IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1459
(Summary Calendar)

GREGORY O'NEIL PRUITT,

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 Northern District of Texas

(3:89-CV-3131-P)

(September 22, 1993)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Petitioner-Appellant Gregory O'Neil Pruitt, a prisoner in the Institutional Division of the Texas Department of Criminal Justice,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeals the district court's denial of habeas corpus relief. For the reasons set forth below, we affirm.

I

FACTS AND PROCEEDINGS

A Texas court found Pruitt guilty of robbery and assessed an enhanced punishment of 99 years' imprisonment. The state Court of Appeals affirmed. Pruitt v. Texas, 683 S.W.2d 537 (Tex. Ct. App. 1984). That court stated the following facts:

> Evelyn Allison, the manager of the Cleanarama Cleaners, was the victim of the robbery. She described the robber to the police as a black man with medium type skin, about six feet tall and one hundred seventy to eighty pounds. The man was clean-shaven, wore a clear shower cap over his hair and had distinctive eyes. Allison also described the gun he was carrying--dark blue with a very short-nosed barrel. Allison testified that she observed the appellant at close range for about five to six minutes and she positively identified appellant in court based on her observation at the time of the robbery. Cross-examination revealed only that Allison hesitated at a live lineup before deciding that a man who looked similar to the appellant was not the appellant, and that at a six-picture lineup she eliminated four men but hesitated before eliminating the fifth and identifying the sixth as appellant.
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> Shelby Harbour testified that he was the police investigator who showed Allison the picture lineup and arrested appellant later on the day of the robbery. Officer Harbour and his partner stopped appellant as he was driving down Lemmon Avenue. A clear shower cap was found in appellant's car.

Id. at 538-39.

Pruitt did not seek discretionary review. He sought state habeas corpus relief five times, but it was denied each time.

Pruitt then filed a federal habeas petition. He alleged, first, that the Fourth Amendment was violated because consent to search his apartment was given by a person who had no authority to

do so; second, that his warrantless arrest was unlawful; third, that the Fifth Amendment was violated when interrogating officers pressed him for inculpatory information after he had stated his wish to stop talking; fourth, that blacks were unconstitutionally excluded from his petit jury; fifth, that his identification resulted from an impermissibly suggestive procedure; sixth, that the State failed to prove the enhancement; and seventh, that counsel was ineffective for not interviewing alibi witnesses, for not investigating alleged police bias against Pruitt, and for not objecting to the racial composition of the jury.

After the State answered, Pruitt filed a brief alleging that counsel was ineffective for not moving to suppress evidence of his arrest. In yet another brief, Pruitt complained that counsel was ineffective for not moving to suppress evidence of the search of his apartment, The State did not respond to these later briefs.

Three months after the second such brief was filed, the magistrate judge recommended that relief be denied. The magistrate judge made no reference to the issues raised in the later briefs.

The magistrate judge's report contains no notice to Pruitt that he might file objections thereto pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), and Pruitt filed none. Adopting the magistrate judge's report, the district court dismissed the action. The district court denied CPC, stating that the law is well-settled and an appeal would be frivolous, but a judge in active duty on this court subsequently granted CPC.

II

ANALYSIS

A. Consent and Search

Pruitt argues first that the person who consented to the search of his apartment lacked authority to give such consent. A defendant who has had a full and fair opportunity to litigate Fourth Amendment issues in state court may not have habeas relief on that ground. Stone v. Powell, 428 U.S. 465, 481-82, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Pruitt raised the issue in the Texas Court of Criminal Appeals, so his claim will not be entertained here.

B. Probable Cause for Arrest

Pruitt next argues that there was no probable cause to support his warrantless arrest. He also raised that Fourth Amendment issue in the Texas Court of Criminal Appeals. For the same reason, his probable cause argument will not be considered here.

C. Right to Remain Silent

Pruitt argues that investigating officers violated his Fifth Amendment right to remain silent. Pruitt complains that an officer improperly extracted from him the address of his residence and the name of an accomplice. An arrestee, of course, has the right to remain silent. Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The trial court held a hearing on the voluntariness of a statement that Pruitt made while in custody, which statement led to the discovery of a weapon that was introduced at trial. See

Pruitt, 683 S.W.2d at 539. At that hearing Investigator Westphalen testified that another investigator advised Pruitt of his Miranda rights, and Pruitt stated that he understood those rights.

Initially, Pruitt told officers that he did not want to talk but then began to talk when they kept asking him about another person's involvement in the crime. He began to talk by stating, "`I know I'm going back to prison. I will go ahead and tell you.'" He identified the accomplice as Charles Rylander. Pruitt then told the officers the address of an apartment that he apparently shared with Rylander.

Counsel asked Westphalen why he did not cease asking questions when Pruitt said that he did not want to talk. The following exchange then took place between counsel and Westphalen:

> A. It's my responsibility to get as much information as I can on this case and any case and I felt that if I quit then I hadn't fulfilled my responsibility as an investigator.
>
> Q. In order for a person to terminate the interview under Miranda, is your interpretation of that -- what do they actually have to say before you will stop talking to a suspect?
>
> A. Well, that depends on the individual. I would think, you know, if he quit talking, that would terminate his part of the interview or the discussion necessarily wouldn't stop any part of it.
>
> Q. So you are going to continue to attempt to interview him after he even states to you that he has talked all he's going to talk?
>
> A. That's right.

Westphalen also stated that no one threatened or coaxed Pruitt into talking, and that Pruitt identified Rylander in a photograph. Officers later showed that photograph to a witness who identified

Rylander. At no time during the investigation, Westphalen testified, did Pruitt state that he wanted to speak with an attorney or that he wanted to terminate the interview.

Westphalen and other investigators then went to the apartment at the address that Pruitt had given them. A woman answered their knock and told them that they could come in. They told her that they were looking for Rylander. She told the officers that he was not there but that they were free to search the apartment, which they did while she watched. They found a gun and other items. Westphalen gave similar testimony at trial. Pruitt, 683 S.W.2d at 539.

The trial court found that Pruitt understood and knowingly and intelligently waived his Miranda rights. That court held the statements admissible, and the state Court of Appeals held that ruling erroneous but harmless. Pruitt, 683 S.W.2d at 541.

Pruitt asserted his right to remain silent. Westphalen did not honor that right. Pruitt suffered a constitutional deprivation, and the trial court's admission of evidence obtained thereby was a constitutional error. Charles v. Smith, 894 F.2d 718, 725-26 (5th Cir.), cert. denied, 498 U.S. 957 (1990). On habeas review, though, the question is whether the error might have contributed to the conviction. If not, the error was harmless. Id. at 726.

Westphalen's testimony that Pruitt gave his address was admitted, and so was the gun. Pruitt, 683 S.W.2d at 539. No evidence of Pruitt's statement about Rylander was introduced. Id.

at 541. The gun was introduced, and Allison testified that it looked like the gun used in the robbery. The address itself was not inculpating. This Fifth Amendment issue, therefore, deals with the admission of the gun into evidence.

In assessing the harm of the error, the state Court of Appeals explained:

> [W]e have the clear and positive identification of the appellant by the complainant. The complainant's observations of the appellant occurred not only after he had drawn his gun and placed her in great fear, but also before the robbery occurred, during the time when the appellant approached the cleaners and was apparently only another customer. The complainant testified that it is her practice to study and learn her customers' faces so that she can address them by name, which encourages repeat business. She identified the appellant from a picture in a lineup the evening of the robbery.

Pruitt, 683 S.W.2d at 541.

The Charles complainant's testimony was clear and unequivocal. Charles, 894 F.2d at 721. So was Evelyn Allison's. The Charles complainant observed the perpetrator very closely during the crime. Id. So did Allison. Because of the strength of the testimony in Charles, the admission of evidence obtained in violation of Charles's Miranda rights was held harmless. Id. at 726. We find that same conclusion applicable in the instant case.

D. Ineffective Assistance of Counsel

Pruitt argues that his counsel was ineffective for failing to object to the admission of evidence obtained in violation of his Fourth Amendment rights. That error, Pruitt argues, arose from counsel's failure to investigate the case enough to know that the Fourth Amendment claims were valid, resulting in counsel's failure

to call the relevant witnesses.

The district court found Pruitt's Fourth Amendment issues meritless because he had a full and fair opportunity to litigate those issues in state court. Pruitt, however, correctly argued in the second of his later briefs that a Stone disposition of a Fourth Amendment claim does not decide a claim that counsel was ineffective for not raising the same Fourth Amendment issue. Kimmelman v. Morrison, 477 U.S. 365, 378, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Neither the magistrate judge nor the district court considered the Kimmelman issue. Pruitt argues the Kimmelman issue on appeal.

To demonstrate ineffectiveness of counsel, Pruitt must establish that counsel's performance fell below an objective standard of reasonable competence and that the defendant was prejudiced by his counsel's deficient performance. Lockhart v. Fretwell, _____ U.S. _____, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993). Judicial scrutiny of counsel's performance must be highly deferential, and courts must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The petitioner must affirmatively plead the prejudice actually resulting. Hill v. Lockhart, 474 U.S. 52, 60, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Pruitt must demonstrate prejudice by showing that counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. Fretwell,

113 S.Ct. at 844. The Supreme Court has said that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697.

The harmlessness of the introduction of the gun found at the apartment was analyzed under IIC above. Because its introduction was harmless, Pruitt cannot show that a failure to object to its admission prejudiced him.

A warrantless arrest may be made if the arresting officers have probable cause. Charles, 894 F.2d at 723. Officers have probable cause if "`at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.'" Id. (quoting Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964)).

Allison identified Pruitt by photograph. Shortly thereafter, Harbour happened to see Pruitt driving on the street. Given the foregoing Beck definition, Pruitt has not shown how probable cause was so lacking that counsel was deficient for not challenging the arrest. Furthermore, the only evidence seized in connection with the arrest was the clear shower cap. Given Allison's convincing identification of Pruitt, he has not shown how a failure to challenge the arrest prejudiced him.

E. Abandoned Claims

On appeal, Pruitt argues only the four issues above; he does

not argue all of the issues raised in the district court. The issues not argued on appeal are deemed abandoned. See Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985).

For the foregoing reasons, the district court's denial of habeas relief is

AFFIRMED.