

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2791
(Summary Calendar)

DENNIS MITCHELL LONG,

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-89-2910)

(March 15, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Petitioner-Appellant Dennis Mitchell Long, a prisoner in the Institutional Division of the Texas Department of Criminal Justice, appeals the denial of his petition for habeas corpus in which he

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

challenged his sentence as being violative of the Ex Post Facto Clause and of the Due Process Clause of the Fifth and of the Fourteenth Amendments. Long also alleged ineffective assistance of counsel. Finding no reversible error by the district court in its denial of Long's petition, we affirm.

I

FACTS AND PROCEEDINGS

The facts are not in dispute. Long was convicted by a jury of aggravated robbery. He then pleaded true to an enhancement paragraph, admitting his previous commission of a felony. The law in effect at the time of sentencing, Tex. Penal Code Ann. § 12.42(c), provided punishment of confinement for not less than 15 years and not more than 99 years. See Tex. Penal Code Ann. § 12.42(c) (Vernon Supp. 1981). That statute was later revised, allowing a fine up to \$10,000. See Tex. Penal Code Ann. § 12.42(c) (Vernon Supp. 1985). The jury imposed a term of 75 years' confinement and a fine of \$1000. Long directly appealed, contending that the sentence imposed a penalty greater than that authorized by law and thus violated the Ex Post Facto Clause.

The state court of appeals affirmed his conviction but ordered that the judgment be reformed to delete the \$1000 fine as provided by article 37.10(b) of the Texas Code of Criminal Procedure. See Tex. Code Crim. Proc. Ann., Art. 37.10(b) (Vernon Supp. 1990); Ex parte Johnson, 697 S.W.2d 605, 607-09 (Tex. Crim. App. 1985) (en banc).

Long did not file a petition for discretionary review, but

subsequently filed a state petition for a writ of habeas corpus. The state district judge, adopting the prosecution's answer, recommended that the Texas Court of Criminal Appeals deny relief because the deletion of the fine from Long's sentence mooted his claim. Relief was denied without written order on the findings of the trial court.

Long filed a § 2254 petition in federal district court attacking his conviction on numerous grounds. He claimed, inter alia: (1) the jury instruction on punishment was fundamentally flawed and thus violated his right to due process under the Fifth and Fourteenth Amendments and the Ex Post Facto Clause; and (2) counsel was ineffective for failure to object to the jury instruction.

A magistrate judge, concluding that Long's ex post facto argument was moot and that he was not denied any rights to due process or effective counsel, recommended that Long's habeas petition be denied. The district court concurred with the magistrate judge's "Memorandum and Recommendation," and an order was entered which, in effect, granted appellee's motion for summary judgment and denied relief under § 2254. Long appealed timely, and the district court granted Long's motion for CPC.

II

ANALYSIS

A. Jury Instruction

Long argues that the jury instruction which applied the wrong statute in violation of the Ex Post Facto Clause also violated his

rights under the Due Process Clause not to be sentenced based on materially false information. He also argues that the remedy for violating his due process rights is for this court to vacate his conviction for retrial or, alternatively, vacate the sentence and remand for resentencing.

After Long was sentenced, the Texas Code of Criminal Procedure was amended in 1985 to allow the trial court to reform the verdict whenever a "jury assesses punishment in a case and in the verdict assesses both punishment that is authorized by law . . . and punishment that is not authorized by law." See Tex. Code Crim. Proc. Ann., Art. 37.10(b) (Vernon Supp. 1993). This provision allowing reformation of verdicts was reviewed by the U.S. Supreme Court, which held that the provision as amended could be applied retroactively without violating the Ex Post Facto Clause. Collins v. Youngblood, 497 U.S. 37, 39-52, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990), rev'g Youngblood v. Lynaugh, 882 F.2d 956 (5th Cir. 1989). The state court of appeals' deletion of the fine as "punishment that is not authorized by law" thus cured the specific evil of which Long complained. As that claim is now moot, Long argues on appeal that he was also deprived of due process.

Long's reliance on Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948), is misplaced and unduly broad. In Townsend, an unrepresented defendant was questioned by a prosecutor in open court at a time after the defendant had pleaded guilty. The prosecution questioned the defendant regarding crimes for which he was found not guilty. The Supreme Court reversed, finding that

comments by prosecution misled the trial court when it sentenced the defendant "on the basis of assumptions concerning his criminal record which were materially untrue." See Townsend v. Burke, 334 U.S. at 736-41. Long's is not such a case. The inaccurate information before the jury did not focus on Long's criminal record at all. Rather, it allowed the imposition of a penalty that was unavailable at law.

Long's argument that retrial or resentencing is necessary lacks merit. Before the Texas Legislature passed Article 37.10(b), any verdict unauthorized by law rendered the judgment void, thus leaving retrial as "the only course of action available" to remedy the error. Ex parte Johnson, 697 S.W.2d at 605-08. Nevertheless, Article 37.10(b) makes reversal of the conviction and retrial -- as well as vacating the sentence for resentencing -- unnecessary. Id. As the remedial measure provided by Article 37.10(b) "does not constitute substantive law defining criminal acts or providing for penalties, it is procedural in nature," id. at 607; see Collins v. Youngblood, 497 U.S. at 44. Therefore, Long's reliance on state case law decided before the enactment of Article 37.10(b) is misplaced. The removal of the fine pursuant to Article 37.10(b) is sufficient to cure the error, in part because its effect was to decrease rather than increase the punishment. See id. at 44-52. Neither does it deprive Long of any substantive right. See id.

Long's speculation as to how the jury might have deliberated when given the wrong statute also lacks merit. Cf. Gryger v. Burke, 334 U.S. 728, 731, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948)

(speculation as to what trial court might have thought when it applied sentencing statute not proper). Neither does judgment meted out in violation of state law, alone, constitute a denial of due process. Id.

For the reasons set forth above, Long's argument is meritless. The district court's ruling denying Long's § 2254 petition was not error.

B. Ineffective Assistance of Counsel

Long argues that counsel was ineffective for not opposing the jury instruction containing the wrong sentencing statute. This argument too is without merit. Long's claims alleging ineffectiveness of counsel based on other grounds that were not raised on appeal are abandoned. Hobbs v. Blackburn, 752 F.2d 1079 (5th Cir.), cert. denied, 474 U.S. 838 (1985).

A claim that counsel has been ineffective will prevail only if the petition proves that such counsel was not only objectively deficient (cause), but also that the petitioner was so prejudiced by counsel's errors that the trial was unfair or unreliable. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." Lockhart v. Fretwell, ____ U.S. ____, 113 S.Ct. 838, 844 (1993).

Long's argument that he was prejudiced by counsel's failure to oppose the jury instruction is based on speculation how the jury

might have imposed the sentence which was within the range allowed by law after deletion of the \$1000 fine. Long thus fails to show that he was actually prejudiced by counsel's clear failure to oppose the jury instruction. Neither does he show that he was subjected to an unfair trial or denied any substantive or procedural right. An ineffectiveness claim based on speculation or conclusional rhetoric will not warrant § 2254 relief. See Lincecum v. Collins, 958 F.2d 1271, 1279 (5th Cir.), cert. denied, 113 S.Ct. 417 (1992). Long's argument thus collapses. Under Strickland a petitioner must satisfy both the cause and the prejudice prongs. As Long has failed to carry the day on the prejudice issue, we need not address cause.

For the reasons set forth above, the district court's rulings are
AFFIRMED.