UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3416
Summary Calendar

WENDELL A. MARTIN,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,
ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CA 89 4177 L)

(February 5, 1993)
( )

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

GARWOOD, Circuit Judge:

Petitioner-appellant Wendell A. Martin (Martin) appeals the dismissal with prejudice of his petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 on several grounds. Finding that none of Martin's arguments on appeal warrant reversal, we

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

affirm the dismissal of his petition.

Facts and Proceedings Below

At shortly after ten p.m. on April 24, 1985, Leo Purnell (Purnell) was shot twice in the head at close range while he was standing outside a restaurant in New Orleans, Louisiana. With him at the restaurant was his girlfriend, Marilyn Johnson (Johnson). Purnell died shortly thereafter and two officers from the homicide division of the New Orleans Police Department, Officer Norman McCord (McCord) and Detective Marco Demma (Demma) arrived and began investigating the killing.

After initially fleeing the scene, Johnson returned and informed the investigating officers that she had been with Purnell when he was killed. She identified the victim, but claimed that she could not identify Purnell's assailant. Another eyewitness, Donna Nettles (Nettles), who lived in the area near the scene of the murder and had been walking to the restaurant when the shooting occurred, did not volunteer any information at the time. Both women later claimed to have been too scared to come forward.

Nettles was subsequently arrested on an unrelated matter and thereafter requested the opportunity to speak with police regarding her knowledge of Purnell's murder. She furnished a written statement to an Orleans Parish deputy who relayed it to Demma. On July 24, 1985, pursuant to a photographic line-up administered by Demma, Nettles positively identified Martin as Purnell's killer. With this information, Demma that same day procured a warrant for Martin's arrest. Later that evening, Demma, McCord and another police officer executed the warrant and arrested Martin at his

apartment.

During Martin's arrest, Demma informed Martin that he was charged with the murder of Purnell. According to Demma, after Martin had been informed of his *Miranda* rights, he stated that he could not have killed Purnell because he had been in the company of his girlfriend Sheila Robertson (Robertson) at the time of the murder. At trial, however, Martin presented an alibi defense based on the scenario that he was with other friends of his, and not Robertson, at that time.

Subsequently, Demma presented a photographic line-up (the same one from which Nettles had identified Martin) to Johnson at two different times. The first time, Johnson claimed to be unable to identify Purnell's murderer, saying that she was afraid for her life. The second time Demma showed her the same photographs, however, Johnson positively identified Martin as Purnell's killer.

Though Martin's case was initially scheduled for a preliminary examination, this hearing was never held because Martin was indicted by a grand jury on second degree murder charges on August 22, 1985. He pleaded not guilty. On September 11, 1985, Martin moved the court for a speedy trial, which motion the court granted. Due to a conflict of interest, however, Martin's appointed counsel was relieved and new counsel appointed on October 4, 1985. Martin's trial was therefore rescheduled for November 25, 1985, to allow his new counsel to adequately prepare.

On November 25, however, the state could not locate Johnson to bring her to court to testify and requested a continuance. Further, the state indicated that it would introduce the statement

Martin made at his arrest in order to impeach his alibi defense. Defense counsel advised the court that a motion to suppress would be filed to contest admission of the statement. For both of these reasons, the court continued the trial until the earliest future date when both counsel could be available, January 15, 1986.

Martin, who had moved the court to allow him to act as his own co-counsel, vehemently objected at the November 25 hearing to what he perceived as the court's stalling in order to aid the prosecution and hinder his defense. Martin further claimed that he had many defense witnesses in court that day waiting to testify on his behalf. To protect Martin's defense, the court ordered that subpoenas be issued to all witnesses who were in court that day requiring them to return to testify on January 15.

Martin's trial began on Wednesday, January 15, 1986, with jury selection. The court heard argument on Martin's motions to suppress both the statement he made at his arrest and the eye witness identifications on Thursday, January 16, and denied both motions. Thereafter, the state began the presentation of its case. Both Nettles and Johnson testified that they saw Martin kill Purnell. Both faced vigorous cross-examination regarding their initial reluctance to testify and prior inconsistent written and oral statements.

Because of a court policy against conducting jury trials on Fridays, and an interceding weekend and official state holiday, the trial did not resume until Tuesday, January 21, 1986. The prosecution presented Demma's testimony regarding the investigation of Purnell's murder and the alibi statement offered by Martin at

his arrest. Robertson testified that Martin had called her on the night of the murder and admitted to her that he had killed Purnell.

Martin's defense consisted of the testimony of several witnesses (including Martin himself) that Martin had spent the evening hours on the day of Purnell's murder posting bond for a friend, Walter Solomen (Solomen), then stopping at a local Burger King, and then returning with Solomen and another friend to his apartment in New Orleans East. Among those testifying in support of this alibi were: Solomen, another of Martin's friends who assertedly had provided transportation for Martin and Solomen throughout the evening, and the clerk of the bonding company Martin had employed.

Martin testified in his own behalf to the alibi and claimed to have learned of Purnell's murder through a telephone call from his brother. Martin's brother corroborated this claim. Martin further testified that he had relayed the news of the killing to Robertson, with whom he had been fighting on the telephone, but did not confess to the murder. Martin's nephew testified to having been at the scene of the murder at the time it occurred and having seen two or more men, none of whom was Martin, fleeing the scene. Further, Martin produced a witness who had overheard Robertson state that she would "down" Martin, and another witness who testified that Johnson had admitted to her that the police were trying to coerce a positive identification from her.

The jury returned a guilty verdict and Martin was sentenced to life imprisonment. Martin's conviction and sentence were affirmed by the Louisiana Fourth Circuit Court of Appeal, which also

remanded the case to the trial court so that the trial court could determine whether Martin was present at all phases of the trial. *State v. Martin*, 508 So.2d 152 (La. App. 4th Cir. 1987). Martin and his appellate counsel then filed separate applications for review by the Louisiana Supreme Court, both of which were denied. *State v. Martin*, 519 So.2d 112 (La. 1988).

Martin then filed this petition for writ of *habeas corpus* in federal court pursuant to 28 U.S.C. § 2254 alleging several asserted infirmities in his trial and direct appeal. The district court dismissed Martin's petition without evidentiary hearing in an order dated April 30, 1991. Martin filed a timely notice of appeal.

Discussion

A. Lack of probable cause to arrest and preliminary hearing

Martin first argues that he was arrested in violation of his Fourth Amendment rights because there was no probable cause on which to base his arrest warrant. He further claims that he was denied his due process rights in that he was denied a preliminary examination to determine whether probable cause existed for his arrest.

There is, however, no constitutional right to a preliminary hearing and the determination of probable cause has been left by the Supreme Court to the state's system of pretrial procedure. *Gerstein v. Pugh*, 95 S. Ct. 854, 868 (1975). Louisiana Code Crim. Proc. Ann. arts. 292 & 296 (West 1991) state that a preliminary examination to determine probable cause is not necessary after a grand jury indictment has been returned.

Further, an indictment, fair on its face, returned by a properly-constituted grand jury, conclusively determines the existence of probable cause. *Id*. at 865 n.19 (citing *Ex Parte United States*, 53 S.Ct. 129, 131 (1932)). Finally, we note the well-established rule that an illegal arrest and detention does not of itself void a subsequent conviction. *Id*. at 865.

Martin was arrested pursuant to a validly-issued arrest warrant founded on the positive identification made by Nettles. Under the above-cited authority, it is clear that the warrant and subsequent grand jury indictment returned against Martin on August 22, 1985, fulfilled Martin's Fourth and Fifth Amendment rights regarding the finding of probable cause and protection of due process in his arrest and pretrial detention. Thus, these claims are meritless.

B. Suppression of the statement made by Martin at his arrest

Martin next argues that because his arrest was illegal (as it assertedly was not founded on probable cause), the alibi statement he made at the time of his arrest that he had spent the evening of Purnell's murder in the company of Robertson should have been suppressed as the fruit of the poisonous tree. As we have noted above, however, there was no lack of probable cause to arrest Martin, and the statement in question was made after Demma had advised Martin of his *Miranda* rights. As the predicate of his suppression claim falls, therefore, so must the suppression claim itself.

Moreover, we note that the state trial court conducted a full hearing on Martin's suppression claim before presentation of

evidence began at his trial. In *Stone v. Powell*, 96 S.Ct. 3037, 3052 (1976), the Supreme Court concluded that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Absent any showing by Martin that he was denied a full and fair hearing of his claim at the time of his suppression hearing, his request for federal habeas relief based upon a Fourth Amendment claim is precluded. *Id*. at 3052-53 n.37. This is so even though the Fourth Amendment claim is raised as a ground to exclude a confession. *Billiot v. Maggio*, 694 F.2d 98, 100 (5th Cir. 1982); *Penry v. Lynaugh*, 832 F.2d 915, 918 (5th Cir. 1987), *rev'd in part on other grounds*, 492 U.S. 302 (1989).

C. Right to a speedy trial

Martin further argues that his speedy trial rights were violated by the state's failure to prosecute him within the 120-day period prescribed by the Louisiana Speedy Trial Act. We note that federal habeas consideration of a claim that a state has violated its own speedy trial rules is limited to a determination of whether the defendant's due process rights were violated by the delay. *Millard v. Lynaugh*, 810 F.2d 1403, 1406 (5th Cir.), *cert. denied*, 108 S.Ct. 122 (1987).

Consideration of a constitutional speedy trial claim involves four elements: (1) the length of delay between arrest and trial; (2) the reasons for the delay; (3) the defendant's assertion of his speedy trial rights; and (4) the prejudice to the defendant

resulting from the delay. *Id*. (citing *Barker v. Wingo*, 92 S.Ct. 2182, 2191 (1972)). The threshold consideration in applying the *Barker* test, however, is whether the delay is of sufficient length to be "presumptively prejudicial," thus requiring inquiry into the other *Barker* factors. *Doggett v. United States*, 112 S.Ct. 2686, 2690-91 (1992); *Gray v. King*, 724 F.2d 1199, 1202 (5th Cir.), *cert. denied*, 105 S.Ct. 381 (1984). While there is no bright line test in this Circuit for determining whether a delay is "presumptively prejudicial," three interests of a defendant that a court should consider in assessing prejudice are: (1) prevention of oppressive pretrial incarceration; (2) minimization of the anxiety and concern of the accused; and (3) limitation of the possibility that the defense will be impaired. *Millard, supra*, 810 F.2d at 1406.

Martin was arrested on July 24, 1985, indicted on August 22, 1985, and his trial began on January 15, 1986. Therefore, the delay in this case was less than six months. In context, this is not a presumptively prejudicial delay for a murder charge.[1] The first continuation was based on allowing newly appointed defense counsel to become familiar with Martin's case. The second continuance, granted on November 25, 1985, was based, at least in part, on giving the defense time to contest the admission of the alibi Martin gave at the time of his arrest. Such a delay does not

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[1] *See Doggett, supra*, 112 S.Ct. at 2691 n.1 ("Depending on the nature of the charges, the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year"); *Millard, supra,* 810 F.2d at 1406 & n.1 and cases cited therein (delays of 11 3/4 months, 15 months, 16 months and 18 months presumptively prejudicial so as to require consideration of final three *Barker* factors); *Gray, supra,* 724 F.2d at 1202 (10¼ month delay not presumptively prejudicial).

seem oppressive, and was apparently allowed primarily for the purpose of aiding the defense, rather than impairing it.

Martin argues, however, that he suffered actual prejudice by the delay. He claims that four witnesses who were in court and ready to testify on November 25, 1985, were essential to his defense and were subsequently unavailable on January 15, 1986.

Martin alleges that Debra Green would have testified that Robertson and Nettles conspired to present perjured testimony to the grand jury implicating Martin in Purnell's murder. Felton Robertson, according to Martin, would have testified that he saw the murder of Purnell and that Martin was not the murderer. Martin claims that his neighbor, Michael Sheehan, would have testified that Martin was at home with friends at the time of the murder. Finally, Martin alleges that Vanessa Faciane would have testified that Johnson had been coerced by police to fabricate her testimony against Martin.

Martin's claim that the four witnesses were in court and available to testify on November 25, 1985, is not supported by the record. The trial court ordered that subpoenas be issued to all witnesses present before they left the courtroom on November 25, but no subpoenas were issued to the four witnesses named by Martin. The record contains no evidence that any of the four witnesses had been successfully served with subpoenas to appear on November 25. Moreover, defense counsel's motion for a continuance on January 15, 1986, was based solely upon the absence of Felton Robertson.

In any event, the testimony of the four witnesses would have been merely cumulative. At least two other witnesses corroborated

Martin's alibi testimony concerning his activities on the night of Purnell's murder. Another witness testified that he overheard Robertson say that she would do everything she could to "down" Martin. Martin's nephew testified that he saw Purnell's murderers running from the scene of the murder and that none of them were his uncle. Finally, another witness testified that Johnson was the victim of police intimidation and that her eyewitness testimony was coerced.

We are satisfied that no constitutional violation resulted from the relatively short delay in the commencement of Martin's trial.

D. Brady claim and knowing use of perjured testimony

Martin next argues that Nettles and Johnson perjured themselves and "framed" him for Purnell's murder. He claims that both witnesses executed written statements to the effect that they had not seen the murder, but then testified differently to the grand jury and at trial. Martin makes the further claims that these alleged contradictory written statements were exculpatory evidence that the state withheld from Martin in violation of *Brady v. Maryland*, 83 S.Ct. 1194 (1963), and that the prosecution presented perjured testimony at trial.

Brady states that the failure of the prosecution to disclose evidence favorable to the accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of the good or bad faith of the prosecution. *Id*. at 1196-97.

Martin made a pretrial motion for disclosure of *Brady*

material. Based on this motion, the trial judge made an *in camera* inspection of the prosecution's entire file in Martin's case and the police investigation file. The trial court found nothing exculpatory that had not already been provided to Martin. Furthermore, Martin only identifies two written statements which he claims are exculpatory, both of which were available to him before trial and were in fact used at trial to impeach the prosecution witnesses. One was a letter written to Martin by Robertson that stated that she knew that he had not killed Purnell. This was used at trial. The other is the written statement that Nettles provided to the Orleans Parish deputy in which she identified Purnell's killer by the name of Winfred. This statement was also used at trial. All of the other evidence that Martin claims was unconstitutionally withheld he found in the transcript of the grand jury proceedings that was also furnished to defense counsel before trial. Martin has pointed to no piece of evidence which could implicate *Brady*.

With regard to the prosecution's use of perjured testimony, Martin makes the same accusations in his *habeas* petition that he made at trial; he asserts that Nettles and Robertson were lying and that Johnson had been coerced by police to identify Martin.

In order to allege a due process violation, Martin must show that the prosecution knowingly presented materially false evidence to the jury. *United States v. Martinez-Mercado*, 888 F.2d 1484, 1492 (5th Cir. 1989). Here, though there may be some room for doubt as to the truth of the testimony provided by Nettles, Johnson, and Robertson, all of the impeachment evidence identified

by Martin as showing their asserted perjury was presented at trial and used to cross-examine those witnesses. The jury was able to make credibility determinations at trial based on all of the facts cited by Martin in his *habeas* filings. Thus, we are not able to say that the prosecution knowingly presented false testimony. Martin essentially asks that the federal court retry the case on basically the same evidence. This is not appropriate.

E. Court reporter's alteration of the trial record

Martin next makes the totally unfounded claims that the trial court violated his constitutional rights by allowing the court reporter to alter the trial record by (1) not including a portion of the trial in which Martin's mother was arrested, and (2) neglecting to include the transcript of the grand jury proceedings in the trial record.

There is no omission in the record regarding the incident in which Martin's mother was removed from the courtroom for making threatening gestures at one of the prosecution witnesses. The transcript clearly states that the incident took place outside of the presence of the jury. Therefore, no possible prejudice could have occurred as a result of the incident.

We similarly see no prejudice in the fact that the transcript of the grand jury proceedings was not made part of the trial record. The trial court ordered a copy of the transcript furnished to defense counsel, though it refused to provide a separate copy for Martin himself. Furthermore, in the exhibits attached to Martin's federal *habeas* petition, Martin admits that he had read a copy of that grand jury transcript and cites testimony therein.

Accordingly, Martin can show no prejudice in the fact that the transcript was not included in its entirety in the trial record.[2]

F. Incomplete appellate record

Martin's final claim is that he was denied a fair appeal of his conviction because a portion of the trial transcript was missing from the record provided to the Louisiana Fourth Circuit Court of Appeal on his direct appeal. While it is apparent that the appeals court did not have a complete record, this error was corrected when the case was remanded to the trial court for clarification. The record does not support the inference, however, that Martin or his appellate counsel did not have a complete trial record from which to prepare an appeal. Specifically, Martin's brief to the Supreme Court of Louisiana and his *pro se* brief to the state Fourth Circuit Court of Appeal both refer to testimony from the supposedly missing portions of the transcript.

Petitions based on a complete record have been subsequently filed before the Louisiana Supreme Court and in the district court below. Based on our own careful review of the record and the claims raised before the state appeals court, we can find no resulting harm from what was apparently simple oversight. We therefore find no merit in this claim.

Conclusion

For the foregoing reasons, we conclude that none of Martin's claims on appeal presents any reversible error in the district court's denial of habeas relief. Therefore, the district court's

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[2] Indeed, Martin made arguments based on the grand jury proceedings before the Louisiana Supreme Court.

order dismissing his *habeas* petition with prejudice is

AFFIRMED.