's attorney was not unreasonable in failing to do either.

D. No medical evidence of rape

Baker claims that his attorney was deficient in failing to procure the testimony of the victim's treating doctor who found no medical evidence supporting the victim's rape allegation. Immediately after the incident, the victim had a medical examination. The examination found no hairs in the victim's pubic combings, no seminal matter in the vaginal or perineal washings, and no semen on her clothes. The report itself contained contradictory statements by the victim. The victim answered "no" to the question: did assailant force patient to commit oral sex? But the report said, "he did oral sex her."

While these records and the treating physician's testimony would have tended to impeach the victim's credibility since she testified that she got a good look at Baker during the alleged rape, Baker's attorney brought out all of this information, except the oral sex discrepancy, in his cross-examination of a police officer. Though the lawyer may have acted unreasonably, any error was harmless since essentially the same evidence was produced on cross-examination.

E. Alibi witnesses

Baker contends that counsel erred in failing to subpoena additional alibi witnesses for the defendant. Baker's alibi is that he was in California with a broken leg at the time of the crime. Baker claims that at least seven witnesses were available and willing to testify. Claims of ineffective assistance of counsel due to uncalled witnesses are disfavored in federal habeas review. *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984). The availability of uncalled alibi witnesses, when other alibi witnesses testified at trial, generally does not justify habeas relief as the testimony is cumulative. *United States v. Simone*, 452 F.2d 554, 555 (5th Cir. 1971), *cert denied*, 92 S.Ct. 2067 (1972) (ineffective assistance of counsel claim of failure to call additional alibi witnesses denied where five alibi witnesses testified at trial); *Morris v. Wyrick*, 516 F.2d 1387, 1391 (8th Cir. 1975), *cert denied*, 96 S.Ct. 268 (1975) (more than two alibi witnesses would be cumulative). Baker claims that his treating physician, Dr. Ross, would testify to the cast on his leg in 1980. Before trial, Dr. Ross's name was not on Baker's witness list and Baker's counsel testified that Baker could not remember the doctor's name. Baker offered no evidence that Dr. Ross would have testified that he was in a cast in April of 1980 or that Dr. Ross treated him in 1980. The only evidence that Dr. Ross ever treated him was a statement from Dr. Ross's office that he was treated in 1983. Baker also failed to offer evidence of the testimony of

several of the other witnesses other than his own conclusory opinion that they would verify his alibi.

Baker, however, presented two witnesses at the habeas hearing, Marilyn Beaver and Archie Nell Shed, who testified that Baker was in California with a broken leg in 1980. This is consistent with the testimony of two alibi witnesses at trial that Baker was in California in 1980 with a broken leg. None of the witnesses, however, testified that Baker was in California on the day the offense occurred. Baker listed other witnesses as available to testify at trial, but failed to present evidence at the habeas hearing of what their testimony would be.

Because this testimony would have been cumulative and the attorney made some efforts to locate these witnesses, we find that the attorney acted reasonably and that Baker's constitutional rights were not violated.

F. Pre-trial investigation

Baker contends that his attorney was deficient in failing to interview police officer Britt prior to trial, thus not having advance warning of Officer Britt's testimony that he (Britt) saw Baker and his sister driving together in what he thought was her car, which he believed was a brown Cadillac, the day he (Britt) was asked to identify the bank photograph, and that Baker was wearing similar clothes in the car as in the photograph. However, this testimony was given by Britt under cross-examination by Baker's counsel at a pretrial suppression hearing, *not* at trial. Hence, counsel learned of it prior to trial regardless of his failure to interview Britt prior to trial; nor was Britt's testimony in this

respect put before the jury. Baker has not shown sufficient prejudice, under *Strickland*, from his attorney's failure to interview the officer prior to trial.

Baker also argued that his attorney failed to subpoena his sister's car papers showing that she did not purchase her brown Cadillac until after the incident occurred. This issue was not exhausted in state court, as the state court granted Baker's motion for dismissal on this issue, and Baker cannot argue it now.

Conclusion

Baker has raised other claims on appeal that were not raised below and has also complained of prison retaliation because of this appeal. We will not consider the arguments that were not raised below. And, this appeal is not the appropriate forum to address Baker's complaints of prison retaliation.[2]

In sum, Baker has demonstrated no reversible error in the district court's denial of his allegations of a *Brady* violation and of ineffective assistance of counsel, and we affirm the judgment of the district court dismissing Baker's habeas petition.

AFFIRMED

[2] We deny Baker's motion, filed in this Court, "to abate and remand for ex[h]austion of state court remedies, newly discovered evidence, or in the alternative new trial."