IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2335
Conference Calendar

MACK BERNARD YATES,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. CA-H-91-1975

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March 16, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

On direct appeal, a defendant has a right to a trial transcript or an alternative device that fulfills the same function as a trial transcript. Griffin v. Illinois, 351 U.S. 12, 18-20, 76 S.Ct. 585, 100 L.Ed. 891. (1956). However, an indigent defendant is not entitled to a free transcript if he had access to the record on direct appeal and fails to demonstrate that he requires the record to establish a non-frivolous post-

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

conviction claim. Smith v. Beto, 472 F.2d 164, 165 (5th Cir. 1973); see also United States v. MacCollom, 426 U.S. 317, 325-326, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976) (federal defendant seeking collateral relief must demonstrate non-frivolous claim in order to obtain a free transcript pursuant to 28 U.S.C. § 753(f)).

Yates was represented by counsel on direct appeal, and a review of the appellate brief reflects that counsel had access to the trial record.

Yates argues that he is entitled to the state-court record to prove that his counsel was ineffective because he failed to obtain the testimony of a psychologist to discredit the testimony of the victim of the robbery. Yates contends that such testimony would show that the victim's identification of him as the robber was unduly influenced by the police.

To prevail on an ineffective assistance claim, a defendant must show that his counsel's performance was deficient, and that the deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prove prejudice, the defendant must demonstrate "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Lockhart v. Fretwell, No. 91-1393, 1993 WL 10366 at 3 (U.S. Jan. 25, 1993) (internal quotation and citation omitted). Ineffective assistance claims based on counsel's failure to call a witness "are not favored in federal habeas review." Murray v. Maggio, 736 F.2d 279, 282 (5th Cir. 1984). A petitioner must overcome a

strong presumption that counsel's decision not to call a witness was a strategic one. Id.

On direct appeal, defense counsel argued that the trial court erred in failing to suppress the victim's in-court identification of Yates because it was tainted by the "on-the-scene confrontation which was inherently suggestive." Yates v. State, 677 S.W.2d 215, 219 (Tex. Ct. App. 1984). The Texas Appellate Court, in affirming the trial court's denial of the motion to suppress the identification, noted that the victim had a ten-minute opportunity to view the appellant during the robbery, that she accurately described the man, and that she positively identified Yates at the time of the confrontation. Id. The evidence also showed that Yates possessed jewelry belonging to the victim at the time of his arrest. Id. Factual findings of the state court are presumed to be correct unless a petitioner demonstrates that they are unreliable. 28 U.S.C. § 2254(d).

In light of the overwhelming evidence of Yates's guilt presented at trial, the claim that the absence of a psychologist's testimony would have rendered the outcome of the trial unreliable is frivolous. Because Yates has failed to allege that there are facts in the state-court record that establish his counsel's ineffectiveness, Yates has not demonstrated that he requires the record to establish a constitutional claim.

AFFIRMED.