IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-8652

Summary Calendar

LYLE RICHARD BRUMMETT,

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 Western District of Texas
(C 90 CA 316)

(December 2, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

The federal habeas petitioner, who was charged with capital murder in one case and with first degree murder in another, argues that his trial counsel gave ineffective assistance by advising him to plead guilty in return for life sentences rather than moving to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

suppress his confessions. We affirm the district court's decision to deny the writ.

I.

Diane Kathleen Roberts was murdered on August 15, 1976. On August 16, Sgts. Manley Stephens and Jim Beck of the Austin Police Department were assigned to investigate the case. Sgt. Stephens first viewed the autopsy, which started at 7:20 p.m., August 16. He took photographs and received swabs and fingernail scrapings from the doctor in charge. Sgts. Stephens and Beck then discovered that Ms. Roberts lived with Jessee Sublett in Austin. David Abbott, who had a room in the same house with Ms. Roberts and Mr. Sublett, told the officers that he, Ms. Roberts, and Lyle Brummett had been together on the night of the murder.

Around 10:00 p.m. that night, Sgts. Stephens and Beck went to see Brummett. They asked Brummett to come downtown for an interview, and Brummett agreed. Brummett claims that Stephens and Beck said they needed him to identify a body. During the interview, Brummett consented to a search of his vehicle, which fit the description of a car that a neighbor had seen parked across the street from Ms. Roberts' residence at about 2:00 a.m. on August 16. Brummett also consented to having the scratches on his arm photographed. He said the scratches were from "pulling electrical wire" in his work. In addition, Brummett said he would take a polygraph; however, one could not be arranged until 8:00 a.m. the next morning.

Sgt. Stephens went back to the Brummett apartment and got Mrs. Brummett. He took her to the police station, where she, Sgt. Beck and Brummett discussed the case. The police then learned that Brummett's fingerprints were found on a car parked near the house where Ms. Roberts' body was found. The prints were on a part of the car near a broken window in the house which was the suspected point of entry. Sometime after his wife left, Brummett was placed in jail.

When Stephens reported to work the next day, August 17, he learned that Brummett had failed the polygraph, had been taken for his magistrate's warnings and had been filed on for capital murder. Sometime after 6:30 p.m. on August 17, Brummett asked to speak with Sgt. Beck. Beck returned to the police department from his home, and Brummett, in the presence of Stephens and Beck, confessed in writing to killing Ms. Roberts. Brummett also gave information concerning two girls who were reported missing in Kerrville, Texas on September 17, 1975. The next day, Brummett helped the police locate the two bodies. On August 19, Brummett confessed to being involved in the rape and murder of these two girls.

Brummett was charged with capital murder for the death of Ms. Roberts and first degree murder for the death of the Kerrville girls. He entered pleas of guilty in exchange for life sentences and did not appeal. He later filed an application for state writ of habeas corpus challenging each of the convictions. The Texas Court of Criminal Appeals denied both applications. Brummett then filed this petition for federal writ of habeas corpus. The

district court adopted the recommendation of the magistrate and denied habeas relief. Brummett appealed, and we granted a certificate of probable cause.

On state habeas, the trial court made a number of findings of fact that are relevant to Brummett's claim:

> 1. Applicant alleges that although he was arrested on August 17, 1976, that he did not see a lawyer until 1977. This is false. Mr. Delmar Cain and Charles Craig were appointed to represent applicant on August 19, 1976, and both consulted with him immediately that day, and on several occasions thereafter.
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> 2. Applicant alleges that "although his wife attempted to visit him on the 16th and 17th, she was not allowed to do so." This is false. Mrs. Brummett visited with applicant before he gave a statement.
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> 3. Applicant voluntarily accompanied Sgt. Jim Beck and Sgt. Manley Stephens to the Austin Police Department on August 16, 1976.
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> 4. Applicant told his attorneys that he went to the police station voluntarily.
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> 5. Applicant advised his attorneys that his statement to the police concerning the Austin case was voluntary. He never told them it was involuntary.
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> 6. Applicant's wife told Charles Craig that she had visited with appellant before he gave a statement and had encouraged applicant to tell the truth. She told Charles Craig that applicant's statements about the Austin case and the Kerrville cases were voluntary.
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> 7. Applicant's attorneys promptly investigated the case by interviewing applicant, his wife, Lt. Colin Jordan, Sgt. Jim Beck, Ranger Joe Davis and others. Applicant's attorneys learned details of the police investigation concerning incriminating evidence against applicant in the Travis County case including applicant's car being seen the night of the murder at the victim's house and applicant's fingerprint on a car outside the window of the victim's house.
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> 8. Applicant's attorney Delmar Cain interviewed applicant's mother and sister and former attorney and pursued an investigation into the possible defense of insanity.

9. Applicant's attorney Charles Craig negotiated with the prosecutors in Travis County and Kerr County on the capital murder case in Travis County and the capital murder case in Kerr County, and reached an agreement in which applicant agreed to testify against his codefendant in Kerr County and the District Attorneys in Kerrville and Austin agreed not to seek the death penalty. The agreement included recommendations by the District Attorney in each county of a life sentence for intentional murder in each county. Attorney Charles Craig also obtained dismissals of the other cases, including an indictment for escape in Travis County, as part of the plea agreement.

II.

To prevail on his ineffective assistance of counsel claim, Brummett must satisfy the two-pronged test set out in Strickland v. Washington, 466 U.S. 668 (1984). He must show that his counsel's actions fell below an objective standard of reasonableness and that he was prejudiced by his counsel's deficient performance. In the context of a guilty plea, the defendant was prejudiced only if there is a reasonable probability that, without his attorney's errors, he would not have pleaded guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

Brummett argues that his lawyers were unreasonable in failing to move to suppress his confessions. Specifically, Brummett says that had his lawyers investigated the circumstances of his detention, they would have easily discovered that Brummett's arrest[1] was illegal and therefore that his confessions were fruit of the poisonous tree. We disagree.

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[1]It is not clear from the record when Brummett was actually placed under formal arrest. We can assume that arrest at least occurred when Brummett was placed in jail. See Art. 15.22, Texas Code of Criminal Procedure ("A person is arrested when he has actually been placed under restraint or taken into custody").

Counsel is presumed to have rendered adequate assistance. Strickland, 466 U.S. at 690. Moreover,

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

Id. at 690-91. The state habeas court specifically found that Brummett's counsel investigated the facts surrounding his confessions.[2] An investigation of the law also supports the decision made by Brummett's counsel. Assuming that his arrest was illegal, his confessions probably were not fruit of the poisonous tree and therefore would have been admissible.[3]

Where a defendant confesses after an illegal arrest, the question is whether the confession was "'sufficiently an act of free will to purge the primary taint.'" Brown v. Illinois, 422 U.S. 590 (1975) (quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963)). The Supreme Court has identified several factors to consider in deciding whether a confession is sufficiently attenuated from the illegal arrest so that it is no longer tainted: "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official conduct." Brown, 422 U.S. at

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[2]These findings are presumed correct, and we must accord them a high measure of deference. See 28 U.S.C. § 2254(d); Marshall v. Lonberger, 459 U.S. 422 (1983).

[3]Brummett cannot challenge the admissibility of his confessions directly, because his guilty plea waives any such claim. See Rogers v. Maggio, 714 F.2d 35, 38-39 (5th Cir. 1983).

603-04. These factors suggest that Brummett confessed as a matter of free will and not as a result of the alleged illegal arrest.

According to Brummett, the temporal proximity of the arrest and his confession to the murder of Ms. Roberts was at least 18 hours. This time period varies significantly from the situations in Brown (2 hours) and Taylor v. Alabama, 457 U.S. 687 (1982) (6 hours) where the confessions were held to violate the Fourth Amendment. Cf. United States v. Manuel, 706 F.2d 908, 912 (9th Cir. 1983) (delay of 18 hours between illegal arrest and confession showed attenuation of taint). At least two days elapsed before Brummett confessed his involvement in the Kerrville murders.

There were also significant intervening circumstances. Most important, Brummett was taken before a magistrate and charged with capital murder before he confessed. See Johnson v. Louisiana, 406 U.S.356, 365 (1972) (holding that the taint was purged by bringing the defendant before a magistrate to advise him of his rights and set bail); see also United States v. Webster, 750 F.2d 307, 325 (5th Cir. 1984) (noting confession was still tainted where, among other things, the defendant had not been brought before a neutral magistrate). The advent of probable cause is also an intervening factor. See Manuel, 706 F.2d at 911-12; United States v. Nooks, 446 F.2d 1283, 1287-88 (5th Cir. 1971). Brummett argues that his arrest was illegal because the police lacked probable cause. Assuming this is true, probable cause certainly developed before Brummett's confession. The police learned that his car matched the description of the one seen at Ms. Roberts' house and that his

fingerprints matched those on the window of a car outside Ms. Roberts' window. Finally, Brummett's visit with his wife when she advised him to tell the truth also weighs in favor of attenuation. Cf. Taylor, 457 U.S. at 691-92 (visit with girlfriend who was emotionally upset did not support attenuation).

Brummett has also failed to show flagrant official conduct. His claim that the police lured him to the station by telling him they needed him to identify a body is unsubstantiated. The state habeas court found that Brummett voluntarily accompanied the police to the station, that he told his lawyer the same, and that he told his lawyer that his confessions were voluntary. This case is not like Brown where the Court concluded that "[t]he manner in which [the petitioner's] arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." 422 U.S. at 605.

In short, we conclude that if his arrest was illegal, Brummett's confessions probably were not tainted. Even if we could not reach this conclusion with such confidence, we would still have a difficult time finding counsels' decision not to pursue a motion to suppress unreasonable. Brummett's lawyers succeeded in getting him life sentences when he faced two murder charges, one of which subjected him to death. The end result makes it difficult to question his lawyers' judgment.

Brummett cannot satisfy the second requirement of Strickland either. We can not say with reasonable probability that if his lawyers had sought to suppress his confessions, Brummett would have

gone to trial. First, as discussed above, a motion to suppress would have likely been denied. Second, even if the confessions were inadmissible, it is not reasonably probable that Brummett would have gone to trial in the face of a capital murder charge. His confessions were not the only evidence against him. His car fit the description of the one seen at Ms. Roberts' house and his fingerprints were on the car parked outside her window. In addition, the state court found that Brummett's lawyers considered the defense of insanity. If he had gone to trial with this defense, he would likely have had to admit that he committed the murders which may have enhanced the prosecution's case. See Williams v. Smith, 888 F.2d 28, 30-31 (5th Cir. 1989). We affirm the district court.