UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-2274
Summary Calendar

James H. Messer,

Petitioner-Appellant,

VERSUS

James A. Collins,

Respondent-Appellee.

Appeal from the United States District Court
For the Southern District of Texas

(June 29, 1993)

Before THORNBERRY, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge:[*]

James H. Messer pleaded no contest to a charge of murder and was sentenced by the state trial court. The district court denied the relief requested in Messer's federal writ of habeas corpus. Messer appeals to this court arguing that his plea was involuntary, his counsel was ineffective and the district court erred for

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

failing to hold an evidentiary hearing on these matters. We affirm the actions of the district court.

Facts and Prior Proceedings

Messer was charged with the murder of a man that he found in the home of his estranged wife. He pleaded no contest before a Texas trial court. The court found Messer guilty of the offense of murder and assessed punishment at 25 years in the Texas Department of Criminal Justice. Messer subsequently filed a motion for new trial, asserting that he was promised a probated sentence and a fine of $1,000.00 by his counsel, and therefore his plea was involuntary. An evidentiary hearing was held on the motion for new trial, and the motion was then denied. A state court of appeals affirmed the trial court's judgment.[1] Messer then filed a petition for discretionary review, which was refused by the Texas Court of Criminal Appeals. Without pursuing post-conviction remedies in the state courts, Messer filed a writ of habeas corpus in federal district court. The respondent filed a motion to dismiss the federal application on the ground that Messer had not exhausted his state remedies. The district court, however, denied the motion to dismiss finding that Messer did not file a writ in state court because he had already raised all relevant issues in the petition for discretionary review which was denied.[2] The district court subsequently denied Messer's application for writ of habeas corpus on substantive grounds but granted a certificate of

[1] **See Messer v. State**, 757 S.W.2d 820 (Tex. Ct. App. 1988).

[2] **See** 28 U.S.C. 2254 (b) and (c).

probable cause. Messer appeals to this court arguing that his plea of nolo contendere was involuntary, his trial counsel was ineffective and the district court erred by not conducting an evidentiary hearing.

Discussion

The constitutionality of a guilty plea is measured by whether the defendant made a knowing and voluntary waiver of his rights "with sufficient awareness of the relevant circumstances and likely consequences." **Brady v. United States**, 397 U.S. 742 (1970). Whether a guilty plea was made voluntarily is a question of law and not a question of fact. **Marshall v. Lonberger,** 103 S.Ct. 843, 849 (1983)(citations omitted). We decide questions of law de novo. **Humphrey v. Lynaugh**, 861 F.2d 875, 876 (5th Cir. 1988), cert. denied, 109 S.Ct. 1755 (1989).

I. Guilty Plea

Messer argues his plea of no contest was involuntary because he based his decision to plead on an unfulfilled promise of his trial counsel. According to Messer, his trial counsel promised him that his punishment would be eight years of probation and a fine of $1,000.00.

If Messer's attorney promised him that he would definitely receive probation, this could render Messer's guilty plea involuntary. "When a defendant pleads guilty on the basis of a promise by his defense attorney or the prosecutor, whether or not such promise is fulfillable, breach of that promise taints the voluntariness of the plea." **McKenzie v. Wainwright**, 632 F.2d 649,

651 (5th Cir. 1980). However, a defendant's mere "understanding" that he will be given a lesser sentence will not invalidate a guilty plea. **Harmason v. Smith**, 888 F.2d 1527 (5th Cir. 1989); **Smith v. McCotter**, 786 F.2d 697, 701 (5th Cir. 1986)(citations omitted). To receive federal habeas relief based on an alleged promise, a prisoner must prove: (1) the exact terms of the alleged promise; (2) exactly when, where and by whom such a promise was made; and (3) the precise identity of an eyewitness to the promise. **U.S. v. Smith**, 915 F.2d 959, 963 (5th Cir. 1990).

The district court rejected Messer's claims concerning the alleged promise, basing its decision on the transcripts taken during the state evidentiary hearing held in response to Messer's motion for new trial. In addition, the district court concluded that the transcripts of Messer's plea hearing clearly demonstrated that Messer acknowledged that his sentence exposure was up to life imprisonment and a fine of up to $10,000.00; that Messer clearly understood and acknowledged that the sentence determination was restricted only by the range of punishment; that Messer never mentioned during the plea hearing that he understood that probation was an option; and he acknowledged that he had not been made any promises to induce his plea. The district court also found that Messer had signed a written "Waiver of Constitutional Rights, Agreement to Stipulate and Judicial Confession" in which he admitted to committing the crime as alleged in the indictment. Further, at the punishment hearing, Messer never attempted to challenge the sentence nor withdraw his plea of no contest. Based

on these findings, the district court held that Messer's allegations concerning the voluntariness of his plea were without merit. We agree with the district court's opinion.

The transcript from the hearing on Messer's motion for new trial reflects that his retained trial counsel testified that on one occasion she informed Messer that her "impression" and "belief" were that the court was "favorably disposed" to grant him probation. She testified that during that conversation, she informed Messer that she "thought" he would get probation. She further testified that prior to the arraignment, she informed Messer "that if he entered his plea of no contest[,] he would be placed on probation for a period of eight years and given a fine of one thousand dollars." Messer's trial counsel admitted during the hearing that she made that statement "predicated upon her belief and interpretation" of conversations with the trial judge.

During cross-examination, trial counsel testified that the trial judge had "committed" to place Messer on probation for eight years with a fine of $1,000.00. She nevertheless admitted that she told Messer that the State had not agreed on a sentence.

Our thorough review of the record reflects that when Messer entered his plea of no contest, he received ample admonishments and made solemn declarations which conflict with his allegations on appeal. In addition, the trial court informed Messer about the range of punishment and was informed that "the only thing that would restrict the [c]ourt in assessing punishment is the range of punishment that I've already given you." The court further stated

that it would consider all the alternatives to punishment, but it added that "the [c]ourt is not required to grant you that alternative treatment just because you qualify." Messer also learned at this same hearing that the State was reserving the right to argue at a later punishment hearing for whatever punishment it felt appropriate. Messer nor his counsel ever told the court at any time prior to his motion for new trial that he had been promised probation.

Messer testified that it was his "understanding" that he would be given probation. In addition, his trial counsel testified that she could not remember if she used the word "promised" in her discussions with Messer about the probability of probation. Further, Messer's solemn declarations in open court that he understood the full sentencing range and that he had been promised nothing, carry a strong presumption of merit. **Blackledge v. Allison**, 97 S.Ct. 1621 (1977). Under these circumstances, the conversations between Messer and his trial counsel do not amount to an "actual promise" upon which relief could be granted by this court. **See e.g. Smith v. McCotter**, 786 F.2d 697, 701 (5th Cir. 1986); **Self v. Blackburn**, 751 F.2d 789, 793 (5th Cir. 1985). The transcript from the motion for new trial hearing and the circumstances of Messer's plea do not indicate his reliance on a firm sentencing agreement or promise. Rather, these events demonstrate no more than a mere understanding on his part that his sentence would probably be probation. Messer has failed to prove the existence of an actual promise. Therefore, based on the

record, we cannot say that Messer's plea of no contest was involuntary and unknowing and that the issuance of a writ of habeas corpus should therefore follow.

II. Effective Counsel

Messer next argues that his trial counsel was ineffective. The burden of proof in a habeas corpus proceeding attacking the effectiveness of trial counsel is upon the petitioner, who must demonstrate counsel's ineffectiveness by a preponderance of the evidence. **Martin v. Maggio**, 711 F.2d 1273, 1279 (5th Cir. 1983), cert. denied, 469 U.S. 1028 (1984). To prove ineffective assistance of counsel, Messer must show that his trial counsel's performance was deficient and that the deficient performance prejudiced him. **Strickland v. Washington**, 104 S.Ct. 2052 (1984).

To satisfy the "prejudice" requirement in a claim arising out of the plea process, such as this one, the defendant must show that there was a reasonable probability that, but for the counsel's errors, he would not have pleaded no contest and would have insisted on going to trial. **Hill v. Lockhart**, 106 S.Ct. 366, 370 (1985). The defendant may not simply allege prejudice--he must affirmatively prove it. **Bonvillain v. Blackburn**, 780 F.2d 1248, 1253 (5th Cir.), cert. denied, 476 U.S. 1143 (1986). Where the alleged error of counsel is counsel's misunderstanding of the range of punishment likely to be dispensed by the trial court, the resolution of the "prejudice" inquiry will depend largely on whether the defendant would have received a less severe punishment after a jury trial. **See Hill**, 106 S.Ct. at 370-371.

Messer asserts that he has shown that he was prejudiced because he and his trial counsel testified, during the hearing on his motion for new trial, that he would have gone to trial had he known that he would not receive a probated sentence. His trial counsel affirmed that she would not have advised Messer to plead no contest had she known he would not receive a probated sentence.

Although Messer provides testimony reflecting an apparent "probability" that he would go to trial had he known he would not have received probation, Messer has not shown by a preponderance of the evidence that probability was "reasonable". **See Hill**, 106 S.Ct. at 370-371. For example, the record reflects that there was an overwhelming amount of damaging evidence that existed against Messer. On January 11, 1986, Messer's estranged wife, a girlfriend and the complainant, and Thomas Michael Schwarz came home from a party at 2:40 a.m. and found Schwarz's tires flattened.[3] Later, after returning from the girlfriend's apartment to pick up necessities for an overnight stay, all three observed Messer sitting in his parked car on the street in front of Mrs. Messer's house. Messer subsequently came to the door and began to question Mrs. Messer about the presence of Schwarz. Schwarz walked to the front door and Messer pulled a pistol from behind his back and fired one time, striking Schwarz in the left eye, killing him instantly.

Messer's Pre-sentence Investigation Report (PSR) indicates that

[3] Messer admitted to sticking Schwarz's tires with a pen knife, while his children were present. He told the children, "let him explain that to his wife".

Messer slashed Schwarz's tires in the presence of his children. He then took his children home, returned and went to the front door of Mrs. Messer's home to question her about the presence of Schwarz. His statement indicates that he had a detailed conversation with Mrs. Messer about calling Schwarz's wife before the shooting. The PSR reflects that Mrs. Messer was on her way to the telephone to call Schwarz's wife for Messer, when Schwarz was killed.

Messer and his trial counsel have insisted that if they had known that the trial judge would assess probation as punishment for his crime, they would have proceeded to trial in an attempt to pursue a voluntary manslaughter charge. We think that Messer has not shown by a preponderance of the evidence that it was likely that he would have been entitled to such an instruction. It is questionable whether the facts of this case would have met the requirement that the crime be committed in sudden passion. See Tex. Penal Code § 19.03 (Vernon Supp. 1990). In addition, Messer's PSR also shows that he had a misdemeanor conviction in 1973 for carrying a prohibited weapon. Messer's description of the events surrounding this charge as cited in the PSR are not favorable to Messer as well.[4] The record also contains other examples of Messer's reactions concerning his suspicions about extra-marital affairs by his wife. Therefore, based on the record, we find that Messer has not carried his burden in proving that he was prejudiced

[4]Messer was picked up on the weapons charge after threatening a friend and kicking in his in-laws door in search of his wife who he thought was with another man.

by his trial counsel's action.

III. Evidentiary Hearing

Messer argues that the district court erred in not conducting an evidentiary hearing. According to Messer, such a hearing was necessary because the state courts did not provide factual findings explaining why the denial of his motion for new trial was proper.

Whether an evidentiary hearing is necessary depends on an assessment of the record. **Smith**, 915 F.2d at 964. If a district court cannot resolve the allegations without examining evidence beyond the record, it must hold a hearing. **Id.** If the record is clearly adequate to dispose fairly of the allegations, the court need inquire no further. **Id.**

The record in this case supplies ample evidence regarding the voluntariness of Messer's plea and the assistance of his trial counsel. An evidentiary hearing, therefore, was not required.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.