

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 91-3909  
Summary Calendar

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DANIEL LOCKETT,

Plaintiff-Appellant,

VERSUS

ED. C. DAY, WARDEN,

Defendant-Appellee.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
CA 90 4458 M

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June 3, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

DAVIS, Circuit Judge:<sup>1</sup>

Daniel Lockett entered an **Alford**<sup>2</sup> plea in Louisiana state court to manslaughter. He had been charged with second-degree murder. The state court sentenced him to fifteen years at hard labor. Lockett filed an application for post-conviction relief in state court. The record does not show that a state post-conviction

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<sup>1</sup>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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

<sup>2</sup>**North Carolina v. Alford**, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

hearing was held on Lockett's issues.

After unsuccessfully pursuing his state remedies, Lockett petitioned for writ of habeas corpus in federal court. In his petition, Lockett claimed that he received ineffective assistance of counsel, which caused him to plead guilty, for counsel failing to interview alibi witnesses and for counsel failing to confer with Lockett concerning pre-trial motions. Lockett also claimed due process violations from his guilty plea because he did not understand the charges and the court failed to find a factual basis for his plea. In its response, the State waived any failure by Lockett to exhaust his state remedies. The district court, after reviewing the record, dismissed the petition and issued a certificate of probable cause for an appeal.

## II.

### A.

The district court concluded that, as to Lockett's due process claim regarding his understanding of the charges, Lockett "was fully aware of the nature and consequences of the offense to which he was charged and that he knowingly and intelligently plead guilty." Lockett does not argue this issue on appeal and, therefore, the issue is deemed abandoned. **Woods v. Whitley**, 933 F.2d 321, 322 n. 2. (5th Cir. 1992). The district court's determination should be affirmed.

Lockett does contest the other due process issue. He argues that he was denied due process of law because the state trial court failed to find a factual basis for his **Alford** plea and that the

district court erred in concluding that there was a factual basis.

A trial court constitutionally may accept a plea of guilty by a defendant who maintains his innocence if there is evidence of his guilt, i.e., a factual basis for his guilt. **North Carolina v. Alford**, 400 U.S. 25, 37-38, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). "In **Willett v. Georgia**, 608 F.2d 538, 540 (5th Cir. 1979), we held that, when a defendant pleads guilty while proclaiming his innocence, the court commits constitutional error by accepting the plea without ascertaining that there is a factual basis for it." **Banks v. McGougan**, 717 F.2d 186, 188 (5th Cir. 1983). In **Willett**, the trial transcript revealed that, although the court and defendant's counsel said there was factual support for the plea, the transcript did not contain evidence demonstrating defendant's guilt. **Willett**, 608 F.2d at 541. The petitioner had therefore "alleged facts that, if proved, would entitle him to habeas corpus relief." **Id.**

The state record indicates that when the trial court accepted Lockett's **Alford** plea, the court heard no evidence of Lockett's guilt or made findings on this issue. In concluding that the trial court had a factual basis for his plea, the district court relied on a statement by Lockett of "other acts" evidence implicating him in an earlier robbery. In the statement Lockett asserted that he and the homicide victim, Willie Campbell, committed robbery several days before the homicide. According to Lockett, Campbell wanted to confess to the robbery, but Lockett did not.

Although this statement is evidence of a motive for the

homicide, it is insufficient to establish that Lockett murdered Campbell. **See Alford**, 400 U.S. at 37. Further, the trial court did not mention this evidence before accepting Lockett's plea. Therefore, Lockett has established that the record does not contain an adequate factual basis for the plea. However, the state should be permitted to present to the district court evidence showing the factual basis for Lockett's plea. **Willett**, 608 F.2d at 541. "[T]he public interest requires that opportunity be given to present evidence which might show that the petitioner suffered no constitutional deprivation." **Id.** (internal quotations and citations omitted). For this reason, the district court's judgment rejecting this claim is vacated and the case is remanded for an evidentiary hearing to allow the state to attempt to present a factual basis of Lockett's guilt.

B.

Lockett argues that his counsel was ineffective for wrongfully advising Lockett to plead guilty. Lockett alleges two instances of counsel's ineffectiveness: failing to interview alibi witnesses and failing to inform him of the trial court's ruling which suppressed Lockett's statements about the alleged burglary committed by Lockett and the homicide victim. Lockett argues that, if either one of these ineffective instances had not occurred, he would have maintained his plea of not guilty and would have gone to trial.

To show a constitutional violation, Lockett "must demonstrate not only that his counsel's performance was deficient, but also

that the deficient performance prejudiced the defense." **U.S. v. Smith**, 915 F.2d 959, 963 (5th Cir. 1990). To prove deficiency, Lockett "must show that counsel's representation fell below an objective standard of reasonableness." **Strickland v. Washington**, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prove prejudice, Lockett "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." **Hill v. Lockhart**, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Where the alleged error of counsel is "a failure to investigate or discover potentially exculpatory evidence," that determination "will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." **Hill**, 474 U.S. at 59.

In dismissing Lockett's claim based on counsel's alleged failure to interview alibi witnesses, the district court relied on Lockett's failure to state what the alibi witnesses would have said or how these interviews would have affected the outcome of the case. Further, the district court relied on Lockett's waiver of his right to compulsory process by his guilty plea. This claim fails the "prejudice" prong of the **Strickland** test. Lockett knew if he was with an alibi witness when the murder occurred. Thus it is unlikely that counsel's interview of Lockett's alleged alibi witnesses would have unearthed information of which Lockett was not already aware, and that would have caused Lockett to change his decision to plead guilty.

The trial court also rejected Lockett's claim concerning counsel's failure to inform him that the trial court had granted his motion to suppress statements Lockett made about the alleged burglary. The district court relied on the transcript indicating that Lockett was present when the trial court made its ruling and on Lockett's failure to ask the trial court about the ruling when he pleaded guilty.

"[T]he district court need not hold an evidentiary hearing when the record from state court is adequate to dispose of the claim." **Joseph v. Butler**, 838 F.2d 786, 788 (5th Cir. 1988). The record indicates that Lockett decided to plead guilty during a conversation with his lawyer "just prior to coming in [the courtroom]" to hear the court's ruling on the motion to suppress. Moreover, Lockett was called to the stand almost immediately after the district court ruled in Lockett's favor. So the record indicates that Lockett was present in the courtroom when the court made its ruling. That part of the record also suggests that the outcome of the motion to suppress was not a material factor in Lockett's decision to plead guilty. So this claim also fails the "prejudice" prong of the **Strickland** test.

For the above reasons, the judgment of the district court is affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion.