

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2802
Summary Calendar

RONALD STEPHEN ASHE,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
Texas Dept. of Criminal Justice,
Institutional Division,

Respondent-Appellee.

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

(CA-H-91-54)

(July 29, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

GARWOOD, Circuit Judge:

Petitioner-appellant Ronald Stephen Ashe (Ashe) appeals the district court's grant of summary judgment in favor of respondent-appellee Wayne Scott (respondent) in Ashe's petition for habeas corpus relief. We hold that the district court correctly concluded that Ashe failed to allege facts sufficient to establish a claim for ineffective assistance of counsel. Accordingly, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

In May of 1985, Ashe was tried in Texas state court for the sexual assault of his seven-year-old step-grandson, Kevin Lee Cordell. On May 6, 1985, a jury found Ashe guilty of aggravated sexual assault of a child and sentenced him to forty years' imprisonment. The state court of appeals affirmed Ashe's conviction, and on April 29, 1987, the Texas Court of Criminal Appeals refused Ashe's petition for discretionary review.

On January 23, 1987, Ashe filed an application in state court for writ of habeas corpus; however, no action was taken on this application because his direct appeal was still pending. Ashe later filed a second application for state habeas relief in which he alleged ineffective assistance of trial and appellate counsel. The state answered and submitted affidavits from the attorneys who had represented Ashe at trial and on direct appeal. This second habeas petition was considered by the same judge who had tried and sentenced Ashe. On December 9, 1989, the state habeas court proposed to the Texas Court of Criminal Appeals that relief be denied. In its proposed findings and order, the habeas court adopted as findings of fact the history of the case set forth in the state's original answer; the court also found to be true the facts asserted in the affidavits of Ashe's trial and appellate counsel. On March 28, 1990, the Court of Criminal Appeals denied Ashe's habeas petition on the basis of the findings of the trial court.

On January 8, 1991, Ashe filed the instant petition in federal district court pursuant to 28 U.S.C. § 2254 for writ of habeas corpus. In his petition, Ashe asserted that his trial and

appellate counsel were ineffective, and that he did not receive a full, fair, and adequate hearing by the state habeas court. The state on May 16, 1991, answered and moved the court to dismiss Ashe's petition. Ashe did not respond to the state's motion, and on June 30, 1991, the district court granted the motion to dismiss and entered a final judgment for the respondent. The court concluded that even accepting as true all of Ashe's allegations, they did not rise to the level of ineffective assistance of counsel. The court also found insufficient Ashe's conclusory assertions about the inadequacy of the state habeas proceedings, and concluded that the state court's findings were correct.

On July 12, 1991, Ashe filed a motion for a new trial, based on his contention that the district court treated the state's motion to dismiss as a motion for summary judgment without allowing Ashe an opportunity to respond. The district court granted Ashe's motion, reopened the case, and allowed Ashe to respond to the state's motion. On September 30, 1992, after considering Ashe's response, the court granted the state's motion for summary judgment for the reasons set forth in its June 30, 1991 order. Ashe timely filed a notice of appeal to this Court and the district court granted a certificate of probable cause to appeal.

Discussion

I. Failure to Grant an Evidentiary Hearing

Ashe's primary point of error on appeal is that the district court erred in concluding that he had not alleged facts sufficient to constitute a claim for ineffective assistance of counsel. Based on its review of the pleadings of the parties as well as the findings of fact made by the state habeas court, the district court

concluded that Ashe failed to demonstrate that his trial counsel's performance was constitutionally deficient. Underlying Ashe's claim is his contention that the district court erred in presuming correct the findings of fact made by the state habeas court when the state court failed to hold an evidentiary hearing on his claim of ineffective assistance of counsel.

On habeas review, a federal court generally presumes that the state court's findings of fact are correct. See 28 U.S.C. § 2254(d) (1988). Although in the instant case the state habeas court "relied on the affidavits without hearing live testimony, we still presume that its findings of fact are correct." *Ellis v. Collins*, 956 F.2d 76, 79 (5th Cir.), cert. denied, 112 S.Ct. 1285 (1992) (citing 28 U.S.C. § 2254(d) and *May v. Collins*, 955 F.2d 299 (5th Cir.), cert. denied, 112 S.Ct. 1925 (1992)); see also *Carter v. Collins*, 918 F.2d 1198, 1202 (5th Cir. 1990) (state court's resolution of an ineffective assistance claim by reference to affidavits is entitled to the presumption of correctness). Moreover, when a state court enters written fact findings in which credibility questions are resolved, and the same state district judge hears both the trial on the merits and the state application for writ of habeas corpus, the state fact-finding procedures are entitled to a presumption of correctness even without a state evidentiary hearing. *Buxton v. Lynaugh*, 879 F.2d 140, 144-46 (5th Cir. 1989), cert. denied, 110 S.Ct. 3295 (1990).

In the case *sub judice*, the state habeas court explicitly stated that it found the facts asserted in Ashe's attorneys' affidavits to be true. Because the state court judge presiding over Ashe's habeas proceedings was the same judge who had presided

over his trial, the judge was in the best position to "compare the information presented in the . . . affidavits against his own firsthand knowledge of the trial." *May*, 955 F.2d at 314. And because the court "was able to judge adequately the reliability of the affiants without hearing live testimony," *Ellis*, 956 F.2d at 79, an evidentiary hearing was unnecessary. Hence, the district court was correct in according a presumption of correctness to the state court findings that were based on the state court's credibility assessment. *Cf. Marshall v. Lonberger*, 103 S.Ct. 843, 851 (1983) ("[Section 2254(d)] gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.").

The presumption of correctness given to state court findings may be overcome only by clear and convincing evidence that the findings are erroneous, and the party challenging the findings bears the burden of establishing error by some reference to section 2254(d) and the state court findings. *Edmond v. Collins*, 8 F.3d 290, 292-93 (5th Cir. 1993); *Kirpatrick v. Whitley*, 992 F.2d 491, 494 (5th Cir. 1993). Although Ashe labels the state court findings of fact "speculative and superficial," the only actual objection he makes to the findings is that they are "not fairly supported by the record." Here, Ashe makes no specific reference to the substance of the state habeas court's findings or to section 2254(d), and thus fails to negate the presumption of correctness accorded to the state court's findings.

II. Ineffective Assistance of Counsel

Ashe asserts that the district court erred in finding that he had failed to allege facts sufficient to establish a claim for

ineffective assistance of counsel. Ineffective assistance claims are reviewed for federal constitutional error under the two-prong standard of *Strickland v. Washington*, 104 S.Ct. 2052 (1984). To satisfy this standard a criminal defendant must establish first that counsel's performance was deficient, and second that the deficient performance prejudiced the defense. *Strickland*, 104 S.Ct. at 2064; *Smith v. Puckett*, 907 F.2d 581, 584 (5th Cir. 1990), *cert. denied*, 111 S.Ct. 694 (1991). "[A] failure to establish either [deficient performance or prejudice] necessarily defeats the claim." *Lincecum v. Collins*, 958 F.2d 1271, 1278 (5th Cir.), *cert. denied*, 113 S.Ct. 417 (1992) (citing *Strickland*, 104 S.Ct. at 2069 and *Smith*, 907 F.2d at 584).

In the case at bar, the district court concluded from its review of the record that the facts alleged by Ashe did not constitute deficient performance.¹ Generally, whether counsel's performance was deficient is a mixed question of law and fact; "accordingly, we generally 'must make an independent determination of whether counsel's representation passed constitutional muster.'" *Gray v. Lynn*, 6 F.3d 265, 268 (5th Cir. 1993) (quoting *Ricalday v. Proconier*, 736 F.2d 203, 206 (5th Cir. 1984)). In our review we "'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' and that a challenged action 'might be considered sound trial strategy,'" *Callins v. Collins*, 998 F.2d 269, 278 (5th Cir. 1992) (quoting *Strickland*, 104 S.Ct. at 2065); hence, our review of the deficiency prong of the *Strickland* test is highly deferential. *Lincecum*, 958

¹ Thus, the court did not address the prejudice prong of *Strickland*.

F.2d at 1278 (citing *Strickland*, 104 S.Ct. at 2065).

Even if we were to conclude that Ashe's counsel's performance was in any way deficient, Ashe would still be required to demonstrate that the deficiency caused him prejudice. To establish prejudice under *Strickland* 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." *Strickland*, 103 S.Ct. at 2068. Keeping in mind this standard, as well as the presumption of correctness of the state habeas court's findings, we review the district court's conclusion that Ashe did not receive ineffective assistance of counsel.

Ashe argues that his trial counsel was ineffective in that (1) he introduced into evidence pornographic magazines found at Ashe's home amongst the belongings of his step-grandchild; (2) he introduced evidence about a prior misdemeanor conviction that was not otherwise admissible; (3) his cross-examination of a witness generated sympathy for the state's case; (4) he failed to object to a prejudicial question from the state; and (5) he failed to conduct a reasonable amount of pretrial investigation.

A. Introduction of Pornographic Magazines

At trial, Kevin Lee Cordell (Kevin) testified that Ashe would wake him up during the night and cause Kevin to perform fellatio on him and then perform fellatio on Kevin. Kevin testified that this occurred on about twenty different occasions. Kevin also testified that Ashe showed him pornographic magazines that contained pictures of "boys and girls [who] were doing the same thing he done to me."

At trial, Ashe's defense counsel, John Pizzitola (Pizzitola), introduced into evidence pornographic magazines as well as

children's books and comics that were found at Ashe's home. Pizzitola also called Ashe's sister, who testified that she had found the pornographic magazines in a drawer along with the children's books and comics. She stated that after she learned that Ashe was under investigation for sexual assault she returned to the house and placed the contents of the drawer in a bag, which she took to her office.

During trial, Pizzitola explained that he introduced the pornographic material to create the inference that Kevin had fantasized or dreamed his encounters with Ashe. In his affidavit, Pizzitola reiterated his theory that Kevin "could have fantasized the allegations of the indictment or created his allegations through the viewing of these magazines." Pizzitola also explained that he introduced the magazines to show the jury "what kind of influences Kevin Cordell was around." Although Pizzitola did not explicitly offer the fantasy theory in his closing argument, he did note that Kevin had seen pornographic magazines depicting naked men and women, and that in every instance but one the encounters that Kevin described took place after Kevin had been awakened from his sleep. While Pizzitola may not have been successful in convincing the jury that Kevin imagined Ashe's sexual assaults, his attempt to do so was within the realm of permissible trial strategy, and thus did not constitute ineffective assistance of counsel.

B. Introduction of Drunk Driving Probated Sentence

Ashe also asserts that his case was harmed by Pizzitola's introduction of a two-year probationary sentence for driving while intoxicated. According to Ashe, the state could not have introduced evidence of this offense because it did not involve

moral turpitude. Pizzitola explained that he thought that it was an admissible offense, and that he was attempting to remove the effect of its introduction on cross-examination.

Regardless of whether evidence of this offense was otherwise admissible, in the context of Ashe's trial its introduction did not amount to ineffective assistance. We have held that "[e]ven the erroneous admission of prejudicial evidence can justify habeas relief only if it is 'material in the sense of a crucial, critical, highly significant factor.'" *Porter v. Estelle*, 709 F.2d 944, 957 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 2367 (1984) (citations omitted). Because a probated sentence for drunk driving is insignificant when compared to the offense Ashe was charged with, introduction of the prior sentence was not material.² Moreover, because Ashe failed to explain how he was harmed by its admission, Ashe cannot establish prejudice. Thus, counsel's introduction of this evidence did not deny Ashe a fair or reliable trial.

C. Cross-Examination of Kevin's Mother

Ashe contends that Pizzitola's cross-examination of Kevin's mother, Lori Cordell, provoked sympathy for the state's case. Pizzitola established on cross-examination that Kevin's father died several days after Kevin's birth, that Ms. Cordell was not married to him when Kevin was born, that Ms. Cordell was later married and separated from a second man, and that Ms. Cordell was currently living with a third man. In his affidavit, Pizzitola explained that in eliciting this testimony, "it was [his] intent to impeach [Lori Cordell's] character by letting the jury know her lifestyle"

² The prosecution did not allude to the probated sentence in its closing argument.

and to "show the pathetic environment [Kevin] was raised in."

Ashe fails to assert how counsel's eliciting of this testimony either constituted deficient performance or amounted to prejudice. Thus, we cannot conclude that Pizzitola's performance in this regard rendered Ashe's trial constitutionally unfair.

D. Improper Objection to State's Question

Ashe claims that Pizzitola asserted an improper basis for an objection to a question posed to Ashe by the prosecution during cross-examination. In response to the question "Isn't it true that the reason you are separated [is] because your wife found out that you had been molesting Kevin?" Pizzitola objected, stating "it's argumentative to the jury, and unless he can show some allegations in the divorce petition that relates to those grounds, then I'll withdraw my objection." Ashe contends that the basis for Pizzitola's objection was erroneous, and that the question would have been objectionable even if there were similar allegations contained in the divorce petition. However, whether the basis for Pizzitola's objection was erroneous is inconsequential, as the court sustained his objection, preventing Ashe from answering the question. Hence, Ashe was not harmed by Pizzitola's alleged deficiency.

E. Failure to Call Glorian Ashe as a Witness at Trial

Ashe's final criticism of his trial counsel is his contention that Pizzitola failed to conduct an adequate pretrial investigation. This argument is based on the assertion that Pizzitola did not interview or call as a witness Ashe's ex-wife, Glorian Ashe. According to Ashe, Glorian Ashe was present "on all the occasions that Kevin visited her and [Ashe]." Ashe does not,

however, give any indication as to what Glorian Ashe would have testified to if she had been called as a witness.

As a matter of trial strategy, the choice of witnesses enjoys a presumption of reasonableness. *Kyles v. Whitley*, 5 F.3d 806, 818 (5th Cir. 1993); *cf. Rivera v. Collins*, 934 F.2d 658, 660 (5th Cir. 1991) (rejecting Strickland claim asserting that counsel failed to call important witnesses). Pizzitola explained in his affidavit that he did not call Glorian Ashe because he felt that she would be an unfavorable witness. Pizzitola also stated that he was concerned about the effect that Glorian Ashe would have on the jury. These concerns were not unfounded: Ashe told Pizzitola that Glorian Ashe had shown pornographic magazines to Kevin, that she took baths with Kevin while she was naked,³ and that she allowed Kevin to stay in the room while she and Ashe engaged in sexual behavior. In light of these assertions, as well as considering that Ashe and his wife were in the midst of a divorce and that Ashe failed a polygraph examination concerning the indictment charges, it was not unreasonable trial strategy not to call Glorian Ashe. There is no basis for concluding that any concern that calling Glorian Ashe might backfire was illegitimate. Moreover, because Ashe failed to assert what Glorian Ashe would have testified, he cannot establish prejudice. Thus, it cannot be concluded that Pizzitola's failure to call Glorian Ashe as a witness constituted ineffective assistance.

³ Ashe related to Pizzitola that once, while Glorian Ashe was bathing with Kevin, she requested that Ashe "shave her genital area." When Ashe asked that Kevin leave the bathroom, Glorian Ashe told him to stay, and he remained in the bathtub while Ashe shaved her.

F. Ineffective Assistance of Appellate Counsel

Finally, Ashe contends that his appellate counsel, Stanley Schneider (Schneider), was ineffective because he failed to raise on direct appeal a claim of ineffective assistance of trial counsel. Ashe claims that because Schneider and Pizzitola once shared office space, Schneider had a conflict of interest which caused him not to raise the ineffective assistance claim. We need not consider the merits of this argument as we have concluded that Ashe did not receive ineffective assistance of trial counsel. Thus, Schneider's failure to raise that claim did not cause Ashe harm. Absent any harm, his appellate counsel's failure to raise the ineffective assistance claim was not itself ineffective assistance.

Conclusion

None of Ashe's arguments on appeal demonstrate error in the district court's grant of summary judgment. Therefore, the district court's judgment is

AFFIRMED.