UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-6164
Summary Calendar

WILLIE LEE WILLIAMS,

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
(H-89-CV-02688)

(December 2, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Willie Lee Williams appeals from the district court's denial of his application for a writ of habeas corpus. We **AFFIRM**.

I.

A Texas state jury found Williams guilty of aggravated sexual assault and sentenced him to life imprisonment. After exhausting his state remedies, Williams sought habeas relief in federal court,

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

raising five grounds: (1) the trial court's refusal to allow a separate finding of guilt or innocence for each paragraph of the indictment; (2) prosecutorial misconduct; (3) failure to preserve evidence; (4) use of perjured testimony; and (5) insufficient evidence. The district court denied relief and dismissed the petition. This court granted Williams' motion for a certificate of probable cause for an appeal, directing the parties to brief (supplemental) the prosecutorial misconduct issue.[2]

II.

Williams contends that the prosecutor's comments on his exercise of his right to counsel rendered his trial fundamentally unfair. Shortly after his arrest, Williams retained as his lawyer Mike DeGeurin, who practiced with the law firm of Percy Foreman. DeGeurin represented Williams at trial in January 1985, but a mistrial was declared after the jury was unable to reach a verdict. Because Williams could no longer afford DeGeurin's services, different attorneys were appointed to represent him at the second trial.

At the second trial, the victim testified that Williams, who worked for the Houston Post, delivered a newspaper to her home on September 30, 1983, after she complained that she had not received the paper. She testified that Williams came back to her home around 11:00 a.m. on October 4 and sexually assaulted her.

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[2] Williams' initial brief was *pro se*; his supplemental brief was filed by a staff attorney with Inmate Legal Services.

We have examined Williams' other points of error and find them to be without merit.

In defense, Williams asserted an alibi. Although Williams admitted that he had delivered the newspaper on September 30, he testified that he never went to the victim's home on October 4, the day of the assault. According to Williams, he delivered newspapers at apartment complexes until around 11:00 a.m. on October 4, went home to take a bath and change clothes, went to his office at noon, picked up an expense check, and cashed it at a grocery store. A secretary for the Houston Post testified for the defense, but could not recall whether Williams had picked up a check from her on October 4. The grocery store operator's testimony was inconclusive, but, based on his banking habits, he indicated that it was likely that Williams cashed the check either on October 5, or after 2:00 p.m. on October 4.

During direct examination, Williams' attorney questioned him regarding a note pad he used in dealing with customer complaints as part of his job for the Houston Post.[3] Williams testified that some of the writing on the note pad, regarding his September 30 encounter with the victim, had been added while he was in jail.[4] The following exchange then occurred:

> Q. [By Williams' Attorney] All right. Who was your lawyer then?

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[3] The note pad contained customers' names and addresses and other information Williams used in resolving complaints.

[4] While he was in jail, Williams wrote on the note pad:

> Lady say she work for police, get home at 2:00 or 3:00 A.M. every morning, is not about to get up at 5:00 or 6:00 A.M. to check on her paper. I told her I'd tell the man responsible for her route and knew he'd take care of it.

A. Mr. Mike DeGeurin who works out of Percy Foreman's office.

Q. And how long was he your lawyer?

A. Approximately fifteen or sixteen months.

Q. All right. When did I get to be your lawyer?

A. About a week or so after my family's money ran out. We couldn't no longer hire Mr. Percy's services.

. . . .

Q. All right. Now, did the notation down there at the bottom that you made in jail occur while I was your lawyer or somebody else was your lawyer?

A. This is when Mr. DeGeurin was my lawyer.

Q. Did you have that in jail with you?

A. No, sir.

Q. How did you come to have that in the jail if you didn't have it in jail with you?

A. Mr. DeGeurin came to me during one of the earlier hearings on this case. That was during April of 1984, and he brought this pad to me and told me there was something that he did not understand ....

Q. Did you have a conversation with Mr. DeGeurin?

A. Yes, sir.

Q. What did you do with the pad?

A. Took it back in one of the court holdover cells with me.

Q. What did you do then?

A. I wrote what I thought Mr. DeGeurin needed to clarify an earlier statement I had made to him.

Q. All right, and did Mr. DeGeurin tell you that was going to be evidence in court?

A. After he got the pad back and I showed it to him, that's when I became aware it was evidence. I hurt myself in writing this down.

Q. And was he angry about it?

A. Yes, sir, he was.

On cross-examination, the prosecutor asked Williams whether, on October 6 (the date of his arrest) he was aware that his whereabouts on October 4 would be important. Williams responded affirmatively. The following exchange then occurred, without objection:

Q. And you testified previously that you hired -- you went to the best law firm in town.

A. My family did.

Q. Okay. Percy Foreman's law firm.

A. That's correct.

Q. And Mr. Foreman's no slouch, is he?

A. He has a reputation of being different from that.

Q. Of being the best; is that correct?

A. That's the reputation.

Q. And that's the reputation of Mr. DeGeurin, the person that represented you, too?

A. I had never heard of Mr. DeGeurin until I talked to him.

Q. But you're not indicating that you're displeased with his performance?

A. No, I'm not saying that.

In rebuttal, the State called Vallen Graham, Williams' supervisor at the Houston Post during the time of the events in question. Graham testified that Williams left the branch office on October 4 around 9:30 to 9:45 a.m., and did not return that day. The defense then offered DeGeurin's deposition, in which he testified that he spoke with Graham on the telephone prior to the first trial, and that Graham told him that Williams was at the office at noon on October 4.

During closing argument, defense counsel stated:

> And we put on Mike DeGeurin's deposition, and we took it before he left because we knew that if [the prosecutor] brought Val Graham we were going to have something to show you that his testimony is not reliable. So we took DeGeurin's testimony and you heard it.

In his final closing argument, the prosecutor commented:

> What about this alibi thing? Well, can't believe Mr. Graham and, gee, if he was my alibi witness I would be worried. Bull. You think the defendant would hire Percy Foreman's law firm in October of 1983 and wait a year and a half before contacting him? Sure, they don't have to prove anything, but use your common sense. Someone puts you in jail. You know that somebody could verify where you were at that time. What are you going to say? Hey, let me out. Hey, wait a second. I want to get out of here. I didn't do it. I got witnesses to prove where I was at this very time. Didn't do that, did he?

In ***United States v. McDonald***, 620 F.2d 559 (5th Cir. 1980), our court held that "[c]omments that penalize a defendant for the exercise of his right to counsel and that also strike at the core of his defense cannot be considered harmless error". ***Id***. at 564. In ***McDonald***, the prosecutor elicited testimony from a Secret Service agent that the defendant's attorney had been present during

the execution of a search warrant. ***Id***. at 561-62. No evidence was found in the search. ***Id***. at 561. During closing argument, the prosecutor implied that the defendant's attorney "caused, aided in or, at the very least, tolerated the destruction of the evidence". ***Id***. at 564. Our court concluded that "the real purpose of the [prosecutor's] reference to the attorney's presence [during the search] was to cause the jury to infer that [the defendant] was guilty", and that "[t]he reference therefore penalized [the defendant] for exercising his Sixth Amendment right to counsel." ***Id***.

In ***United States v. Mack***, 643 F.2d 1119 (5th Cir. 1981), the defendant argued that the prosecutor referred to the "battery of people helping here in the Courtroom" and to "counsel from both Dallas and San Antonio" in order to prejudice the jury against him. ***Id***. at 1123. Although the court found the comment "inappropriate", ***id***., it held that "any error in the prosecutor's remarks was harmless beyond a reasonable doubt." ***Id***. at 1124. The court distinguished ***McDonald***, stating:

> The critical point in the *McDonald* case ... was the fact that the prosecutor was emphasizing McDonald's reliance upon counsel in a situation where often counsel is not present. The jury in *McDonald* would have no knowledge of the use of counsel by the defendant at the search if the prosecutor had not made the point, thus implying that the use of counsel at least hinted at guilt.

Id.

Our court has also addressed a similar issue in a habeas case, ***Stone v. Estelle***, 556 F.2d 1242 (5th Cir. 1977), *cert. denied*, 434 U.S. 1019 (1978). On direct examination, Stone testified that, at

the time of his arrest, he was on his way to turn himself in. ***Id***. at 1243. On cross-examination, Stone testified that he had cooperated with the police. ***Id***. at 1244. The prosecutor then asked about Stone's refusal to participate in a line-up, and Stone stated that he had asked for an attorney. ***Id***. During closing argument, the prosecutor stated that Stone had not turned himself in immediately, would not tell the police anything, and had asked for an attorney. ***Id***. The court held that although the prosecutor's remarks and questions were "unwarranted", the error, if any, was harmless, and did not produce "a trial which was fundamentally unfair so as to deny [Stone] due process." ***Id***. at 1243, 1244.

In this case, the prosecutor's questions and comments do not rise to the level of impropriety which constituted reversible error in ***McDonald***, but instead are subject to the harmless error analysis applied in ***Stone*** and ***Mack***. The prosecutor's cross-examination of Williams regarding the reputation of DeGeurin and his law firm was in response to defense counsel's questions and Williams' answers on direct examination, which the prosecutor reasonably could have interpreted as an implied criticism of DeGeurin's representation.

The prosecutor's comments during closing argument likewise did not penalize Williams for exercising his right to counsel. Defense counsel first brought up the subject of DeGeurin's former representation of Williams during direct examination of Williams. Furthermore, defense counsel introduced DeGeurin's deposition testimony for the purpose of attacking the credibility of the

State's witness, Graham, and referred to DeGeurin's testimony during closing argument. It was not fundamentally unfair for the prosecutor to respond to that evidence and argument. The prosecutor did not imply that Williams' defense was less believable because high-quality lawyers represented him, nor did he imply that Williams' attorneys aided or tolerated his fabrication of an alibi.

In any event, the prosecutor's comments did not strike at the core of Williams' alibi defense. The State introduced the testimony of a police officer regarding the time it would take to drive from the victim's home to the Houston Post's office. In his closing argument, the prosecutor argued that, even if Williams had returned to the office at noon (as testified to by Williams and DeGeurin, but denied by Graham), that was not inconsistent with the victim's testimony regarding the timing of the assault, because Williams would have had time to assault the victim after 11:00 a.m., and still reach his office around noon.

This case presented the jury with a credibility choice between Williams and the victim; the jury believed the victim. There was ample evidence of guilt. Defense counsel opened the door to the subject of DeGeurin's prior representation of Williams, and the disputed prosecutorial questions and comments were very brief in the context of the entire trial. *See* ***Stone v. Estelle***, 556 F.2d at 1246. Given the fact that Williams had six prior felony convictions (two for robbery by assault and four for rape), it is extremely unlikely that the prosecutor's comments affected the jury's decision to impose a sentence of life imprisonment.

We therefore conclude that, even if the prosecutor's remarks were improper, any error was harmless beyond a reasonable doubt.

III.

The judgment of the district court dismissing Williams' petition for a writ of habeas corpus is

AFFIRMED.