IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-5831
Summary Calendar

RALPH B. WELSH, JR.,

Petitioner-Appellant,

VERSUS

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

Respondents-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA 91 CV 358)

(January 7, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Ralph Welsh appeals the denial of his state prisoner's petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Finding no error, we affirm.

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

At the time his petition was filed, Welsh was confined by the Texas Department of Criminal Justice pursuant to two convictions for aggravated sexual abuse of a child (Nos. 83-CR-2406 and 83-CR-3139) and two convictions for indecency with a child (Nos. 82-CR-1801 and 83-CR-3139).[1] Based upon evidence in the three 1983 cases, his probation in the 1982 case[2] was revoked. He waived his right to a jury trial in the 1983 cases, stipulated to the evidence, and entered pleas of nolo contendere. The four cases were consolidated for appeal, and the state court of appeals affirmed.

After exhausting state habeas corpus remedies, Welsh filed this petition, alleging that (1) the evidence was insufficient to sustain a conviction because it consisted only of challenged hearsay statements and (2) he was deprived of effective assistance of counsel (Counsel failed to file motions to dismiss on various grounds, and the trial judge denied defense counsel's motion to withdraw on the day of trial.); (3) he was denied access to material evidence necessary to prepare a defense and an appeal[3]; (4) he was denied a speedy trial; and (5) the trial judge coerced him into pleading nolo contendere, ignoring his election to plead not guilty and to proceed to trial before a jury. Welsh and the

[1] Case No. 82-CR-1801 will be referred to as the 1982 case, and the three remaining convictions as the 1983 cases.

[2] Welsh pleaded guilty in No. 82-CR-1801 and was placed on probation for eight years.

[3] Welsh has abandoned this issue on appeal.

state respondent filed cross-motions for summary judgment.

The magistrate judge determined that Welsh's claims were groundless and recommended that relief be denied. The district court considered Welsh's objections to the magistrate judge's report, reviewed the record de novo, denied relief, issued a certificate of probable cause to appeal, and permitted Welsh to appeal in forma pauperis.

II.

A.

Welsh asserts that the trial judge refused to accept his plea of "not guilty," denied him his right to a jury trial, and coerced him into a plea of nolo contendere. He alleges that on the morning of trial, he filed an "election sheet" requesting a trial by jury. He cannot produce the "election sheet," but he speculates that the trial judge either withheld the document or destroyed it.

There is no factual basis in the record to support Welsh's claim that he elected to plead not guilty. On the contrary, the statement of facts indicates that Welsh entered a plea of nolo contendere in all three of the 1983 cases. Welsh waived the reading of the bills of indictment, stating that he had copies of them, and confirmed that his plea was "freely, voluntarily and willingly made." Thus, his present allegation that he wished to proceed to trial is unconvincing.

B.

Welsh asserts that he was denied effective assistance of counsel because the trial, without a hearing, denied defense counsel's motion to withdraw and refused to appoint new counsel. "[T]he type of breakdown in the adversarial process that implicates the Sixth Amendment is not limited to counsel's performance as a whole)) specific errors and omissions may be the focus of a claim of ineffective assistance as well." United States v. Cronic, 466 U.S. 648, 657 n.20 (1984) (citing Strickland v. Washington, 466 U.S. 668, 673-96 (1984)).

The trial judge appointed Nelson Atwell to represent Welsh at the revocation hearing for his 1982 conviction and for the three 1983 offenses. On the same day that Welsh entered his plea in the 1983 cases, Atwell filed a motion to withdraw, stating that he and Welsh had reached an impasse and that he could no longer represent him. In his motion to withdraw, defense counsel included a copy of Welsh's motion to the trial court alleging that Atwell had interviewed him once and had failed to perform any legal services for him. Atwell asserted that he had filed eleven pretrial motions in each of the four cases and had spent over twenty hours appearing on Welsh's behalf. He also noted that he was the second attorney appointed to represent Welsh.

The denial of a last-minute request for withdrawal and substitution of counsel is within the trial court's discretion. See McCoy v. Cabana, 794 F.2d 177, 180 (1986) (citation omitted). The trial court had to consider whether relieving counsel would

delay the trial or encourage further delays and whether the adversarial process would remain intact if Atwell continued to represent Welsh. See Lowenfield v. Phelps, 817 F.2d 285, 289 (5th Cir. 1987), aff'd, 484 U.S. 231 (1988).

We conclude that it was not unreasonable for the trial judge to decline to substitute counsel on the morning that Welsh was scheduled to enter a plea of nolo contendere. Atwell was familiar with the case, and the record indicated that he had actively represented his client. See id. Further, there was no reason to believe that Welsh would enjoy a better relationship with new counsel. Id. Because there is every indication that "the adversarial process remained intact during this trial" and that the trial judge did not abuse his discretion, there was no Sixth Amendment violation. Id.

C.

Welsh argues that the trial judge improperly denied his motion to dismiss based upon a violation of his right to a speedy trial. He contends that the state had failed to announce "ready" within the statutory time limit and that the trial court violated due process and equal protection by disregarding the law. Only two of the cases, Nos. 83-CR-3139 and 83-CR-3140, present viable speedy trial questions.[4]

[4] On direct appeal, the court of appeals established that Welsh did not contend that the Speedy Trial Act applied to the motion to revoke in No. 82-CR-1801 and that he did not file a speedy trial motion in No. 83-CR-2416. The state court's findings of fact are presumed correct. 28 U.S.C § 2254(d); Sumner v. Mata, 449 U.S. 539, 546-47 (1981).

A valid guilty plea waives all "independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." Tollett v. Henderson, 411 U.S. 258, 267 (1973); United States v. Benavides, 793 F.2d 612, 618 (5th Cir.), cert. denied, 479 U.S. 868 (1986). "Because a plea of nolo contendere is treated as an admission of guilt, the law applicable to a guilty plea is also applicable to a plea of nolo contendere. Carter v. Collins, 918 F.2d 1198, 1200 n.1 (5th Cir. 1990) (citations omitted).

As discussed above, there is no showing that Welsh's plea was anything other than knowing and voluntary. Hence, the acceptance of his plea waived any complaints that he was constitutionally deprived of a speedy trial.

D.

Welsh asserts that his right to confront witnesses was violated when the trial judge, over Welsh's objections, permitted the prosecutor to present hearsay evidence of the offense. He contends that, in the absence of the hearsay, the prosecutor lacked sufficient evidence to convict him.

In concert with his plea, Welsh executed a written waiver of his right to confront witnesses and stipulated that the state's documentary evidence was correct. Moreover, at the hearing, the trial judge informed Welsh of his rights of confrontation and cross-examination and asked whether he was "willing to give up the rights and allow the State to proceed by offering the papers

against [him]." Although Welsh challenged the written statements by the minors as being "compounded or exaggerated," he stipulated that the documentary evidence was essentially correct. He stated that he was waiving his right to confront the witnesses because their appearances in court would not change anything. Without a showing of involuntariness, Welsh's plea waived his Sixth Amendment right of confrontation. See United States v. Robertson, 698 F.2d 703, 707 (5th Cir. 1983). There is no merit to his claim.

AFFIRMED.