UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3076
Summary Calendar

RONNIE EVERIDGE,

Petitioner-Appellant,

versus

ED DAY, Warden; RICHARD P. IEYOUB,
Attorney General, State of Louisiana,

Respondents-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA 91 1249 H)

(December 30, 1992)

Before POLITZ, Chief Judge, HIGGINBOTHAM and WIENER, Circuit Judges.

POLITZ, Chief Judge:[*]

Ronnie Everidge, a Louisiana state prisoner convicted of armed robbery and sentenced to 15 years imprisonment, appeals the rejection of his petition for habeas relief under 28 U.S.C. § 2254. Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Donna Pace was robbed at gunpoint of her van in a shopping mall parking lot in broad daylight. Two days later Paul Pace, Donna's husband, spotted their van and notified the police. Paul Pace and two New Orleans police officers gave chase. A high-speed chase, which obviously endangered pedestrians and motorists alike, ended when Everidge crashed the van into a parked car. Paul Pace called his wife who hurried to the scene and identified Everidge as the man who had robbed her two days earlier.

At the trial the state offered the on-scene identification by Donna Pace, which she repeated in the courtroom, and a gun found in the van which Donna Pace said was not the gun used in the robbery. The prosecutor referred in closing argument to a police report which he had not provided to the defense.

Everidge was convicted and his conviction was affirmed on appeal.[1] The Louisiana Supreme Court denied certiorari.

In his habeas petition Everidge complains of the admission of Donna Pace's identification and the gun, and he contends that the prosecutor erred in failing to turn over the police report used in closing argument, improperly cross-examined his sister, and made improper remarks in closing argument. Finally, he contends that his sentence is unconstitutionally excessive. The district court rejected all of these contentions but granted Everidge a certificate of probable cause for appeal. Everidge timely

[1] **State v. Everidge**, 523 So.2d 879 (La.App. 1988).

appealed.

Analysis

At the threshold we feel compelled to remind of the parameters and limitations of federal habeas review of state court convictions. We do not look for mere error in Everidge's trial. The Great Writ may be invoked "only on the ground that [the applicant] is in custody in violation of the Constitution or laws or treaties of the United States."[2] We do not review as if we were considering a direct appeal of a criminal conviction. Whereas the Constitution affects many aspects of state criminal trials, it does not supplant state laws and procedures.[3] We may only examine Everidge's trial, therefore, for violations of federally-secured rights.[4]

Everidge first complains of Donna Pace's identification at the arrest scene. Everidge correctly notes that such "show-up" identifications frequently are unduly suggestive;[5] such was not the case here. Immediately after the robbery Donna Pace gave the

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[2] 28 U.S.C. § 2254(a). See also **Lewis v. Jeffers**, 497 U.S. 764 (1990) ("[F]ederal habeas corpus does not lie for errors of state law.").

[3] E.g., **Pacheco v. Dugger**, 850 F.2d 1493 (11th Cir. 1988), cert. denied, 488 U.S. 1046 (1989).

[4] **Ex parte Parks**, 93 U.S. (3 Otto) 18 (1876).

[5] See **United States v. Shaw**, 894 F.2d 689 (5th Cir.), cert. denied, 111 S.Ct. 85 (1990).

police a description of her robber which closely approximated Everidge's sex, age, race, height, weight, and a distinguishing feature, a gold tooth. She had a good look at Everidge at the shopping mall before the robbery because she saw him and thought he was acting strangely. He wore no mask during the robbery and she looked directly at him as he forcibly took her van and drove away. She immediately identified him when she saw him at the arrest scene and did likewise in the courtroom.

We entertain little doubt that the state trial judge did not err in allowing this identification. We entertain no doubt whatever that the identification procedure reflected in this record did not result in a substantial likelihood of misidentification.[6] We are persuaded beyond peradventure to the contrary.

Everidge next contends that the state court erred in admitting the gun found in the van. This may have been error under Louisiana law, but in light of Donna Pace's testimony that it was not the gun used in the robbery it appears manifest that the admission of this evidence, in the absence of some indication that it "infected and fundamentally undermined the reliability of [Everidge's] conviction," does not admit of habeas relief.[7] There is no showing that this evidence rendered the trial fundamentally unfair.

Everidge next complains of the withholding of and the

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[6] **Herrera v. Collins**, 904 F.2d 944 (5th Cir.), cert. denied, 111 S.Ct. 307 (1990).

[7] **Peters v. Whitley**, 942 F.2d 937, 940 (5th Cir. 1991), cert. denied, 112 S.Ct. 1220 (1992).

prosecution's reference to a police report of the arrest incident. Louisiana law recently was amended to allow the defense to have access to initial police reports. This statutorily-created right does not extend to "follow-up reports."[8] The state court ruled that the report of the arrest two days after the robbery was a follow-up report. If a finding of fact, this characterization is entitled to a presumption of correctness.[9] Everidge has not rebutted the presumption. Likewise, the remarks of the prosecutor do not constitute grounds for habeas relief unless Everidge establishes that they were so gross and egregious, or that the evidence was otherwise so tenuous that, absent the remarks, a conviction would not likely have occurred.[10] Everidge has not acquitted either burden, and although the comments are arguably inappropriate they fall short of the prohibited threshold.[11]

Everidge also complains that the prosecution impermissibly questioned his sister who testified for him as an alibi witness and that the trial judge's comments in overruling an objection to the prosecution's line of questions constituted a disparaging remark about defense counsel which denied him due process. Everidge has

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[8] La. R.S. 44:3A (Supp. 1992).

[9] 28 U.S.C. § 2254(d).

[10] **Byrne v. Butler**, 845 F.2d 501 (5th Cir.), cert. denied, 487 U.S. 1242 (1988).

[11] The prosecutor stated: "Give us some justice. For once let's give the victim some justice."

not demonstrated either that the questions or the judge's ruling were improper or that either was significant in the finding of guilt.[12]

Finally, Everidge complains that his 15-year sentence is unconstitutionally excessive. We are not persuaded.

In **Solem v. Helm**,[13] the Supreme Court directed a three-part analysis to determine whether a sentence is unconstitutionally disproportionate. Under this test courts are to consider (1) the gravity of the offense relative to the harshness of the penalty; (2) the sentences imposed for other crimes in the jurisdiction; and (3) the sentences imposed for the same crime in other jurisdictions.

Although there was no clear majority of the Court, the **Solem** approach was refashioned in **Harmelin v. Michigan**.[14] Relying on **Harmelin**, we have held that while the eighth amendment prohibits greatly disproportionate sentences, the three-part **Solem** test is not mandated in every case.[15] Under the approach detailed in **Harmelin**, there should be a threshold comparison of the gravity of the offense against the severity of the sentence. It is only when

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[12] **Tucker v. Day**, 969 F.2d 155 (5th Cir. 1992).

[13] 463 U.S. 277 (1983).

[14] _____ U.S. _____, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991).

[15] **McGruder v. Puckett**, 954 F.2d 313 (5th Cir.), cert. denied, 61 U.S.L.W. 3259 (U.S. Oct. 5, 1992) (No. 91-8571).

the sentence is grossly disproportionate to the offense that the last two **Solem** factors became relevant.

In light of the gravity of Everidge's conduct during the robbery (use of the gun), and prior to his arrest (high-speed chase), he has not made the threshold showing necessary to trigger the further analysis under **Solem**. This assigned error lacks merit.

For these reasons the judgment of the district court is AFFIRMED.