IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2031

FRANK GONZALES,

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 Southern District of Texas
(H-89-CV-1715)

(January 7, 1994)

Before REAVLEY and DAVIS, Circuit Judges and ROSENTHAL[*].

PER CURIAM:[**]

Frank Gonzales raises two issues on appeal from the district court's refusal to issue a writ of habeas corpus: (1) insufficiency of evidence to support the crime charged, and (2) ineffective assistance of counsel. We affirm.

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[*] District Judge of the Southern District of Texas sitting by designation.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

A. Insufficiency of Evidence

At the time of Gonzales' conviction, Texas law provided that the possession of cocaine, including adulterants and dilutants, in excess of 28 grams subjects the possessor to a penalty of imprisonment between five and ninety-nine years. TEX. REV. CIV. STAT. ANN. art. 4476-15 § 4.04(c) & (d) (Vernon Supp. 1981).[1] The State sought to obtain a conviction under this statute. The indictment and jury charge each stated that Gonzales possessed over 28 grams of cocaine; nothing was said about adulterants and dilutants. At trial, the State proved that Gonzales possessed 54.75 grams of street-cut cocaine, only 7.12 grams of which was pure cocaine. The jury returned a guilty verdict for the possession of more than 28 grams of cocaine. Gonzales argues, and the State concedes, that the evidence does not support a conviction for the possession of 28 grams of pure cocaine.

An applicant is entitled to habeas corpus relief under 28 U.S.C. § 2254 "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 99 S. Ct. 2781, 2791-92 (1979). This "standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id*. at 2792 n.16. Gonzales bases his constitutional complaint on the variance between the evidence and the jury charge. Relying on *Jackson*, he

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[1] NOW TEX. HEALTH & SAFETY CODE ANN. § 481.115(c) & (d) (Vernon 1992).

argues that no rational trier of fact could have found that he possessed 28 grams of pure cocaine. This argument, however, overlooks this court's scope of review. As stated in *Jackson*, to determine whether a constitutional violation occurred, we compare the evidence presented at trial with the elements of the offense as defined by state law, not as defined in the jury charge or the indictment. *Brown v. Collins*, 937 F.2d 175, 181 (5th Cir. 1991). And the evidence at trial supports Gonzales' conviction for the possession of more than 28 grams of cocaine, including adulterants and dilutants.

B. Ineffective Assistance of Counsel

"To merit habeas relief on a claim of ineffective assistance of counsel, a habeas petitioner . . . must establish: (1) that counsel's performance was deficient in that it fell below an objective standard of reasonable professional service; and (2) that this deficient performance prejudiced the defense such that there is a reasonable probability that [the result of the proceeding] would have been different." *Thomas v. Lynaugh*, 812 F.2d 225, 229 (5th Cir.), *cert. denied*, 484 U.S. 842 (1987); *Strickland v. Washington*, 104 S. Ct. 2052, 2064 (1984). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." *Id.* at 2066.

Gonzales argues that he is entitled to habeas relief because his former counsel did not argue on appeal that the State failed

to prove Gonzales possessed more than 28 grams of pure cocaine. To support his ineffective-assistance-of-appellate-counsel claim, Gonzales cites two Texas cases that were decided *after* Gonzales' conviction: *Cruse v. State*, 722 S.W.2d 778, 780 (Tex. App.–Beaumont 1986, no pet.) and *Vera v. State*, 800 S.W.2d 310, 311 (Tex. App.–Corpus Christi 1990, pet. ref'd). At the time of Gonzales' conviction, there was case law standing for the general proposition that the prosecution could raise its burden of proof beyond what was required by statute through its drafting of the indictment and the charge,[2] but until *Cruse*, this had never been applied as these cases do to an indictment and charge based on TEX. REV. CIV. STAT. ANN. art. 4476-15 § 4.04 (Vernon Supp. 1981). We conclude that an attorney's failure to anticipate novel applications of existing case law does not amount to deficient performance under *Strickland*.

AFFIRMED.

[2] *See e.g., Doyle v. State*, 661 S.W.2d 726, 729 (Tex. Crim. App. 1983); *Ortega v. State*, 668 S.W.2d 701, 704-05 (Tex. Crim. App. 1983).