IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3249
Summary Calendar

GLENN FISHER,

Petitioner-Appellant,

v.

JOHN P. WHITLEY, Warden, Louisiana State Penitentiary, and RICHARD P. IEYOUB, Attorney General, State of Louisiana,

Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(91-3416-J)

(November 3, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

In 1980, Glenn Fisher pleaded guilty to one count of issuing and transferring a forged writing. In 1981, a Louisiana jury found Fisher guilty of armed robbery, and the forgery conviction was used as enhancement. After exhausting state remedies, Fisher filed this federal habeas petition challenging the enhanced sentence by asserting that his 1980 guilty plea to the

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

enhancement offense was unknowing and involuntary. One of the reasons he alleges for the involuntariness of his plea is his counsel's ineffective assistance. The district court denied relief and also denied Fisher's request for a certificate of probable cause ("CPC"). This court granted Fisher's motion for CPC and this appeal followed.

I.

The colloquy between Fisher and the state trial court concerning his guilty plea on the 1980 forgery charge reflects that Fisher was informed of his rights against self-incrimination, to plead not guilty, to a trial by jury, and to confront his accusers and cross-examine them at a trial. Fisher stated that he was aware that his plea of guilty waived all of these rights. Instead of asking Fisher if he understood that he was pleading guilty to forgery, the trial judge asked, "Do you understand that you are pleading guilty to the charge that on the 12th of July, 1980 in Orleans Parish you wrote a worthless check?" Fisher stated that he understood. However, issuing a worthless check is a separate statutory offense from forgery, the offense Fisher was charged with committing. Compare La. Rev. Stat. Ann. § 14:71 (West 1986 & Supp. 1993) with La. Rev. Stat. Ann. § 14:72 (Supp. 1993). It is because of this apparent misstatement by the trial judge that Fisher argues his 1980 conviction for forgery was unknowing and involuntary because he did not understand that he was pleading guilty to forgery.

The district court did not hold an evidentiary hearing on this claim.[1] The only hearing in state court in the record was conducted during the sentencing phase for the armed robbery conviction. The trial judge conducted a hearing off the record apparently on the issue of whether the plea colloquy for the forgery conviction met the minimum constitutional standards for advising the defendant of the rights he waives by entering a guilty plea. The judge stated on the record that Fisher had adequately been advised of the rights he waived. However, it does not appear in the record whether the judge considered the voluntariness of the plea, whether Fisher understood the charge to which he was pleading guilty or whether Fisher's counsel was ineffective. No additional state court findings appear in the record.

II.

The test for determining the validity of a guilty plea is whether the defendant voluntarily and intelligently chose between the alternate courses of action open to him. Hill v. Lockhart, 474 U.S. 52, 56 (1985). The Supreme Court has held that the defendant must have "`real notice of the true nature of the

[1] The district court issued an order denying Fisher's petition. In the order, the court recounted the facts in the police incident report, namely that Fisher attempted to cash a stolen check, and concluded that Fisher undoubtedly was aware of the charge to which he pleaded guilty. However, Fisher's awareness of his own conduct does not necessarily compel the conclusion that he knew what offense his conduct constituted and the legal ramifications attached to that conduct. See Henderson v. Morgan, 426 U.S. 637, 645 (1976) (requiring real notice of the nature of the charge against him).

charge against him'" for a guilty plea to be voluntary. Henderson v. Morgan, 426 U.S. 637, 645 (1976) (citing Smith v. O'Grady, 312 U.S. 329, 334 (1940)). The trial court's failure to explain the elements of the offense does not render the plea involuntary if the evidence adduced at an evidentiary hearing shows that the defendant understood the charge and its consequences, or if the record indicates that defense counsel explained the nature of the offense to the defendant or that the defendant otherwise understood the charge. Henderson, 426 U.S. at 646-47; Bonvillain v. Blackburn, 780 F.2d 1248, 1250-51 (5th Cir.), cert. denied, 476 U.S. 1143 (1986); Hobbs v. Blackburn, 752 F.2d 1079, 1081 (5th Cir.), cert. denied, 474 U.S. 838 (1985). In addition, a defendant is presumed to have understood the consequences of his plea if he understood the maximum sentence he could receive. Hobbs, 752 F.2d at 1082.

A federal habeas court must hold an evidentiary hearing if disputed facts exist and if the petitioner did not receive a full and fair state court hearing, either at trial or at a collateral proceeding. Wiley v. Puckett, 969 F.2d 86, 98 (5th Cir. 1992) (citing Townsend v. Sain, 372 U.S. 293, 312 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992)). However, if the record is adequate to dispose of the issues, the district court need not hold an evidentiary hearing. Id.; Rogers v. Maggio, 714 F.2d 35, 37 (5th Cir. 1983).

The record does not indicate that Fisher discussed the nature of the forgery charge with his attorney. Further, the

guilty plea colloquy does not contain a factual basis for or recitation of the charge. It also contains no discussion of the maximum sentence Fisher could receive, or any questioning about whether Fisher understood the sentence he was receiving. It thus presents no basis to presume that Fisher was aware of what he was being asked to admit, particularly because the judge seems to have questioned him about the wrong charge. See Henderson, 426 U.S. at 646-47 (requiring real notice of the charge against the defendant). In addition, no findings of fact on this issue by any court, state or federal, appear in the record.[2]

We can not decide whether Fisher knowingly and voluntarily pleaded guilty to forgery from the record before us. Because Fisher raises questions of fact which have apparently never been the subject of a hearing, he is entitled to a evidentiary hearing on this issue.

III.

Fisher also contends that his attorney was ineffective in failing to investigate the forgery charge or explain its nature to him. He also asserts that his attorney was ineffective because of his failure to investigate sufficiently to realize that Fisher should only have been charged with attempt.

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[2] This court has held that under some circumstances, the requirement of a hearing in state court can be met by a "paper hearing" in which the court considers affidavits submitted by both sides regarding the facts at issue. May v. Collins, 955 F.2d 299, 309-15 (5th Cir.), cert. denied, 112 S. Ct. 1925 (1992). However, the record does not reflect even a paper hearing.

To demonstrate ineffective assistance of counsel, Fisher must demonstrate both that his counsel's performance fell below an objective standard of reasonable competence and that he was prejudiced by counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984). Judicial scrutiny of counsel's performance must be highly deferential, and courts must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct. Id. at 689. "Ineffective assistance of counsel can undermine the knowing and voluntary requirements of a guilty plea because the plea `would not represent an informed waiver of the defendant's constitutional rights.'" Rogers, 714 F.2d at 37 (citing Bradbury v. Wainwright, 658 F.2d 1083, 1087 (5th Cir. 1981), cert. denied, 456 U.S. 992 (1982). In addition, to meet the second prong of the Strickland test, Fisher must show that but for errors of counsel, he would not have pleaded guilty and would have insisted on going to trial. See Hill, 474 U.S. at 59.

The record does not reveal whether Fisher has ever had an evidentiary hearing on this claim in state court; no state findings of fact appear in the record. In addition, the district court did not hold a hearing. Thus, the record is inadequate for this court to decide whether counsel's performance was ineffective and whether Fisher would have insisted on going to trial. A habeas petitioner is entitled to an evidentiary hearing in federal court if he did not receive a "full and fair" hearing in state court. Wiley, 969 F.2d at 98. Because Fisher raises

questions of fact which have apparently never been the subject of a hearing, he is entitled to a evidentiary hearing on this issue.

IV.

For the foregoing reasons, we VACATE the judgment of the district court and REMAND for further proceedings in accordance with this opinion.