UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3121
Summary Calendar

LOUIS HALL,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana
90 CV 4186

(July 19, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Petitioner-appellant Louis Hall (Hall) appeals the district court's denial of his petition for a writ of habeas corpus, under 28 U.S.C. § 2254, in which he attacks his Louisiana conviction for armed robbery. 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

On December 9, 1981, Herbert Thornton (Thornton), upon leaving a grocery store, was confronted by an armed assailant who demanded that he "give it up." The robber then took from Thornton at gun point one hundred eighty-seven dollars. Thornton later identified an individual other than Hall from a photographic line-up.

At trial on March 4, 1982, Thornton identified Hall but admitted that he was not wearing his glasses when he was robbed, and that Hall's identity was confirmed through an eyewitness, West Dalton (Dalton). Thornton also admitted that he knew Dalton and had seen him drink on occasion but had never seen him in a drunken state.

Dalton testified that from a distance of approximately twelve feet he saw an armed Hall rob Thornton. Dalton then identified Hall as the assailant he had seen. On cross-examination, Dalton admitted that he had consumed approximately five beers before being summoned to court to testify, but he denied drinking any alcoholic beverages before witnessing the crime, and said that although he did drink on occasion, he did not consider himself currently intoxicated. The following exchange then occurred before the jury:

> "**By Mr. Thomas (defense counsel):** Your Honor, I'm going to object to this man testifying. This man is intoxicated.
>
> **By The Court:** He doesn't look intoxicated to me.
>
> **By Mr. Thomas:** He said, he had five beers. He brings an intoxicated witness in an armed robbery charge. I think that's ridiculous.
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> **By Mr. Williams (prosecutor):** Objection to this sort of commentary by defense counsel.

> **By Mr. Thomas:** I'm objecting to the credibility of this witness coming in here drunk testifying.
>
> **By The Court:** Just a moment. I'm ordering you to be quiet. Take the jury out."

After the jury was removed, the court determined that Dalton was not intoxicated and was competent to testify.

Subsequently, police officer Rodney Bailey (Bailey) testified that he had arrested Hall for armed robbery. Bailey testified that Hall had made a post-arrest inculpatory statement to the effect that Thornton was elderly and would be unable to identify him. On cross-examination, Bailey admitted that this statement was not mentioned in his police report or in any other report. Defense counsel also briefly called Bailey, and as a defense witness he testified only that Thornton could not identify Hall in the photographic line-up.

After the close of the evidence, the jury found Hall guilty of armed robbery and he was sentenced on March 26, 1982, as a multiple offender to 198 years of imprisonment.[1]

Hall appealed his conviction, and during the pendency of his direct criminal appeal Hall filed a motion for a new trial based on newly discovered evidence. This evidence consisted of unsworn, unnotarized statements by several individuals, including two people purporting to be Dalton's sisters, which stated that Dalton was an alcoholic and had received psychiatric treatment, and medical records allegedly substantiating these statements. The trial court

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[1] This sentence was ultimately set aside by the Louisiana courts and Hall was resentenced to ninety-nine years of imprisonment.

subpoenaed the Charity Hospital medical records concerning Dalton and had a medical expert review the records. On June 24, 1984, the trial court heard testimony on the motion, and during this hearing Dalton represented himself and was also represented by appointed counsel. At the hearing, evidence was presented that Dalton had been admitted to the hospital one or two times for the treatment of alcoholism and that he was never treated for insanity. Subsequently, the trial court denied the motion for a new trial.[2]

The state appellate court subsequently affirmed the trial court's rulings on the motions. *State v. Hall*, No. K-2610 (La. App. 4th Cir. August 14, 1984) (unpublished order). Hall also unsuccessfully sought a remedial writ from the Louisiana Supreme Court. *State ex rel. Hall v. Foti*, 512 So.2d 429 (La. 1987). The state concedes that Hall has exhausted his state remedies. Hall then filed the instant *pro se* petition for writ of habeas corpus in

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[2] The pertinent written reasons for the trial court's denial for the motion were:

> "One of the allegations made by the defendant in his motion for new trial was that that witness was incompetent, and should not have been permitted to testify. And, also, that that witness was under the influence of alcohol, and should not have been permitted to testify. The record of Charity Hospital indicated that the witness had been there several times, I say several, it was one or two times, for treatment of alcoholism. At not [sic] time was he ever treated for insanity. It was also alleged in this motion for a new trial that that witness was drunk when he was on the witness stand, which was totally false. This Court sat closer to that witness than anybody, and couldn't smell alcohol on him. If he had been drunk, or if he had been drinking when [sic] to any extent, this Court would have been able to smell it. The man's eyes were not glassy. His tongue was not loose. He was able to speak fluently."

the district court on October 25, 1990. On January 23, 1992, the district court entered final judgment denying relief. Hall appealed and was granted a certificate of probable cause on February 12, 1992.

Hall, *pro se,* now raises three grounds of relief. First, he argues that the trial court erred in denying his motion for a new trial based on newly discovered evidence. Second, Hall contends that the trial judge made a prejudicial remark during his trial. Finally, Hall complains that his trial counsel was ineffective for any one or more of three reasons.

Discussion

I. Motion For New Trial

Hall contends that he is entitled to a new trial based on newly discovered evidence consisting of allegations brought by Dalton's sisters, who would testify that Dalton has a history of alcohol abuse and mental illness.[3] For federal habeas purposes, such evidence must at least meet the requirements for granting a new trial, which are composed of five elements: "(1) the evidence must be discovered following trial; (2) the movant must show due diligence in its discovery; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the evidence must be of such a nature that a new trial would probably produce a new result." *Boyd v. Puckett*, 905 F.2d 895, 896

[3] Hall does not contend that this new evidence was known to the relevant law enforcement officials who might have withheld it from Hall in violation of *Brady v. Maryland*, 83 S.Ct. 1194 (1963).

n. 1 (5th Cir. 1990).[4] We will not review all of the factors because we are satisfied that Hall has failed to meet the third requirement that the newly discovered evidence must not be merely cumulative or impeaching.

Hall's new evidence is that Dalton has been hospitalized and has been treated for alcoholism. This evidence did not bear directly on whether Dalton was intoxicated when he witnessed the robbery in question or when he testified, but rather on his habit of drinking and his propensity for being intoxicated. Under Louisiana law, the general credibility of a witness can be challenged, but the inquiry must be limited to general reputation and cannot go into particular acts, vices, or courses of conduct. LA. REV. STAT. ANN. § 15:491; *State v. Chaisson*, 425 So.2d 745 (La. 1983). This alleged new evidence could not have been admitted to impeach Dalton's general credibility because such evidence concerning chronic alcoholism cannot be admitted for the purpose of "impeachment of the [witness's] general credibility through particular acts and vices." *State v. Landry*, 359 So.2d 99, 102 (La. 1978). This prohibition includes "[e]vidence of habitual

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[4] We note that the existence of evidence relative to the guilt or innocence of a state prisoner is normally not a ground upon which habeas relief may be granted. *Herrera v. Collins*, 113 S.Ct. 853, 860 (1993); *Townsend v. Sain*, 83 S.Ct. 745 (1963). Furthermore, this Circuit will not determine whether the five elements required for the grant of a new trial are present where "the new evidence bears only upon the petitioner's guilt or innocence; [and] he asserts no constitutional infirmity in his state proceedings." *Boyd*, 905 F.2d at 896-97. For purposes of this case, we will assume, *arguendo*, that Hall has satisfied the *Boyd* requirement.

intemperance [which] should not be admissible." *Id.*[5] Even if the evidence could have been admitted, it would have served merely to impeach Dalton and was also cumulative of other evidence showing Dalton's propensity to consume intoxicating beverages.[6] Therefore it would fail to satisfy the third *Boyd* requirement, and the district court did not err in denying habeas relief on this claim.

II. Prejudicial Remark

Hall claims that the trial court made a prejudicial remark that denied Hall a fair and impartial trial when it stated that Dalton "doesn't look intoxicated to me." This comment by the trial court on Dalton's condition allegedly unduly influenced the jury's opinion. However, the trial court made this remark after Hall's counsel challenged Dalton's competency to testify because of his alleged intoxicated condition. In a Louisiana criminal trial, the courtSQand not the jurySQis required to determine the issue of whether an individual is competent to testify. LA. REV. STAT. ANN.

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[5] Certainly, evidence of intoxication is admissible as to "the witness' ability to perceive or witness that which he is testifying about." *Landry*, 350 So.2d at 102. It is therefore permissible to cross-examine a witness as to his use of drugs or alcohol at the time of the incident in question in order to weaken his credibility. *Id.*; *State v. Luckett*, 327 So.2d 365, 372 (La. 1975); *State v. Sejours*, 113 La. 676, 37 So. 599 (1904). We note that Hall's counsel was allowed to question Dalton about whether he was intoxicated when he observed the offense.

[6] As to the cumulative nature of this evidence, defense counsel was given wide latitude at trial to go into Dalton's propensity to consume alcohol, and obviously knew about Dalton's history of consuming intoxicating beverages. Counsel repeatedly asked Thornton, the state's first witness, about his knowledge of Dalton's drinking. Counsel solicited from Dalton that he had consumed five beers the day of the trial and that he did not feel intoxicated. Counsel then stated twice, before the jury, that Dalton was currently "intoxicated."

§ 15:461; *State v. Wilkerson*, 448 So.2d 1355, 1361 (La. Ct. App.), *writ denied*, 450 So.2d 361 (La. 1984). Hall complains that the trial court's observation interfered with his right to try to impeach the credibility of the witness but again, as mentioned above, Hall could not attack Dalton's credibility by showing his propensity to consume alcohol. The trial court made a short observation in answer to defense counsel's direct challenge concerning Dalton's competency, and the trial court's answer did not go beyond its duty so as to vouch for the credibility of Dalton, or to unfairly comment on the evidence. Given the trial court's duty in response to defense counsel's objection, the trial court's remark did not render Hall's trial fundamentally unfair.

III. Ineffective Assistance of Counsel

The issue of ineffective assistance of counsel must be measured by the standards of *Strickland v. Washington*, 104 S.Ct. 2052 (1984). To prevail upon such a claim, Hall must satisfy a two-prong test. First, he must show that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment; second, Hall must show that the deficient performance actually prejudiced his defense. *Id.* at 2064. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* A failure to make both showings required under *Strickland* is fatal to a defendant's claim of ineffective assistance of counsel. *See id.*

Judicial scrutiny of counsel's performance is highly deferential; the Supreme Court has admonished against judging a

counsel's effectiveness by hindsight with the view that, because the defendant was convicted, his counsel must not have been very effective. *Id.* at 2065. Accordingly, our standard of review encompasses a "strong presumption" that counsel's performance was adequate. To overcome this presumption, Hall "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 2066. Finally, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 2066. Rather, the appropriate test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 2068.

Hall complains that his trial counsel: (1) failed to discuss with Hall matters of his defense; (2) failed to conduct an independent investigation so that he would have discovered Dalton's alcoholism; and (3) failed to file any pretrial motions so that he would have discovered the state's intent to introduce an inculpatory statement.

As to Hall's first complaint, we would note that "brevity of consultation time between a defendant and his counsel, alone, cannot support a claim of ineffective assistance of counsel." *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984) (citing *Jones v. Wainwright*, 604 F.2d 414, 416 (5th Cir. 1979)). "'Effective assistance may be rendered in the twenty or thirty minutes the appointed lawyer said he spent with [the defendant], or counsel may

remain ineffective despite a month of futile exertions.'" *Schwander v. Blackburn*, 750 F.2d 494, 500 (5th Cir. 1985) (quoting *Diaz v. Martin*, 718 F.2d 1372, 1378 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 2358 (1984)). Hall contends that had his counsel conferred with him, Hall would have supplied facts that could have been used to impeach Dalton at trial.[7] These alleged "facts" are nothing more than further attacks on Dalton's character, and as mentioned above, Hall's counsel obviously was aware of Dalton's propensity to consume intoxicating beverages and cross-examined him vigorously on the matter. Simply put, Hall has "'not shown what additional evidence could have been produced had additional conversations taken place.'" *Id.* (quoting *Maggio*, 736 F.2d at 283).

As to his counsel's failure to conduct an investigation, Hall alleges that his counsel would have discovered Dalton's history of alcoholism and could have presented his medical records or the statements of Dalton's sisters as impeaching evidence. Again, we note that Hall's counsel exposed at length Dalton's propensity to consume intoxicating beverages, and that further evidence on this matter would have been cumulative. As noted by the Supreme Court in *Strickland*, "when the facts that support a certain potential line of defense are generally known to counsel . . . the need for

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[7] Hall also argues that he would have provided his counsel with the names of residents who could testify as to Dalton's "unreliable character." As noted by the district court, Hall does not reveal their identities, establish their availability, or demonstrate that these persons would have testified favorably in the case. Such a bald assertion may be rejected out of hand. *See Maggio*, 736 F.2d at 282 (noting that "[c]omplaints of uncalled witnesses are not favored in federal habeas review").

further investigation may be considerably diminished or eliminated altogether." 104 S.Ct. at 2066.

Moreover, Dalton's medical records may have been classified as privileged documents that could not be introduced into evidence without his consent. *State v. Eishtadt*, 531 So.2d 1133, 1135 (La. Ct. App. 1988). As for the sisters' testimony, their brief, identical statements merely declare that Dalton was a "mental patient" who was an "alcoholic" and was treated at an "alcoholic institution." As mentioned above, this evidence of Dalton's general credibility would probably not be admissible. There is nothing to suggest that Hall's counsel failed to conduct an adequate investigation.

Finally, Hall contends that if his counsel had filed pretrial motions he would have discovered the prosecution's intent to submit an inculpatory statement into evidence and could have suppressed the statement. Hall does not dispute the voluntariness of the statement or offer any reason why its pretrial discovery by counsel could have allowed counsel to prevent its admission into evidence. In accordance with Louisiana law, at the commencement of trial the prosecution filed and served a notice of intent to introduce an inculpatory statement under LA. CODE CRIM. PROC. ANN. art. 768. The trial court considered defense counsel's objection before trial to the possible impermissible scope of the statement as including admissions of other wrongdoing, but determined that such objection should be made when the statement was to be offered into evidence. When the statement was offered, defense counsel objected to the voluntariness of the statement and the trial court ruled that the

statement was voluntary. Bailey testified as a witness to the statement, and was cross-examined concerning the fact that he had not mentioned the statement in his police report. He was also called back as a witness for the defense and testified that Thornton had been unable to positively identify Hall in the photographic line-up.

Given the fact that Hall does not articulate any reason why the trial court should have suppressed the statement, defense counsel's failure to file a pretrial motion is not a "'fatal defect' since it was highly unlikely that [the trial court] would have granted such a motion. Counsel is not required to engage in the filing of futile motions. The filing of pretrial motions falls squarely within the ambit of trial strategy." *Maggio*, 736 F.2d at 283. Furthermore, Hall's counsel was able to impeach Bailey's testimony to some degree and elicited from Bailey damaging testimony concerning Thornton's identification of Hall. Hall does not explain how his defense counsel could have presented a better defense if he had known of the statement earlier. Under these circumstances, we reject the claim of ineffective assistance of counsel for failing to file pretrial motions.

Conclusion

None of Hall's claims on appeal demonstrate error in the district court's denial of his habeas petition. Therefore, the district court's judgment is

AFFIRMED.