UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1991
Summary Calendar

GEORGE WILLIAM SNOWDEN,

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
(4:91-CV-703-Y)

(February 17, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

George William Snowden, *pro se* and *in forma pauperis*, appeals from the denial of habeas relief. We **AFFIRM**.

I.

In November 1988, a Texas jury convicted Snowden of forgery (passing a forged writing); he was sentenced to 80 years imprisonment. On direct appeal, his conviction was affirmed in January 1990; the Texas Court of Criminal Appeals refused

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

discretionary review that May. ***Snowden v. State***, 784 S.W.2d 559 (Tex. App.--Ft. Worth 1990). In March 1991, Snowden filed a state habeas application. That June, the Texas Court of Criminal Appeals denied relief without written order.

Snowden filed a federal habeas petition in October 1991. In September 1992, the magistrate judge recommended that relief be denied. Because the district court denied the petition before Snowden's objections to the magistrate judge's report arrived, it granted Snowden's motion to amend the judgment; but, after considering the objections, it again denied relief. Snowden's request for a certificate of probable cause was granted.

II.

Snowden presents five issues: (1) denial of an examining trial; (2) insufficient evidence; (3) failure to instruct the jury on circumstantial evidence; (4) ineffective assistance of counsel at trial and on appeal; and (5) failure by the district court to conduct *de novo* review of the magistrate judge's report and recommendation.

A.

Snowden contends that he was unconstitutionally deprived of an "examining trial".[2] Of course, to prevail, he must show a violation of federal law. ***Pemberton v. Collins***, 991 F.2d 1218, 1223 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 637 (1993).

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[2] Under Texas law, the accused in a felony case has the right to an examining trial prior to indictment; that right terminates upon return of an indictment. *See* ***Texas v. Reimer***, 678 F.2d 1232, 1233 (5th Cir. 1982).

The federal Constitution, however, does not guarantee an "examining trial". ***Texas v. Reimer***, 678 F.2d 1232, 1233-34 (5th Cir. 1982). Therefore, to the extent that Snowden contends that the trial court lacked jurisdiction because no examining trial took place, that contention is meritless. ***Id***. at 1233 ("Failure to grant an examining trial prior to the return of the indictment in no way affects its validity".).

B.

Snowden contends that his conviction is not supported by sufficient evidence. A habeas petitioner is entitled to relief on such a claim only if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt". ***Jackson v. Virginia***, 443 U.S. 307, 324 (1979). The elements of the Texas offense of passing a forged instrument are: "(1) a person must pass as true; (2) a forged instrument in writing; (3) knowing that it was forged at the time of passing". ***Hill v. State***, 730 S.W.2d 86, 87 (Tex. App.--Dallas 1987). Knowledge and the intent to defraud or harm may be shown by circumstantial evidence. *See* ***id***.

Snowden specifically complains that the State did not prove: that he passed or attempted to pass an instrument as true; that the instrument was a forgery; and that he knew that such an instrument had been forged at the time it was passed.

Deborah Ford testified that on the evening of March 2, 1988, in the mailbox in front of her home, she placed three bills with checks. The next morning, before the mail had been delivered, she

noticed that the mailbox was open and the bills and checks were missing. Ford then went to her bank to report the checks stolen.

Jennifer Torzewski testified that, while working in the bank on March 3, 1988, she saw Snowden, accompanied by a female passenger, in a car in the drive-through area of the bank. Snowden transmitted two checks and a deposit slip (State's Exhibits 1, 2, and 3, described *infra*) to Torzewski through a "teller tube". Joel Allis, a United States postal inspector, also witnessed Snowden placing the items in the tube.

Exhibit 1 is a counter check dated March 3, 1988, for $250, purportedly signed by Deborah Ford, with Ford's account number handwritten on it. Exhibit 2 is a check dated February 29, 1988, for $750, made payable to Ford and purportedly signed by Brent Jacobs and indorsed by Ford. Exhibit 3 is a deposit slip reflecting a $750 deposit (the Jacobs check) to Ford's account. When shown exhibit 1 at trial, Ford testified that the signature on the check was not hers; that she had not authorized anyone to sign her name to the check; and that she did not indorse exhibit 2.

Torzewski assumed that Snowden wanted to deposit the $750 check and cash the $250 check. After being instructed not to complete the transaction, she handed the items to investigators who were in the bank. After the bank president parked his vehicle in front of Snowden's vehicle in an attempt to block his escape, Snowden pulled out over the curb and sped away.

While being pursued by police officers, Snowden ran a red light in a busy area, drove through another intersection,

sideswiping two to three vehicles, and eventually lost control of the car and struck a utility pole. Snowden and the female passenger then ran from the car in separate directions. They subsequently were apprehended and arrested.

Snowden attempts to blame his co-defendant, Theresa Hibbits, who pleaded guilty, as the sole offender. He contends that he did not know that the item was forged when he passed it; and that he fled the scene because, after the item had been passed, Hibbits told him that it was forged, and he did not want to become involved in the offense because of his criminal record. Needless to say, regardless of Snowden's interpretation of the evidence, it is the sole province of the jury to weigh the evidence and assess the credibility of the witnesses. *See* ***United States v. Martin***, 790 F.2d 1215, 1219 (5th Cir.), *cert. denied*, 479 U.S. 868 (1986) (direct appeal).

The evidence, direct and circumstantial, viewed in the light most favorable to the prosecution, is more than sufficient to permit a rational trier of fact to find Snowden guilty beyond a reasonable doubt. *See* ***Jackson v. Virginia***, 443 U.S. at 319.

C.

Snowden contends that the trial court should have instructed the jury on the limited uses of circumstantial evidence. On collateral review of an allegedly erroneous jury instruction, the question is "`whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process', ... not merely whether `the instruction is undesirable,

erroneous, or even `universally condemned'". ***Henderson v. Kibbe***, 431 U.S. 145, 154 (1977) (quoting ***Cupp v. Naughten***, 414 U.S. 141, 147 (1973)). "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law". ***Id***. at 155.

At the time of both the offense and trial, neither Texas law nor the federal Constitution required that a charge limiting the uses of circumstantial evidence be given to a jury. *See* ***Holland v. United States***, 348 U.S. 121, 139-40 (1954); ***Hankins v. State***, 646 S.W.2d 191, 198-99 (Tex. Crim. App. 1981). The jury charge required it to find Snowden guilty only if the State proved each element of the offense beyond a reasonable doubt. Snowden has not shown that the omission of an instruction on circumstantial evidence resulted in a violation of due process.

D.

Snowden contends that he was denied effective assistance of counsel at trial and on appeal. To obtain habeas relief based on ineffective assistance of counsel, a petitioner must show not only that his attorney's performance was deficient, but "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". ***Strickland v. Washington***, 466 U.S. 668, 694 (1984). In evaluating such claims, we indulge in "a strong presumption" that counsel's representation fell "within the wide range of reasonable professional competence". ***Bridge v. Lynaugh***, 838 F.2d 770, 773 (5th Cir. 1988).

1.

In his habeas petition, Snowden contended that his attorney was ineffective because he failed to file a motion for an instructed verdict of not guilty at the close of all the evidence. Snowden asserted that because the evidence was insufficient to support his conviction, such a motion would have been meritorious. The record, however, reflects that trial counsel made two oral motions for an instructed verdict of acquittal on the ground that the State had failed to prove every element of its case beyond a reasonable doubt: the first motion came at the close of the State's evidence; the second, at the close of all the evidence.

2.

For the first time on appeal, Snowden contends vaguely that his counsel was ineffective for asserting, in an affidavit filed in the state habeas proceeding, that he had not moved for an instructed verdict. Snowden suggests that his counsel committed perjury or that he was ineffective for perhaps believing both that the State had made out a prima facie case and that the State had not proved every element of the offense. "An issue raised for the first time on appeal generally is not considered unless it involves a purely legal question or failure to consider it would result in a miscarriage of justice". *See, e.g.*, ***Atlantic Mut. Ins. Co. v. Truck Ins. Exch.***, 797 F.2d 1288, 1293 (5th Cir. 1986). Because Snowden has not demonstrated that these alleged deficiencies resulted in any prejudice, our failure to consider this contention will not result in a miscarriage of justice.

3.

Snowden contends that his appellate counsel was ineffective because counsel failed to cite any authorities to support one of the grounds of error on direct appeal. But, Snowden has not suggested any authorities that would have resulted in reversal. Moreover, the state appellate court fully considered the point of error despite the failure to provide supporting authority. ***Snowden v. State***, 784 S.W.2d at 562-63. Snowden, therefore, has failed to demonstrate that he was prejudiced.

4.

Snowden also contends that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence on direct appeal. As stated, under the ***Jackson v. Virginia*** standard, which is used both in Texas and in federal habeas proceedings, sufficient evidence supports Snowden's conviction. *See* ***Jackson v. Virginia***, 443 U.S. at 324; ***Hill v. State***, 730 S.W.2d at 87.

E.

Snowden's contention that the district court did not conduct an "adequate" and "meaningful" review of this case is meritless. Its order granting Snowden's motion to amend reflects that it "engaged in a de novo review of this cause, paying particular attention to Petitioner's objections to the magistrate's findings". We must "assume that the district court did its statutorily commanded duty in the absence of evidence to the contrary". *See* ***Longmire v. Guste***, 921 F.2d 620, 623 (5th Cir. 1991).

III.

For the foregoing reasons, the denial of habeas relief is **AFFIRMED**.