

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-2134

(Summary Calendar)

JAMES SANDERS, JR.,

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 Southern District of Texas
(CA-H-91-1497)

(February 12, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

James Sanders, Jr., proceeding pro se, appeals the district court's denial of his petition for writ of habeas corpus. Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

Sanders was convicted of first-degree murder,¹ largely upon his tape-recorded confession of the crime. Sanders filed a motion to suppress the confession, arguing that it was not given voluntarily. After a pre-trial hearing, the motion was denied. His conviction was subsequently affirmed by the Texas Court of Appeals. Sanders filed a state application for writ of habeas corpus, which was denied without written order. He then filed a federal petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254 (1988), which was also denied.

Sanders appeals the district court's denial of his petition for habeas relief, arguing that: (1) his confession was inadmissible at trial because it was a result of a warrantless, illegal arrest, in violation of the Fourth Amendment; and (2) he was denied effective assistance of both trial and appellate counsel, in violation of the Sixth Amendment.

II

A

Sanders first argues that his confession was obtained pursuant to an illegal arrest. See Brief for Sanders at 3. "A Fourth Amendment claim of illegal arrest is foreclosed in habeas if the

¹ Sanders was found guilty of killing his common-law wife, whose body was discovered face down in a residential front yard. The victim had been stabbed seven times in the chest area, apparently with a kitchen knife which was discovered nearby. Sanders had a history of abusing the victim, and was the last person known to have seen her alive.

state 'provided an opportunity for full and fair litigation' of the claim." *Penry v. Lynaugh*, 832 F.2d 915, 918 (5th Cir. 1987) (quoting *Stone v. Powell*, 428 U.S. 465, 493-95, 96 S. Ct. 3037, 3052-43, 49 L. Ed. 2d 1067 (1976)), *rev'd on other grounds*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989). In determining whether a petitioner has been afforded a full and fair opportunity to litigate his claim, we examine the availability of trial court procedures for presenting and deciding such issues and meaningful mechanisms for review of such decisions. See *Davis v. Blackburn*, 803 F.2d 807, 808 (5th Cir. 1986) (holding that petitioner was afforded full and fair opportunity to litigate Fourth Amendment claim where suppression hearing held and claim was presented to state supreme court for review).

Sanders had numerous opportunities to litigate his Fourth Amendment claim. The trial court held an evidentiary hearing, and found the confession admissible. See Statement of Facts, vol. 4, at 217-19. Sanders presented his claim that the arrest was unlawful in his brief on direct appeal. See State Records tab C. The Texas Court of Appeals concluded that Sanders's claim was procedurally barred because the claim was not preserved for review. See State Records tab. A at 3-4. Sanders then presented his claim in his state application for a writ of habeas corpus. See *id.* tab. B. at 3. Because Sanders was given a full and fair opportunity to litigate his Fourth Amendment claim, he is barred from federal review of his claim. See *Billiot v. Maggio*, 694 F.2d 98, 100 (5th Cir. 1982) ("Federal courts possess no authority in habeas

proceedings to scrutinize a state court's application of fourth amendment principles absent a showing that the petitioner was denied a full and fair opportunity to litigate a [Fourth Amendment] claim").

B

Sanders argues next that he was denied effective assistance of both his trial and appellate counsel. We examine claims of ineffective assistance of counsel to determine whether counsel's performance was both deficient and prejudicial to the petitioner. See *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). We indulge a strong presumption that counsel's conduct was not deficient. *Id.* at 689, 104 S. Ct. at 2065. Furthermore, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. Sanders claims that his trial counsel's failure to challenge the admissibility of his confession on the ground that the arrest was illegal, denied him effective assistance of counsel. We disagree.

Sanders fails to prove how an objection to the legality of his arrest would have successfully prevented the confession from being admitted into evidence. Even had an objection been made, the trial judge could have concluded that the taped confession was not the fruit of an arrest))illegal or otherwise))because Sanders admittedly "volunteered to accompany the officers to the Police Station." See Record on Appeal at 26. Moreover, even if Sanders was arrested at

the station, Sanders admits that he was advised of his rights on at least three separate occasions before taping of his confession commenced. See State Records tab. F. at 102-03. Each time, Sanders expressly waived his right to counsel. See *id.* Thus, the trial judge could have concluded that these series of warnings and waivers broke any connection between the arrest and the voluntary confession, particularly where Sanders has not challenged the actions of the police officers as unreasonable.² See *Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 2261-62, 45 L. Ed. 2d 416 (1975) (holding that the purpose and flagrancy of the official misconduct, and whether *Miranda* warnings are given, are relevant factors in determining whether confession obtained by exploitation of illegal arrest). Because Sanders cannot prove that the voluntary confession would have been suppressed had the illegal arrest issue been raised, he cannot show any prejudice to his defense. See *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

Sanders further alleges that his appellate counsel's failure to contest the confession on the three grounds raised and preserved at trial, denied him effective assistance of counsel. "[A]ppellate counsel's effectiveness is judged by the same standard as that of trial counsel" *Cantu v. Collins*, 967 F.2d 1006, 1017 (5th Cir. 1992), *petition for cert. filed*, Oct. 20, 1992. Again, Sanders fails to show prejudice. Sanders argues that his appellate counsel should have raised the following issues on appeal: (1) his

² Upon arriving at the police station, Sanders was immediately taken before a magistrate, who advised Sanders of his rights. See State Records tab. E at 15-16.

confession was coerced; (2) his mental capacity was insufficient to validly waive his constitutional rights; and (3) he was denied access to counsel before confessing. Testimony at the suppression hearing established that Sanders never told the magistrate that he wanted a lawyer, or that he felt threatened by the police officers, or that he was mentally unstable. See State Records tab. E at 13-14. Further, Sanders affirmatively waived his right to counsel on the tape after being advised of his rights for the third time. See *id.* tab. F. at 102-03. Thus, even had appellate counsel pursued on appeal the three grounds for suppression raised at trial, his conviction would still have been affirmed. Consequently, Sanders cannot prove prejudice.

III

For the foregoing reasons, we **AFFIRM.**