IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3675
(Summary Calendar)

ROOSEVELT MCCORMICK,

Petitioner-Appellant,

v.

STEVE RADAR, Warden,
Louisiana Correctional Industrial
School, and RICHARD P. IEYOUB,
Attorney General, State of
Louisiana,

Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-92-1280-K)

(August 10, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Louisiana prisoner Roosevelt McCormick appeals from the district court's dismissal of his habeas corpus petition. 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On September 18, 1971, Roosevelt McCormick was arrested and charged with attempted aggravated rape. The charge arose from events that had occurred the previous day involving a woman who lived in the same apartment complex as did McCormick. On December 8, 1971, a New Orleans jury found McCormick guilty of the charged offense.

During trial, the complainant, Olivia Jamison, recounted the events of September 17 as follows: She was preparing to go to a washerette with a friend, Rosalyn Charles. McCormick, who previously had resided with his wife in the apartment below the apartment occupied by Jamison and her husband, offered to drive them to the washerette. When Charles' baby woke up, however, she decided not to go. Jamison then left with McCormick in his car.

When McCormick drove past the washerette, Jamison asked him where he was taking her. McCormick responded by telling her to "hush up" and threatening her with a gun. McCormick then began talking about killing her, and Jamison began crying and begging.

McCormick ultimately stopped the car and ordered Jamison to get out. When Jamison started to run, however, McCormick shot at her with the gun and slapped her. McCormick then forced her into his apartment and ordered her to remove her clothing.

While Jamison was unzipping her clothing, McCormick continued to threaten her and told her that she was going to "give [him] some." As she undressed, however, Jamison put her foot on the bed. She then jumped across the bed and out of the

open bedroom window. As Jamison ran for help, McCormick pursued her, at one point attempting to run her over with his car. Jamison ultimately secured the assistance of two by-standers and called the police.

During her testimony, Jamison also recounted that the police had taken custody of the clothing she wore on September 17. She identified the gold "jump-suit," and it was admitted into evidence. Jamison also identified stains on the jump-suit and explained that it had been soiled when she jumped out of the window.

Patrolman John Woods, who had examined the crime scene, also testified at McCormick's trial. His testimony corroborated Jamison's. He testified that the screen on the bedroom window was bent outward, that the curtains had mud on them, and that the shrubs beneath the window had broken branches. Another patrolman verified Woods' observations.

The testimony of McCormick's wife also corroborated Jamison's story. She testified that, when she arrived home on the day in question, she had noticed a dirty footprint on the bed. She also testified that the window screen was bent, that the curtains were soiled, and that the shrubs beneath the window were broken.

McCormick's wife, who testified that she was familiar with her husband's handwriting, also identified three letters--including letters allegedly signed by Mrs. Rosetta Thomas and McCormick's grandmother--as having been written and signed by

McCormick. Two letters were addressed to Jamison and her husband and asked them to request dismissal of the complaint against McCormick. The third letter, the letter actually signed by McCormick, requested the addressee's assistance in convincing Jamison to request dismissal.

Upon his conviction, McCormick was sentenced to five years hard labor. McCormick's motion for new trial was denied, and his conviction and sentence were affirmed on direct appeal to the Louisiana Supreme Court.[1] McCormick apparently was released from custody after serving his full sentence.

Subsequently, on March 28, 1979, McCormick was convicted of armed robbery. The State then filed a multiple bill, alleging that McCormick previously had been convicted of the attempted aggravated rape. McCormick was adjudged a second offender and sentenced to serve thirty-three years hard labor. He is currently incarcerated at the Louisiana Correctional and Industrial School in Dequincy, Louisiana.

After exhausting his state remedies,[2] McCormick filed the instant federal habeas corpus action in which he challenges the legality of his current confinement on the grounds that he was denied the effective assistance of counsel during his 1971 trial for attempted aggravated rape. McCormick asserts that he is

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[1] State v. McCormick, 272 So.2d 692 (La. 1973).

[2] To the extent that McCormick's state appeals and state habeas petitions did not raise the specific arguments he has raised in this proceeding, the State has waived the exhaustion requirement. See McGee v. Estelle, 722 F.2d 1206, 1212-13 (5th Cir. 1984) (en banc).

entitled to relief because the challenged conviction was used to enhance the sentence he received after his 1979 conviction. Concluding that McCormick had failed to establish that his defense attorney had committed any professional errors during the 1971 trial, or that his defense was in any way prejudiced by the attorney's conduct, the district court dismissed the petition without conducting an evidentiary hearing. McCormick timely appealed.

II.

Proceeding on appeal pro se, McCormick challenges the district court's conclusion that he was not denied the effective assistance of counsel during his 1971 trial. He also contends that the district court improperly dismissed his petition without conducting an evidentiary hearing. After a careful review of the record, we conclude that neither of McCormick's arguments has merit.

A.

At the outset, we must consider Respondents' argument that the district court lacked jurisdiction to review McCormick's petition because he was not "in custody" as a result of the conviction under attack, as required by 28 U.S.C. § 2254. Respondents argue that McCormick challenges only his 1971 attempted aggravated rape conviction, the sentence for which expired some fifteen years ago. Because McCormick has not challenged the armed robbery conviction for which he is currently

incarcerated, Respondents argue, he is not "in custody" for purposes of § 2254. We disagree.

"The federal habeas statute gives the United States district courts jurisdiction to entertain petitions for habeas relief only from persons who are `in custody in violation of the Constitution or laws or treaties of the United States.'" Maleng v. Cook, 490 U.S. 488, 490 (1989) (quoting 28 U.S.C. § 2241 (c)(3)). Unless a petitioner is in custody for the challenged conviction at the time his petition is filed, the district court does not have subject matter jurisdiction to entertain the action. Id. at 490-91. The Court has recognized, however, that a habeas petitioner meets the in custody requirement where he challenges a conviction used to enhance a sentence for which he is currently incarcerated. Id. at 492-93; Thompson v. Collins, 981 F.2d 259, 261 (5th Cir. 1992). But compare Maleng, 490 U.S. at 492 (the mere "possibility" that a prior conviction will be used to enhance sentences imposed for subsequent convictions is not enough to satisfy the in custody requirement).

In his amended petition, McCormick states that he is now serving a sentence of thirty-three years "solely because" his 1971 attempted aggravated rape conviction was used to "multiple-bill [McCormick] and to enhance his sentence." Because we think that McCormick's petition, construed with the deference to which pro se litigants are entitled,[3] can be read as asserting a challenge to the sentence imposed as a result of his 1979

[3] See Haines v. Kerner, 404 U.S. 519 (1972).

conviction, as enhanced by the allegedly invalid prior conviction, we conclude that he is in custody for purposes of § 2254. See Maleng, 490 U.S. at 493. We therefore move to the merits of McCormick's appeal.

B.

McCormick first challenges the district court's conclusion that he was not denied the effective assistance of counsel during his 1971 trial. McCormick argues that he was denied the effective assistance of counsel because his defense attorney (1) failed to investigate and interview potential witnesses, (2) failed to cross examine the victim about the alleged rape, (3) failed to challenge the sufficiency of the State's evidence by moving for dismissal of the charges or for a mistrial, and (4) failed to object to the admission as evidence of three letters offered by the State. After a careful review of the record, we agree with the district court's conclusion that McCormick is not entitled to relief.

To succeed on an ineffective assistance of counsel claim, a defendant must show (1) that his attorney's performance was deficient in that it fell below an objective standard of reasonableness and (2) that the attorney's deficient performance actually prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 688-94 (1984); Lincecum v. Collins, 958 F.2d 1271, 1278 (5th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 417 (1992). Because the range of attorney conduct that may be considered reasonable is extremely wide and dependent upon the necessities

of a given case, our review of the attorney's performance is highly deferential. Strickland, 466 U.S. at 688-89; Lincecum, 958 F.2d at 1278. The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Strickland, 466 U.S. at 689.

If professionally unreasonable errors are established, the defendant must establish prejudice by showing that there is a reasonable probability that, but for the attorney's professional errors, the result of the proceeding would have been different. Id. at 694. That is, he must show that his attorney's performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 844 (1993). A petitioner's failure to establish either deficient performance on the part of the defense attorney or prejudice necessarily defeats the claim. Strickland, 466 U.S. at 697.

1.

McCormick argues that his defense attorney was ineffective for failing to investigate and interview witnesses who could have testified in his defense. He claims that his job supervisor, whom he does not name, could have testified that he and the victim had a closer relationship than was described during the victim's testimony. He also contends that his attorney should have called as witnesses Mrs. Joseph Chain and a man who lived next door to him. McCormick offers no specifics regarding the testimony that these witnesses might have offered, stating only

that their testimony "would have `certainly supported' his entire version of the facts surrounding the `alleged' commission of the entire offense."

This court has stated that ineffective assistance of counsel claims premised on defense counsel's failure to call witnesses must be rejected unless the petitioner demonstrates prejudice therefrom. Alexander v. McCotter, 775 F.2d 595, 602 (5th Cir. 1985). To demonstrate the requisite prejudice, the petitioner must show not only that the testimony of a particular witness would have been favorable, but also that the witness would have testified at trial. Id. Here, McCormick does not specifically name each of the allegedly overlooked witnesses, and he presents no affidavits to show what their testimony likely would have been or that they would have testified. Consequently, he has failed to meet his burden of establishing that his defense attorney's failure to call these witnesses in any way prejudiced his defense.

2.

McCormick also argues that his attorney failed to cross-examine the victim about the alleged rape. Our review of the record, however, leads us to conclude that McCormick's defense attorney in fact conducted a wholly adequate cross examination of Ms. Jamison.

3.

McCormick next contends that his defense attorney failed to challenge to sufficiency of the State's evidence. He questions

the credibility of the State's witnesses and argues that his attorney should have moved for dismissal or for a mistrial. Again, we find no basis for relief.

At the time of McCormick's 1971 trial, the Louisiana Code of Criminal Procedure did not authorize trial judges to enter judgments of acquittal in cases tried to a jury. See State v. Stevenson, 447 So.2d 1125, 1132 (La.App. 1st Cir. 1984). Thus, a criminal defendant's only means of challenging the sufficiency of the evidence presented against him before a jury was a motion for new trial. See Hudson v. Louisiana, 450 U.S. 40, 41 n.1 (1981). The record before us discloses that McCormick's defense attorney filed a motion for new trial asserting that the jury's verdict was contrary to the evidence. The motion was denied. McCormick thus has not shown any attorney error.[4]

4.

McCormick also argues that his defense attorney was ineffective because he failed to object to the introduction of three letters as evidence at trial. Specifically, McCormick argues that his attorney should have objected to the introduction

[4] To the extent that McCormick's argument could be construed as a challenge to the sufficiency of the evidence, we also find no basis for relief. Ms. Jamison testified that McCormick abducted her, shot at and threatened her, ordered her to disrobe at gunpoint, and told her that she was going to "give him some." Such conduct would be sufficient to fulfill the elements of attempted aggravated rape under Louisiana law. See State v. Parish, 405 So.2d 1080, 1086 (La. 1981). Viewing the testimony adduced at trial in the light most favorable to the verdict, a rational jury could have found McCormick guilty of the charged offense. See Jackson v. Virginia, 443 U.S. 307, 319 (1979).

of the letters on the grounds (1) that they were not voluntarily made, (2) that the State failed to lay a proper foundation, and (3) that they were not shown to the jury. Again, the record discloses no attorney error.

Even assuming that the three letters in question should be considered "confessions" for purposes of this analysis, McCormick has offered nothing that suggests they were not voluntarily written. Moreover, the letters were clearly relevant to the issue of McCormick's state of mind, and the record reflects that McCormick's wife testified that she was familiar with her husband's handwriting and that the letters appeared to be in his hand. Such testimony is sufficient to authenticate a handwritten document. See FED.R.EVID. 901(b)(2).[5] The record also reflects that the letters were shown to the jury.

C.

Finally, McCormick argues that the district court improperly dismissed his petition without conducting an evidentiary hearing. We disagree. This court has held that, where the record is adequate to dispose of a claim raised in a federal habeas proceeding, the federal district court need not hold an evidentiary hearing. Wiley v. Puckett, 969 F.2d 86, 98 (5th Cir. 1992); see also Lincecum, 958 F.2d at 1279-80. In this case, the

[5] McCormick also raises the related issue that his attorney should have hired a "graphologist" to analyze the handwriting on the letters, yet he offers nothing to suggest that the testimony of an expert might have been beneficial. Thus, as noted supra McCormick has failed to establish that the attorney's failure to call such a witness prejudiced his defense. See Alexander, 775 F.2d at 602.

state court record is sufficient to resolve the factual issues raised by McCormick's ineffective assistance of counsel claim.

III.

For the foregoing reasons, we AFFIRM the judgment of the district court dismissing McCormick's petition for writ of habeas corpus.