UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-6170
Summary Calendar

KENNETH RAY CRAWFORD,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H-89-4097)

(December 30, 1993)

Before POLITZ, Chief Judge, DAVIS and SMITH, Circuit Judges.

POLITZ, Chief Judge:[*]

The district court denied the petition of Kenneth Ray Crawford for federal habeas relief, 28 U.S.C. § 2254. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

A Texas state jury found Crawford guilty of murder and, upon determining that he had a prior felony conviction, imposed an enhanced sentence of life imprisonment. The conviction and sentence were affirmed on direct appeal and a state collateral attack was unsuccessful. The instant application for federal relief followed. Adopting the magistrate judge's recommendations, the district court denied habeas relief, issued a certificate of probable cause, and granted *in forma pauperis* status for appeal. Crawford timely noticed his appeal.

Analysis

On appeal Crawford complains that his trial improperly was conducted by a visiting judge, his *pro se* motions to quash the indictment, for issuance of a subpoena to the foreman of the grand jury, and for dismissal of his trial counsel were improperly handled, his counsel was ineffective, the jury was wrongfully charged, and the evidence was insufficient to support his conviction. We find no assignment of error persuasive.

Crawford complained of his trial by an assigned visiting judge on direct appeal. The Texas appellate court rejected the contention that Texas law had been violated by assignment of a trial judge from another jurisdiction. The Texas appellate court also rejected Crawford's complaints that his motions to quash the indictment, for a subpoena to the grand jury foreman, and for dismissal of his counsel were improperly disposed of by the trial

court. Citing Texas statutes and jurisprudence the court held to the contrary on each point. The record before us does not reflect that any of these rulings adversely affected the fundamental fairness of the trial. Assuming *arguendo* that state law was violated as to any or all of these contentions, absent a demonstration of fundamental unfairness of the trial, no basis for federal habeas relief exists.[1]

The ineffectiveness of counsel charge details several purported failures by defense counsel. To prevail on this contention Crawford must demonstrate both deficient performance by counsel and prejudice therefrom.[2] Crawford has failed to do so.

Crawford complains that his counsel failed to: (1) conduct an adequate investigation, (2) advise of a plea bargain offer, (3) properly advise on a speedy trial waiver, (4) object to assignment of the visiting judge, (5) argue his *pro se* motions, (6) block use of a part of his confession, and (7) call him as a witness. We find all contentions without merit.

The record reflects Crawford's refusal to cooperate with counsel. This necessarily hampered counsel's performance.[3] There is nothing in the record to support the claim that a plea offer was

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[1]**Smith v. Phillips**, 455 U.S. 209 (1982); **Smith v. McCotter**, 786 F.2d 697 (5th Cir. 1986). See also, **Liner v. Phelps**, 731 F.2d 1201 (5th Cir. 1984).

[2]**Strickland v. Washington**, 466 U.S. 668 (1984).

[3]**Bell v. Watkins**, 692 F.2d 999 (5th Cir. 1982), cert. denied, 464 U.S. 843 (1983) (although defendant's failure to cooperate does not negate counsel's duty to investigate, the scope of that duty can be limited by a defendant's lack of cooperation).

made or that his counsel had knowledge of such.[4] There is not even a suggestion of prejudice on the speedy trial waiver issue, and the complaint that counsel failed to argue the *pro se* motions founders, if for nothing else, on the specific findings by the Texas trial and appellate courts that the *pro se* motions totally lacked merit. The state offered a part of Crawford's confession, excising a portion that the victim attacked Crawford. Counsel objected and the entirety of the confession was placed in evidence. Finally, whether Crawford should have been called as a witness is a matter particularly deferred to trial counsel and the selected trial strategy. That decision will not be reviewed with the 20/20 visual acuity of hindsight.

Crawford next complains of the jury instruction because it contained a reference to the "lesser offense of voluntary manslaughter." Crawford argues that the charge would have allowed a conviction for involuntary manslaughter without a specific instruction thereon.[5] We do not agree. We recognize that under

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[4]Crawford attaches to his brief a purported affidavit from his father which was not presented either to the state court or the court *a` quo*. We will not consider it. **United States v. Smith**, 915 F.2d 959 (5th Cir. 1990).

[5]The allegedly erroneous charge to the jury was as follows:

> If you find from the evidence beyond a reasonable doubt that the defendant is guilty of either murder or voluntary manslaughter, but you have a reasonable doubt as to which of said offenses he is guilty, then you must resolve that doubt in the defendant's favor and find him guilty of the lesser offense of voluntary manslaughter.

Texas law involuntary manslaughter is a lesser-included offense of voluntary manslaughter,[6] but the charge as given permitted only a conviction for murder or voluntary manslaughter, or an acquittal. Crawford's alternative complaint that no charge was given on involuntary manslaughter does not raise a constitutional issue and will not be considered.[7]

Finally, Crawford maintains that the evidence did not support his conviction for murder. Specifically, he argues that the prosecution did not carry its burden of negating his "sudden passion" theory which would warrant a lesser verdict. The trial record contains adequate evidence in support of the verdict, including that of an eyewitness that Crawford shot the victim in the chest without any provocation. Other witnesses supported the jury's implicit finding of absence of provocation.

The judgment of the district court is AFFIRMED.

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[6]**Brooks v. State**, 548 S.W.2d 680 (Tex.Crim.App. 1977).

[7]E.g., **Alexander v. McCotter**, 775 F.2d 595 (5th Cir. 1985).