

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1863
Summary Calendar

UNITED STATES OF AMERICA,

Defendant-Appellee,

v.

LYMAN BOYD DANIEL,

Plaintiff-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(2:91-CV-17(2-89-CR-33))

(April 26, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.*

PER CURIAM:

Appellant Daniel was denied § 2255 habeas relief from his federal arson conviction. On appeal, he contends principally that the procedures used in the courts below prevented him from investigating and pursuing his claims properly with court-appointed counsel. Finding no reversible error, we affirm.

The magistrate judge, noting that Daniel had "requested that the case be expedited and . . . requested the [evidentiary]

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

hearing," conducted the evidentiary hearing on his petition about two weeks after appointing counsel for Daniel. Counsel had received two continuances, but a third request to continue the hearing was denied. At the conclusion of the evidence, the magistrate judge allowed both parties additional time to file authorities and/or supplemental briefs addressing the issues presented. Both parties filed supplemental briefs. Some months later, the magistrate judge then issued a thorough report and recommended that Daniel's § 2255 motion be denied. The magistrate judge also entered a report and recommended that Daniel's motion for leave to amend his original § 2255 motion be denied. Daniel filed both specific objections and a general objection because he "was appointed counsel with inadequate time to prepare for the evidentiary hearing."

The district court adopted the magistrate judge's report and recommendation, overruled Daniel's objections, and after an independent and de novo review, denied the § 2255 motion and dismissed the case. Judgement was entered accordingly.

Daniel argues on appeal that he was denied due process and the right to effective assistance of counsel in connection with his § 2255 motion because the magistrate judge: 1) refused to grant a third continuance; 2) refused to allow adequate time for investigation and preparation prior to the evidentiary hearing; and 3) unreasonably delayed the appointment of counsel. Daniel asserts that, as a result, he was denied adequate time to seek leave of the

district court to contact two trial jurors regarding allegations of jury misconduct. His arguments are unavailing.

Although Daniel asserts that his rights to due process and effective assistance of counsel were violated, the right to collaterally attack a conviction is not a right guaranteed by the Constitution. The Due Process Clause does not require the appointment of counsel for a collateral attack on a conviction, and no Sixth Amendment right to appointed counsel, let alone effective appointed counsel, extends to prisoners' collateral attacks on their convictions. Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 95 L.Ed.2d 539 (1987). No constitutional right of Daniel's was infringed by the magistrate judge's procedures.

The issue remains, however, whether the district court abused its discretion by refusing to grant a continuance. A trial court's denial of a motion for a continuance is reviewed under the abuse-of-discretion standard. Spinkellink v. Wainwright, 578 F.2d 582, 590-91, n.11 (5th Cir. 1978) (reviewing district court denial of continuance in § 2254 proceeding), cert. denied, 440 U.S. 976 (1979). A trial court's denial of a continuance is not tantamount to an abuse of discretion unless the movant shows that he was seriously prejudiced by the denial. U.S. v. Khan, 728 F.2d 676, 681 (5th Cir. 1984). The public interest in the prompt and efficient administration of justice and the trial court's interest in the management and control of its docket must be weighed against a petitioner's need for a fair hearing. Alford v. U.S., 709 F.2d 418, 423 (5th Cir. 1983).

On appeal, Daniel has alleged that the denial of his motion for a continuance deprived him of an adequate opportunity to investigate and prepare for the evidentiary hearing and to obtain leave of the district court to contact two jurors to be witnesses. To obtain a continuance on the grounds of unavailability of a witness, a movant must show: 1) that due diligence was exercised to obtain the attendance of the witness; 2) that the witness would tender substantial favorable evidence; 3) that the witness is available and willing to testify; and 4) material prejudice as a result of the denial of the continuance. U.S. v. Botello, 991 F.2d 189, 193 (5th Cir. 1993), cert. denied, 114 S. Ct. 886 (1994). In the district court, Daniel alleged that juror Phoebe Grice "would have known about" prior fires at Daniel's place of business, and that the jury foreman, Mr. Fidel Ortega, "was aware of the prior fires." These allegations are mere speculation, and as such, are undeserving of habeas relief. See Lockhart v. McCotter, 782 F.2d 1275, 1282 (5th Cir. 1986), cert. denied, 479 U.S. 1030 (1987) (§ 2254 case -- failure of attorney to call witnesses); Alexander v. McCotter, 775 F.2d 595, 602 (5th Cir. 1985) (same). At the evidentiary hearing, Daniel admitted that he had no personal knowledge that Grice either knew of, or had indicated to anyone that she knew about, the prior fires. Regarding Ortega, Daniel assumed, with no specific basis, that Ortega knew of the prior fires because of his working relationship with an individual whose father-in-law had at one point been the fire chief in the same community Daniel lived in. Id. at 69-70. His contentions are

nothing more than conclusional allegations, which are insufficient to raise a constitutional issue. See Ross v. Estelle, 694 F.2d 1008, 1012 (5th Cir. 1983).

Daniel's assertion that the magistrate judge abused his discretion by denying Daniel and his attorney adequate time to investigate prior to the evidentiary hearing is also unavailing. To make a case regarding failure to investigate, or inadequate investigation, a § 2255 movant "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." See U.S. v. Green, 882 F.2d 999, 1003 (5th Cir. 1989) (standard for ineffective-assistance-of-counsel claim).

On appeal, Daniel fails to assert specifically what further investigation would have revealed, had he had additional time. He states only that numerous witnesses needed to be interviewed and substantial fact gathering was necessary. Furthermore, most of the issues Daniel raised in the district court were readily answerable from the record of the prosecution, and Daniel's counsel was given ample time to supplement the evidentiary hearing with a post-argument brief. He has not shown that the magistrate judge abused his discretion.

Daniel also contends that his conviction was obtained improperly because of: 1) a Brady violation; 2) jury misconduct; 3) grant jury abuse; 4) perjured testimony; and 5) ineffective assistance of trial counsel. He did not adequately brief these issues, id. at 16-18, and thus, they are deemed abandoned. See

Brinkman v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748
(5th Cir. 1987).

Because Daniel has failed to show that the trial court abused its discretion or that any of his issues are meritorious, the judgment is **AFFIRMED**.