

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 91-7174
Summary Calendar

MICHAEL E. FLOYD,

Petitioner-Appellant,

VERSUS

STEVE W. PUCKETT,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
(DC88-48-D-D)

(January 22, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Appellant, who was convicted of armed robbery in Mississippi state court, seeks habeas relief. The district court denied relief and we affirm.

Appellant first argues that the fact that his victim identified him from a photo display should have been suppressed because his mugshot used in the display was the result of a prior illegal arrest on an unrelated charge. Assuming, without deciding, that the prior arrest was illegal, the evidence need not have been

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

suppressed because the illegal arrest was not the "but for" cause of the photo display. United States v. DeSimone, 660 F.2d 532, 542 (5th Cir. 1981), cert. denied, 456 U.S. 928 (1982). Appellant's photo could have been taken again and used. Additionally, his victim also identified appellant from a live lineup in which appellant participated without objection. See United States v. Miller, 666 F.2d 991, 997 (5th Cir.), cert. denied, 456 U.S. 964 (1982). Appellant's further complaint that use of the mugshot violated his right against self incrimination is foreclosed by Edwards v. Butler, 882 F.2d 160, 164 (5th Cir. 1989).

Next, appellant claims that the photo display was unduly suggestive since his mugshot was first in the group and was the only one with a dark background. We evaluate such claims by determining first if the display was unduly suggestive. United States v. Shaw, 894 F.2d 689, 692-93 (5th Cir.), cert. denied, 111 S.Ct. 85 (1990). If not, the inquiry ends. If so, we must examine the totality of the circumstances to see the likelihood of misidentification. Shaw, 894 F.2d at 692. Assuming without deciding that the display was suggestive, there was no likelihood of misidentification. The record shows that the victim had ample opportunity and favorable conditions to view the Appellant's face during the commission of the crime and that his attention was intensely focused thereon; the victim assisted the police in constructing a very accurate composite drawing of the suspect shortly after the robbery; the victim was always absolutely certain of his identification of Appellant as the robber; the photographic

identification occurred only two weeks after the robbery; and, finally, there is nothing in the record to suggest that the victim was in any way influenced by the order in which the pictures were presented or the differing background.

Appellant also complains that the state somehow violated his rights by moving in limine to suppress evidence that the defendant had a "look alike". The trial court, however, denied the state's motion and defense counsel was apparently unaware of any such potential evidence. This cannot result in a constitutional violation. Since appellant is pro se it is possible to construe his argument as one of insufficiency of the evidence. That is, Appellant complains that the evidence was insufficient to show that it was he who committed the robbery. On such a claim, we view the evidence in the light most favorable to the verdict. United States v. Martin, 790 F.2d 1215, 1219 (5th Cir.), cert. denied, 479 U.S. 868 (1986). So viewed, the evidence of guilt is overwhelming.

Finally Appellant makes numerous claims of ineffective assistance of counsel. We examine under the well-known standards of Strickland v. Washington, 466 U.S. 668 (1984). Appellant's claims relating to excess pre-arraignment detention, incomplete investigation and violation of Mississippi procedural rules fail because there is no allegation of prejudice resulting therefrom. The contention regarding failure of counsel to call certain witnesses fails because the district court found that this decision was a strategic one as defense counsel had previously subpoenaed both of the witnesses. The record supports the conclusion. The

remaining issues are all totally without merit and appellant himself even concedes some of them in his argument.

AFFIRMED.