UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-3402
Summary Calendar

FRED J. CHAMPION,

Plaintiff-Appellant,

VERSUS

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

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(92 CV 0106 "H")

October 1, 1993

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Fred J. Champion (Champion) appeals the district court's order denying habeas relief. We find no error and affirm.

I.

Champion, represented by Public Defender Salvador Liberto, was convicted by a jury of armed robbery. The court sentenced him to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

serve 99 years at hard labor. On direct appeal, the judgment was affirmed. **State v. Champion**, 412 So.2d 1048 (La. 1982).

The state established at trial that Champion and Patrick Mullen (Mullen), both armed with handguns, entered a pharmacy in Covington, Louisiana, owned by the pharmacist, Richard Heap, late in the afternoon of November 24, 1980. When Heap saw them enter, he set off a silent alarm. Champion pointed a handgun at Heap and made him place the controlled-substance drugs in a paper sack. The robbers also took money. When Heap's wife telephoned, Champion had Heap answer the phone. Heap said to his wife, "don't take the medicine, otherwise it'll make you sick." At that point, Champion pointed his pistol at Heap's face, told him to get off the phone, and threatened to blow his brains out. Champion and Mullen had Heap, his sister the cashier, and a customer lie on the floor and tied their hands and feet.

Before the robbers could leave the pharmacy, they were arrested by police who answered the silent alarm. At that time, Champion was carrying a box containing money, the sack of drugs taken from the pharmacy, and his pistol. At the trial, Heap and the arresting officers positively identified Champion as having been one of the robbers.

Sergeant Blount, one of the investigating officers, testified that Champion did not appear to be under the influence of alcohol or drugs. When arresting officer Rieff was asked about this, he replied that "Mr. Champion, appeared to be pretty relaxed throughout the whole thing."

At sentencing, Champion's former employer and his common-law wife testified on his behalf. Mr. Liberto and Champion himself also addressed the court. None of them said anything about Champion having a drug problem.

Mr. Liberto sought a continuance of the trial because he thought that Champion was going to be represented by a retained attorney. The trial court denied Mr. Liberto's motion for a continuance based on insufficiency of time to prepare a defense, and later denied a motion for new trial based on that ground. These rulings were affirmed on direct appeal. The trial transcript shows that Mr. Liberto skillfully conducted voir dire, cross-examined the state's witnesses, and argued the case. The defense did not call any witnesses to testify.

In his federal habeas petition, Champion alleged that Mr. Liberto provided ineffective assistance because if he had investigated the case, he would have discovered and presented Champion's defense of toxic insanity. Champion alleged that "[t]here were professional and lay witnesses available who could and would have testified that ... when the offense occurred [he] did not know right from wrong."

The district court noted that Champion did not "specifically identify the witnesses [who allegedly would have testified in his defense] or [allege] the substance of their testimony." The court concluded that "[m]ere conclusory statements are insufficient to raise a constitutional issue in a habeas proceeding,." citing **Schlang v. Heard**, 691 F.2d 796, 799 (5th Cir. 1982), **cert. denied**,

461 U.S. 951 (1983). Accordingly, the district court determined that a hearing was unnecessary and denied habeas relief.

II.

Champion contends that the district court erred by denying relief without conducting an evidentiary hearing. In support, he attached to his brief the affidavits of his mother, his sister, his codefendant Mullen, and another man to the effect that at the time of the offense Champion was insane. **See** 28 U.S.C. § 1746. We decline to consider these affidavits because they were not presented to the district court. **Self v. Blackburn**, 751 F.2d 789, 793 (5th Cir. 1985).

Champion contends, as he did in the district court, that Mr. Liberto failed to provide effective assistance of counsel because he did not discover and present Champion's defense of toxic insanity. Champion asserts that if Mr. Liberto had conducted an adequate investigation, he would have been aware that this was a viable defense.

To obtain habeas relief on grounds of ineffective legal assistance, a habeas petitioner must show both (1) that his counsel's performance was deficient, falling below an objective standard of reasonableness, and (2) that the defective performance prejudiced his defense. **Strickland v. Washington**, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish prejudice, Champion must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at

694. The record demonstrates that Champion suffered no prejudice and we need not inquire into the adequacy of counsel's performance.

Under Louisiana law, Champion was presumed sane at the time of the offense. La. Rev. Stat. Ann. 15:432 (West 1992). Accordingly, "[t]he defendant has the burden of establishing the defense of insanity ... by a preponderance of the evidence." La. Code Crim. Proc. Ann. art. 652 (West 1981). Louisiana's standard for determining insanity is whether "the offender was incapable of distinguishing between right and wrong with reference to the conduct in question." La. Rev. Stat. Ann. 14:14 (West 1986). **See State v. Weber**, 364 So.2d 952, 956 (La. 1978).

In **Bouchillon v. Collins**, 907 F.2d 589, 597-98 (5th Cir. 1990), this Court affirmed a grant of habeas relief on grounds that "counsel's lack of investigation after he had notice of Bouchillon's past institutionalization, fell below reasonable professional standards." Conversely, Champion has not alleged that he was ever in a mental institution or that Mr. Liberto had any other reason to believe that a toxic-insanity defense was available. At sentencing, neither Champion nor his witnesses suggested that he had a drug problem. **See Strickland v. Washington**, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). At trial, two of the investigating officers testified that Champion did not act as if he was intoxicated or drugged. Furthermore, the evidence showed that the robbery was deliberately planned and executed.

Champion's failure to identify the persons who allegedly would have testified in his defense or to allege the substance of their testimony justified the district court's reliance on the holding of **Schlang**, 691 F.2d at 799, that mere conclusory statements do not raise a constitutional issue in a habeas proceeding." Accordingly, the district court did not err by holding that if "the facts alleged by [Champion] are true, they would not establish an insanity defense." **See Sawyer v. Butler**, 848 F.2d 582, 591-92 (5th Cir. 1988), **aff'd on the relevant point for the reasons stated by the panel**, 881 F.2d 1273, 1276 (5th Cir. 1989) (en banc), **aff'd**, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990). Champion therefore was not entitled to an evidentiary hearing on his contention that Mr. Liberto was ineffective because he did not discover and present a toxic-insanity defense at Champion's trial. **See Ellis v. Lynaugh**, 873 F.2d 830, 840 (5th Cir.), **cert. denied**, 493 U.S. 970 (1989).

AFFIRMED.