IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-6249
Summary Calendar

MARIO ARNOLDO YARRITO,

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 M 90 195)

April 21, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Mario Yarrito 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

Yarrito was convicted by a Hidalgo County, Texas, jury, of the murder of Edward Brooks and sentenced to serve ninety-nine years in prison. His conviction was affirmed on direct appeal, and his application for state habeas corpus relief was denied. The district court notes that Yarrito's habeas petition was denied by the Texas Court of Criminal Appeals, but there is no record of any appeal to, or denial by, that court.

Yarrito filed a federal habeas petition, and the magistrate judge recommended granting the state's motion for summary judgment. Yarrito objected, but the district court adopted the report and recommendation of the magistrate judge, denying and dismissing Yarrito's petition. The district court granted Yarrito a certificate of probable cause and leave to proceed in forma pauperis.

II.

A.

Yarrito contends that he was convicted on the basis of evidence seized pursuant to an illegal search and that the district court erred by concluding that his claim was not cognizable in a federal habeas proceeding. In particular, he argues that his wife did not freely and voluntarily consent to the search of their home and yard by police. Stone v. Powell, 428 U.S. 465, 494 (1976), holds that a state prisoner may not be granted federal habeas relief if the state has provided the opportunity for "full and fair litigation of a Fourth Amendment claim." The opportunity to

present a Fourth Amendment claim to the state trial and appellate courts, irrespective of whether that opportunity is exercised or proves successful, constitutes an opportunity under Stone, absent an allegation that the state process is "routinely or systematically applied in such a way as to prevent the actual litigation of fourth amendment claims on their merits." Williams v. Brown, 609 F.2d 216, 220 (5th Cir. 1980).

At the pre-trial presentation of Yarrito's motion to suppress the evidence discovered pursuant to the search of his home and yard, both Yarrito and the state agreed to carry the motion until the state sought to introduce the evidence. During the trial, prior to the state's introduction of the evidence found during the search, the court conducted a lengthy evidentiary hearing outside the presence of the jury. Yarrito was allowed to present evidence, witnesses and, as the trial court noted, was given "ample leeway" to argue the motion. Moreover, Yarrito challenged the trial court's ruling on appeal, and the appellate court reviewed the trial court's ruling and concluded that the search was proper. Thus, as Yarrito had a full and fair opportunity to litigate his Fourth Amendment claim, Stone bars federal review of it.

B.

Yarrito argues that evidence of his prior criminal history should not have been admitted at either the guilt-innocence or the punishment phase of his trial. He contends that the trial court erroneously admitted evidence of his prior conviction for "unlaw-

fully carrying a weapon on licensed premises" and that this prejudiced him by serving to exaggerate his bad character.

Yarrito's brief contains no record references or citations, stating only that the prior conviction was introduced "at some point" during the guilt-innocence phase of the trial. In his state habeas petition, Yarrito argued only that the prior conviction was erroneously admitted during the punishment phase. The state habeas court found only that the prior conviction was properly admitted during the punishment phase.

In the instant appeal, the state contends that this evidence was not introduced during the guilt-innocence portion of the trial. The index of exhibits from the trial does not contain any reference to, or evidence of, prior convictions. The two witnesses whose testimony established the existence of Yarrito's prior conviction during the punishment phase of the trial)) Ernesto Cano of the Hidalgo County District Clerk's Office and Angel Cerdo of the Hidalgo County Probation Department)) did not testify during the guilt-innocence phase.

In his objections to the magistrate judge's report and recommendation, however, Yarrito states that he was unable to provide exact references to the prosecution's introduction of evidence of his prior conviction because he did not have access to the trial transcript. The trial transcript reveals several vague references, elicited by defense counsel during the cross-examination of the police officer in charge of the investigation into

Brook's murder, to Yarrito's alleged "criminal history," with no specific reference to any particular crimes.

On re-direct examination of the same witness, the prosecution elicited that officer's testimony that he knew "for a fact" that Yarrito had "a criminal history." Again, however, no specifics were provided, and the record is devoid of any other references to Yarrito's past crime. There was no attempt by the state to introduce evidence of Yarrito's prior offense for unlawfully carrying a weapon. See United States v. Lowenberg, 853 F.2d 295, 299 (5th Cir. 1988), cert. denied, 489 U.S. 1032 (1989) (government may follow up if the defense opens the door to an issue). Yarrito has not borne his "strong burden of showing that he is entitled to habeas corpus relief." Hayes v. Maggio, 699 F.2d 198, 200 (5th Cir. 1983) (citation omitted).

Yarrito has cited no authority indicating that the Constitution proscribes the introduction of evidence of his prior conviction during the punishment phase of his trial; research has disclosed no such authority. In addition, Yarrito has not established any state-law violation at all)) a predicate to this type of claim. See Bailey v. Procunier, 744 F.2d 1166, 1169 (5th Cir. 1984).

Texas law specifically allows for the admission of a defendant's criminal record during the punishment phase of the trial: "Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to the prior criminal record of the defendant, his

general reputation and his character." Tex. Code Crim. P. Ann. § 37.07(3)(a) (West 1981). Again, Yarrito has not shown that he is entitled to habeas relief on this ground. See Hayes, 699 F.2d at 200.

C.

Yarrito argues that the trial court violated his Fifth Amendment right against self-incrimination when it allowed the prosecutor to instruct him to stand next to the prosecutor and raise his arm in order to demonstrate the angle at which Yarrito fired his first shot, which grazed the victim near his eye. In Schmerber v. California, 384 U.S. 757, 761 (1966), the Court limited the privilege against self-incrimination to evidence that is "testimonial or communicative" in nature. See also Edwards v. Butler, 882 F.2d 160, 164 (5th Cir. 1989). The privilege does not extend to evidence that is demonstrative, physical, or real. United States v. Brown, 920 F.2d 1212, 1215 (5th Cir.), cert. denied, 111 S. Ct. 2034 (1991). Under Schmerber and its progeny, Yarrito's participation in the presentation in front of the jury was plainly demonstrative, not testimonial, in nature. Yarrito argues that because the trial court instructed him to repeat the gesture so that the jury could view it better, it became "testimonial" evidence, but no authority suggests that the repeat of an unprotected demonstrative gesture transforms that gesture into privileged testimonial evidence.

D.

Yarrito contends the district court erred in concluding that his claim involving the submission of a special issue to the jury did not state a federal constitutional claim. He argues that because the indictment only alleged that he committed murder by shooting Edward Brooks with a gun, and a gun is "not a deadly weapon per se" under Texas law, the trial court erroneously entered that the jury made an affirmative finding that he used a deadly weapon during the commission of the offense.

The record does indicate that on state habeas review, the trial court recommended denying the writ but also recommended amending Yarrito's sentence to delete the affirmative finding regarding the use of a deadly weapon. Although there is no indication of Yarrito's habeas petition to the Texas Court of Criminal Appeals in the current record, both the state and Yarrito acknowledge that such petition was made and rejected without written order by that court. As Yarrito's state habeas petition did contain this particular challenge to the indictment, and as the highest court in Texas did implicitly uphold the indictment's sufficiency, Yarrito is foreclosed from bringing this particular challenge in a federal habeas action. Alexander v. McCotter, 775 F.2d 595, 598-99 (5th Cir. 1985).

AFFIRMED.