

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-2478
Summary Calendar

EARNEST EDWARD DACUS,

Petitioner-Appellant,

VERSUS

LAWRENCE COLEMAN, Director
Harris County Adult Probation
Department, and JAMES A. COLLINS,
Director, Texas Dept. of Criminal
Justice, Institutional Division,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-91-179)

(April 5, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:¹

Appellant Dacus was convicted in Texas of delivery of a controlled substance and was sentenced to six years imprisonment, the sentence to be probated. He sold drugs to an officer. He sought federal writ of habeas corpus alleging that he was denied due process because the trial court refused to reopen the case to hear testimony from a material witness; the trial court refused to

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

give a "mistaken identity" jury instruction; and another individual confessed to the offense. The district court granted the Respondent's motion for summary judgment. We granted Dacus's motion to proceed in forma pauperis on appeal and a certificate of probable cause. We now affirm in part, vacate in part and remand.

Dacus argues that he was entitled to a "mistaken identity" jury instruction. Under Texas state law a defendant is not entitled to a mistaken identity jury instruction because such an instruction is an improper comment on the evidence. See Roberson v. State, 852 S.W.2d 508, 511 (Tex. Crim. App. 1993). The district court properly dismissed this claim.

Dacus also argues that newly discovered evidence, specifically a confession by James W. Ben exculpating Dacus, establishes that he is factually innocent and entitles him to relief. An allegation of newly discovered evidence relevant only to the guilt of a state prisoner does not state a cognizable ground for federal habeas corpus relief. Armstead v. Maggio, 720 F.2d 894, 896-97 (5th Cir. 1983). This claim was correctly dismissed.

Dacus next argues that he was denied due process because the trial judge refused to reopen the case after both sides had rested but before the jury had been charged. Dacus sought to present testimony from a witness who allegedly would have testified that Dacus was not the seller of the cocaine to the undercover police officer. Dacus argues that the trial court's refusal to reopen the evidence and wait twenty minutes for the witness to arrive rendered his trial fundamentally unfair. The Respondent correctly asserted

that the claim was procedurally barred, and the district court denied relief on that basis.

A petitioner may raise a procedurally barred claim in a federal habeas petition if he can demonstrate cause for the default and actual prejudice as a result of the alleged constitutional violation, or if he can demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. Smith v. Black, 970 F.2d 1383, 1385-86 (5th Cir. 1992). A "fundamental miscarriage of justice" occurs where the alleged constitutional violation has probably caused an innocent person to be convicted. Murray v. Carrier, 477 U.S. 478 (1986).

The district court correctly held that Dacus has not shown cause or prejudice for the default. The district court did not, however, consider whether Appellant has made a colorable showing that failure to address the merits of his claim will result in a fundamental miscarriage of justice.

Dacus contends that his witness, Melvin Kemp, would have named the individual who actually committed the offense and that another individual has confessed to committing the offense. Under Texas law a trial judge must reopen a case to permit a party to introduce more evidence if the evidence is admissible and offered before the jury is charged, unless it appears that the introduction of the evidence would impede the trial or interfere with the orderly administration of justice. See Tucker v. State, 578 S.W.2d 409, 410 (Tex. Crim. App. 1979). Dacus requested a twenty-minute recess because Kemp was on his way to the courthouse, but the trial judge

denied the request apparently because of the delay. The denial of the twenty-minute recess can be reversible error, see Tucker, 578 S.W.2d at 410, and a violation of state law can be a valid basis for federal habeas relief if it rendered the trial fundamentally unfair. Lavernia v. Lynaugh, 845 F.2d 493, 496 (5th Cir. 1988). Dacus's defensive theory was mistaken identity, and therefore the trial judge's refusal to reopen the case and grant him a twenty-minute recess and hear the witness may have rendered Dacus's trial fundamentally unfair.

Although Dacus may show that he was denied due process because the trial judge refused to reopen the case, he must also demonstrate factual innocence. Because the district court did not address the fundamental-miscarriage-of-justice exception to the procedural default doctrine, this portion of the district court's order is vacated and the case remanded. On remand the district court should consider whether the denial of the twenty-minute delay to hear the witness was error and whether Ben's confession and Kemp's testimony are sufficiently credible to support Dacus's claim of factual innocence.

For the first time on appeal Dacus also argues that the indictment was invalid and that the prosecution knowingly used perjured testimony and suppressed Brady material. We do not address these issues. See Smith, 970 F.2d at 1389 (issues not raised in the habeas petition in the district court will not be addressed on appeal).

AFFIRMED in part, VACATED in part, and REMANDED.

