

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3434
Conference Calendar

RUDOLPH KELLER,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CA-91-3883-L
- - - - -
(November 1, 1993)

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

PER CURIAM:*

Rudolph Keller argues for the first time on appeal that his sentence is disproportionate to his offense and excessive in violation of the Louisiana State Constitution. In habeas proceedings this Court does not review issues raised for the first time on appeal. Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985). Additionally, Keller does not brief, and therefore has abandoned, several other

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

claims regarding the effectiveness of his counsel and the sentencing judge's failure to comply with the guidelines outlined in Art. 894.1. Id.

Keller's surviving issue is whether his sentence of thirty years is disproportionate to his offense of aggravated burglary and constitutionally excessive in violation of Eighth Amendment prohibition against cruel and unusual punishment. To determine whether a sentence is unconstitutionally disproportionate the reviewing court considers (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. Solem v. Helm, 463 U.S. 277, 292, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). However, the three-part Solem test is not used in each case. McGruder v. Puckett, 954 F.2d 313, 316 (5th Cir.), cert. denied, 113 S.Ct. 146 (1992) (relying on Harmelin v. Michigan, ___ U.S. ___, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991)). This Court makes a threshold comparison of the gravity of the offense against the severity of the sentence. Only if the sentence is grossly disproportionate to the offense does the Court consider the last two Solem factors. Id.

While armed and in broad daylight, Keller and two other men broke through the front door of Mrs. Jackson's home and forced Mrs. Jackson and the four children in the bedroom. Once there, Keller terrorized Mrs. Jackson by placing a gun in her mouth. Keller and his companions then gagged and bound her hand and foot before ransacking her home and taking certain of her belongings.

Keller's offense of aggravated burglary under La. Rev. Stat. § 14:60 is punishable by a statutory maximum sentence of thirty years imprisonment. La. Rev. Stat. Ann. § 14:60 (West 1986). The sentence Keller received reflected the gravity of his offense. Keller's excessive sentence claim does not rise above the threshold question.

In his only surviving claim of ineffective assistance of counsel, Keller argues that his attorney failed to object to the fact that Keller was to be tried in readily identifiable prison garb. Keller contends that the district court erred in deciding that allowing Keller to wear prison clothing during his trial was a strategic choice on the part of Keller's attorney, and that the attorney's failure to object to his prison attire did not amount to a voluntary waiver by Keller.

To prevail, Keller must show that counsel's performance was both deficient and prejudicial to him. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to establish prejudice, Keller must show that counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993). Such unfairness or unreliability results only if counsel's ineffectiveness deprives a defendant of a substantive or procedural right to which the law entitles him. Id.

Compelling an accused to stand trial before a jury in prison clothes violates the Fourteenth Amendment; however, the failure to make a contemporaneous objection to the defendant's

appearance negates the presence of compulsion necessary to establish a constitutional violation. Estelle v. Williams, 425 U.S. 501, 512-13, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); United States v. Birdsell, 775 F.2d 645, 652 (5th Cir. 1985), cert. denied, 476 U.S. 1119 (1986).

Allowing a client to appear at trial in prison garb has been recognized as legitimate trial strategy. See Birdsell, 775 F.2d at 652. Keller testified in his own defense, admitting certain details of the crime. At the beginning of Keller's direct examination, his attorney pointed out Keller's prison garb and elicited from him the fact that he was incarcerated in jail for failure to pay child support. Counsel's failure to object to Keller's prison garb was a strategic choice to elicit sympathy from the jury.

AFFIRMED.