UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-6159
Summary Calendar

THOMAS C. MORROW,

Petitioner-Appellant,

VERSUS

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

Respondent-Appellee.

Appeal from the United States District Court
For the Southern District of Texas
(CA-H-89-3373)

(February 24, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Thomas C. Morrow, a Texas state prisoner, was indicted for murder. A jury found him guilty of voluntary manslaughter. He received a 60-year term of incarceration, enhanced by two prior

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

felony convictions. His conviction was affirmed on direct appeal. Morrow v. State, 735 S.W.2d 907, 912 (Tex. Crim. App. 1987).

After unsuccessfully pursuing state court remedies, Morrow filed this federal habeas petition. A magistrate judge issued a memorandum recommending that the petition be denied. Morrow filed written objections. The district court entered an order of dismissal, adopting the magistrate judge's memorandum and recommendation, and entered final judgment denying Morrow's federal habeas petition.

Morrow filed a timely notice of appeal. He also filed for a certificate of probable cause (CPC) for an appeal, which the district court granted.

Morrow first contends that the evidence was insufficient to support his conviction, arguing that voluntary manslaughter could not be a lesser-included offense of murder in his case because proof of "sudden passion" was lacking.

When a federal habeas petitioner contends the evidence is insufficient to support a state court conviction, the relevant inquiry is if any rational trier of fact could have found the "essential elements" of the crime beyond a reasonable doubt, after viewing the evidence in the light most favorable to the prosecution. Foy v. Donnelly, 959 F.2d 1307, 1313 (5th Cir. 1992). This Court applies this standard with explicit reference to the substantive elements of the criminal offense as defined by state law. Id.

Under Texas law, a person commits murder if he intentionally or knowingly causes the death of an individual. Tex. Penal Code Ann. § 19.02 (Vernon 1974). Voluntary manslaughter is defined as:

> (a) A person commits an offense if he causes the death of an individual under circumstances that could constitute murder under Section 19.02 of this code, except that he caused the death under the immediate influence of sudden passion arising from an adequate cause.
>
> (b) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.
>
> (c) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

Tex. Penal Code Ann. § 19.04 (Vernon 1974).

Morrow asserts that a finding of sudden passion is not supported by the record. It is unclear whether sudden passion was an element of voluntary manslaughter during the time-frame applicable to this case. The offense in question occurred on May 22, 1984. Trial commenced on December 3, 1984 and a judgment of guilty was rendered on December 6, 1984. Morrow's conviction was affirmed on direct appeal on July 23, 1987.

Despite the aforementioned statutory language, at the time of Morrow's conviction, sudden passion was not an element of voluntary manslaughter. Rather, it was "in the nature of a defense to murder that reduces that offense to voluntary manslaughter." Braudrick v. State, 572 S.W.2d 709, 710-11 (Tex. Crim. App. 1978), cert. denied, 440 U.S. 923 (1979). Braudrick's "nature of a defense" holding was overruled in February 1985. Bradley v. State, 688 S.W.2d 847, 849-

51 (Tex. Crim. App. 1985). Bradley held that "when the evidence raises the issue of `sudden passion,' its negation becomes an `implied element' of murder." Id. at 851. However, it remains unclear whether sudden passion was considered an element of voluntary manslaughter at all times applicable to this matter.[1] Assuming, arguendo, that it was, the record evidence reveals that sufficient evidence of sudden passion was raised at trial.

Morrow admits fatally shooting Ralph Brandes on the night in question. Morrow testified to several confrontations with Brandes prior to the date of the shooting. Brandes made several disparaging comments and called Morrow various vile epitaphs and accused him indirectly of being the non-passive partner while engaging in anal sexual intercourse with various "punks" in prison. Brandes also told Morrow that he never went anywhere without his gun and that if Morrow continued to frequent the north side (of Houston), he would find out why Brandes carried the gun.

After a number of weeks of this confrontational behavior, Brandes encountered Morrow in the B&C Lounge. Morrow testified that the owner, George Hayes, gave him a loaded, cocked, .22 automatic pistol and stated "Tommy, he's (Brandes) got a gun in his hand." Brandes and Morrow had not had any verbal exchanges on the night in question prior to the shooting. Morrow then testified that the pistol was sitting on the table in front of him, Brandes

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[1] The current Texas caselaw holds that voluntary manslaughter is not a lesser included offense of murder unless there is some evidence of sudden passion. State v. Lee, 818 S.W.2d 778, 781 (Tex. Crim. App. 1991).

had his hand down by his leg as he was sitting on a barstool at the end of the bar, Brandes raised his arm up and jumped off the barstool, and Morrow reacted by firing one shot.

When asked whether he had an immediate and sudden fear that he was going to be harmed, Morrow answered, "Well, I thought he was fixing to shoot me, yes." When asked whether it was a sudden situation as far as he was concerned, Morrow replied, "[I]t just happened, you know, in a split second." When asked what thoughts went through his mind at that particular point in time with regard to being on parole and the shooting, Morrow testified, "[I] knew I was probably in big trouble. I was, more or less, numb, you know. I really wasn't thinking, you know, rationally then."

Morrow also testified with regard to the prior verbal altercations that as time went on, he became more and more afraid of Brandes. Morrow testified that "I thought I was fixing to get shot" and that:

> I was under the impression that he had a gun. I was the only one in there that I knew of that he had anything against. I knew that he had made statements that he would use a gun and that he would kill me. I meant that I wasn't prepared to stand up and let him kill me, that I would kill him to keep him from killing me, if that is what it took.

The aforementioned testimony shows that Morrow raised the issue of "sudden passion" arising from an adequate cause. The testimony indicates an immediate provocation in that Morrow thought Brandes possessed a gun, suddenly raised his arm and jumped off the barstool, and headed toward Morrow. Morrow also testified that he was not thinking rationally at the time of the shooting. A

rational trier of fact could have concluded that Morrow had a fear of Brandes and was acting under the immediate influence of that fear. Morrow's contention that his voluntary manslaughter conviction is not supported by sufficient evidence is without merit.

Assuming, arguendo, that sudden passion was not an element of voluntary manslaughter, Morrow's argument is not cognizable as a challenge to the sufficiency of the evidence. See Foy, 959 F.2d at 1313. However, Morrow's brief, liberally construed, contends that the jury should not have been allowed to consider the lesser-included offense of voluntary manslaughter, and thus, the corresponding jury charge was erroneously submitted.

The district court noted a potential procedural bar under state law but did not perform a federal procedural bar analysis. In any event, in the district court the state did not raise whether the issue is procedurally barred. Thus, the issue has been waived. See United States v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992).

To obtain federal habeas relief for this alleged error of state law, Morrow must show that a violation of state law occurred and that the error rendered the state proceedings fundamentally unfair. See Lavernia v. Lynaugh, 845 F.2d 493, 496 (5th Cir. 1988). No violation occurred because once evidence of sudden passion was presented, a jury charge regarding voluntary manslaughter and sudden passion was proper under Texas law. See Hobson v. State, 644 S.W.2d 473, 477-78 (Tex. Crim. App. 1983); Bradley, 688 S.W.2d at 852. Further, the aforementioned record

evidence supports a finding of sudden passion. Thus, the jury charge was proper.

As an ancillary matter, Morrow also argues that the evidence sufficiently supported his theory of self-defense as a matter of law. He is mistaken. Self-defense is not an element of voluntary manslaughter. See Tex. Penal Code Ann. § 19.04 (Vernon 1974). Thus, his argument is not cognizable as a challenge to the sufficiency of the evidence but is more properly considered as an assertion that state criminal law was violated and rendered the proceedings fundamentally unfair. See Lavernia, 845 F.2d at 496. His argument fails for the same reasons that his challenge regarding sudden passion fails. The record shows no fundamental unfairness.

Texas Penal Code Ann. § 9.31(a) (Vernon 1974) defines self-defense as justified use of force against another "when and to the degree he reasonably believes the force is immediately necessary to protect himself . . . ." In light of the facts developed above, and especially in light of the autopsy report which revealed that Brandes was shot at least five times, including two times to the chest and temple from point-blank range, Morrow has not shown that the proceedings were rendered fundamentally unfair by the state courts' determination that he did not act in self-defense as a matter of law.

Morrow also contends that he received ineffective assistance of trial counsel because his attorney, Patrick Gailey, failed to:

1) Interview Morrow until seventeen hours prior to trial;

2) Interview state and defense witnesses;

3) Visit the crime scene;

4) Conduct an independent investigation beyond mere reliance on the prosecutor's file;

5) Move for a continuance of trial;

6) File a motion for new trial;

7) Timely perfect an appeal;

8) Abide by court orders during Morrow's state habeas proceeding; and,

9) Acquaint himself with the applicable range of punishment.

His contentions are without merit.

To prevail on his claim of ineffective assistance of trial counsel, Morrow must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish prejudice, Morrow must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. If Morrow fails to prove either prong of the Strickland test, he will not merit relief. Id. at 687. Additionally, this Court must give great deference to counsel's performance, and there is a strong presumption that counsel exercised reasonable professional judgment. Id. at 690.

Morrow contends that Gailey was ineffective because he only discussed the case with him for approximately 20 minutes on the day prior to trial. Gailey averred that he had a lengthy conversation with Morrow prior to trial, as well as a number of other

discussions. Additionally, Morrow has not shown any prejudice in this regard nor how additional conversation would have benefited him. Mattheson v. King, 751 F.2d 1432, 1439 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986). He has also failed to show how he was prejudiced by Gailey's failure to visit the crime scene. These arguments do not merit federal habeas relief. See Ross v. Estelle, 694 F.2d 1008, 1012 (5th Cir. 1983).

Morrow further contends that Gailey failed to interview a number of state and defense witnesses, failed to visit the crime scene, and failed to request a trial postponement when it was "obvious" that he was unprepared for trial. These contentions are also without merit.

Gailey averred that Morrow only specified one witness, Mary Lara, by name, and also failed to provide any concrete information as to the whereabouts of any potential witnesses. Where the sole evidence regarding a claim of a missing witness is from the defendant, ineffective assistance claims are viewed with extreme caution. Lockhart v. McCotter, 782 F.2d 1275, 1282 (5th Cir. 1986). Claims regarding uncalled witnesses are not favored due to their speculative nature. While Morrow maintains that Lara would have given Gailey names of other witnesses, he fails to identify them specifically, and he does not allege what they may have said on his behalf. Furthermore, nothing in the record indicates that Lara was a witness to the shooting, or present at the B&C Lounge at any relevant time.

Additionally, at a pretrial motion hearing, the state trial judge specifically asked Morrow whether there are any witnesses he wished to call. He responded in the affirmative. When pressed to identify his witnesses so that the court could subpoena them, Morrow declined to identify any witnesses, merely stating "[J]ust like I say, we will have to sit down and discuss each aspect." He has made no showing of prejudice by Gailey's alleged failure to interview any prospective witnesses. Thus, this assertion fails to raise a claim deserving federal habeas relief. Ross, 694 F.2d at 1012.

With regard to his allegation that Gailey failed to request a trial postponement, Morrow has failed to show any prejudice thereby. The court offered to order the appearance of any fact witnesses he cared to designate. While Morrow argues that Mary Lara should have been called, he fails to state what testimony she would have offered on his behalf and thus, has not shown Strickland prejudice. Ross, 694 at 1012.

Morrow also alleges that Gailey failed to investigate the case properly. The only evidence Morrow contends he was deprived of at trial concerned Brandes' criminal background. The court and the prosecutor both stated that Brandes' criminal record would be made available to him, and it was. Gailey had complete access to the prosecutor's files. Morrow's contention is devoid of merit. Ross, 694 F.2d at 1012. Morrow also contends that Gailey was ineffective for failing to file a motion for new trial and to perfect an appeal in a timely manner. He has failed to show how he

is prejudiced by either alleged failure. He fails to show any grounds for a new trial. Although Morrow's appeal was initially abated for failure to timely file a brief, the appeal was reinstated and the conviction was reviewed and upheld by the appellate court. Morrow, 735 S.W.2d at 912. He has shown no prejudice as a result of these alleged ineffective actions. See Ross, 694 F.2d at 1012.

Morrow contends that Gailey's delay in filing an affidavit in his state habeas proceeding delayed it for more than one year. However, he has not made a substantial showing of the denial of a federal right. The right to effective assistance of counsel springs from the right to counsel. Strickland, 466 U.S. at 686. Morrow had no right to counsel during his state post-conviction proceedings. See Pennsylvania v. Finley, 481 U.S. 551, 556-57, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). Affording his petition a liberal construction, Morrow also challenges the propriety of his state habeas proceeding. Allegations of infirmities in state habeas proceedings are not grounds for federal habeas relief. Vail v. Procunier, 747 F.2d 277, 277 (5th Cir. 1984). This contention is devoid of merit.

Regarding his argument concerning the applicable range of punishment, Morrow has failed to brief the issue adequately. Thus, it is deemed abandoned. See Brinkman v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987).

Inasmuch as Morrow has failed to allege Strickland prejudice from Gailey's allegedly deficient performance, and because a

rational trier of fact could affirm his voluntary manslaughter conviction based on record evidence and no showing of fundamental unfairness nor state law violations, the district court properly denied his federal habeas petition.

Finally, Morrow argues that the district court erred by failing to hold an evidentiary hearing. Our recent cases, however, have recognized the general rule that "[i]f the record is clearly adequate to dispose fairly of the allegations, the court need inquire no further." United States v. Smith, 915 F.2d 959, 964 (5th Cir. 1990) (citing Byrne v. Butler, 845 F.2d 501, 512 (5th Cir. 1988)); Ellis v. Lynaugh, 873 F.2d 830, 840 (5th Cir. 1989) (citing Lavernia v. Lynaugh, 845 F.2d 493, 501 (5th Cir. 1988)). Even where petitioners have asserted facts that would entitle them to relief, courts need not conduct a hearing if the existing record is adequate to resolve the claim. Id. The record before this Court is adequate to resolve Morrow's allegations without examining evidence beyond it.

Morrow has filed a motion for appointment of appellate counsel. His request is denied because the interests of justice do not require such an appointment. See Schwander v. Blackburn, 750 F.2d 494, 502 (5th Cir. 1985).

AFFIRMED.