

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3929
Summary Calendar

LLOYD GRAY,

Petitioner-Appellant,

versus

JOHN 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
(CA 91 4383 H)

(April 23, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

The question in this appeal is whether trial counsel's lack of success in locating two potential witnesses amounts to ineffective assistance of counsel.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.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

Lloyd Gray is a state prisoner serving a life sentence for an aggravated rape that occurred in Orleans Parish, Louisiana, in 1980. The Louisiana Supreme Court affirmed the conviction and sentence. See State v. Gray, 412 So.2d 107 (La. 1982). It later denied Gray's application for post-conviction relief. See State ex rel. Gray v. Whitley, 588 So.2d 96 (La. 1991).

Gray subsequently filed a federal habeas-corpus petition alleging ineffective assistance of counsel. Gray argued that his attorney had been ineffective because he failed to locate two key defense witnesses. After conducting an evidentiary hearing on three separate days, the magistrate judge recommended dismissing Gray's petition with prejudice. The district court approved the magistrate judge's recommendation. Gray now appeals.

II

According to Gray, his trial counsel's failure to locate two witnesses before trial constitutes ineffective assistance of counsel. Because a district court's ultimate conclusion on an ineffective-assistance-of-counsel claim involves a mixed question of fact and law, this court will review the district court's conclusion de novo. Koch v. Puckett, 907 F.2d 524, 527 (5th Cir. 1990).

To prove ineffective assistance of counsel, a defendant must affirmatively show that (1) his counsel's performance fell below an objective standard of reasonableness; and (2) the deficient

performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If an insufficient showing is made on either inquiry, a court may dispose of the claim without considering both prongs. 466 U.S. at 697.

The proper standard for judging a counsel's performance is that of "reasonably effective assistance," considering all the circumstances. Id. at 688. Appellate scrutiny of counsel's performance is highly deferential, and every effort must be made to eliminate the distorting effects of hindsight. Id. at 689. In addition, a strong presumption exists that an attorney's performance "falls within the wide range of reasonable professional assistance." Id.

As for the second part of the test, a defendant has the burden of showing that a reasonable probability exists that, but for counsel's unprofessional errors, the results of the proceeding would have differed. Id. at 694. A "reasonable probability" is one sufficient to undermine confidence in the outcome. Id. In determining prejudice, however, a reviewing court must also examine "whether the result of the proceeding was fundamentally unfair or unreliable." Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993).

III

The following evidence was presented during the evidentiary hearing. Prior to trial, an investigator who worked with Gray's attorney in the Orleans Indigent Defender Program talked to Gray in

jail. Gray told the investigator that he had not raped the victim and that he had "several witnesses." Gray then provided the investigator with the names "Herbert Collins" and "Mr. Williams," who was known as "Skip."

Gray told the investigator that Collins lived "somewhere on First Street." He also told the investigator that he could find Collins at "2710 South Galvez at Club Hollywood because that's where he worked." Gray also gave his attorney this information at the preliminary hearing. The investigator subsequently canvassed the area around First and Johnson Streets at least four times prior to trial but found the residents very uncooperative. He also talked to one of Gray's sisters, but she told him merely that she remembered Gray coming home the night the crime occurred. The investigator also went to the Hollywood Bar, i.e., Club Hollywood, where Collins allegedly worked, but it was temporarily closed because of "some trouble."

Trial counsel's testimony from the evidentiary hearing reflects that Gray and the members of his family did not provide him with assistance. Two of Gray's relatives, Hattie Rowe and Delores Harris, testified that they did not recall anyone contacting them regarding Gray's trial. They also admitted that they did not know Herbert Collins.

Herbert Collins testified at the habeas evidentiary hearing. His testimony reflects that he did not learn of Gray's conviction until two years after the incident. According to Collins, he and

Gray worked together at Club Hollywood as disc jockeys. On the night of the offense, Gray and Collins were both at the bar. At one point in the evening, Gray "dashed out the door" behind the victim. A few minutes later, somebody came in to tell Collins that Gray was "beating her up."

Collins broke up the fight and told the victim to go home. Gray and the victim then walked away from each other. While Collins and Gray walked together after the fight, Gray "was still running his head" and told Collins that "he wasn't finished whipping her tail." Gray further yelled to the victim: "I'm going to get your ass, I'm going to whipum [sic] more. I'm going to put some more on your ass if you don't get my money." Collins then went home.

Collins admitted that he did not have a telephone number under his own name in 1980. Collins further testified that he was never contacted to go to state court to testify. The record does not contain any information about the identity of "Williams," who is also referred to in the record as "William" and "Skip."

IV

As support for his argument, Gray relies on Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985), which he asserts is indistinguishable from this case. In Nealy, this court found defense counsel ineffective because he failed to contact three potential alibi witnesses whose names were provided by his client. One of the witnesses was known to defense counsel personally. He

contacted that witness's grandmother, who supplied him with a telephone number. Counsel unsuccessfully telephoned that witness and left messages. Counsel, however, made no further efforts to obtain the witness's presence at trial. In addition, counsel made no effort whatsoever to contact the other two witnesses. This court concluded that Nealy's attorney, in failing to make any efforts to investigate, "abdicated his responsibility to advocate his client's cause." Id. at 1178 (quoting Strickland).

A failure to investigate a client's cause adequately certainly may constitute ineffective assistance of counsel. For example, in Sullivan v. Fairman, 819 F.2d 1382, 1391-92 (7th Cir. 1987), defense counsel neglected to track down five witnesses who had made statements to police exculpating the defendant and whose names and addresses were in the police report. The Seventh Circuit ruled that the attorney's "perfunctory" attempts to locate the witnesses demonstrated a lack of "reasonable professional judgment." Id. at 1392. Furthermore, in Code v. Montgomery, 799 F.2d 1481, 1482 (11th Cir. 1986), an armed robbery case, defense counsel intended to rely on an alibi defense but did not attempt to locate or contact any witnesses who could testify about defendant's whereabouts on the day in question. The Eleventh Circuit ruled that the attorney's failure to investigate and failure to seek a continuance amounted to ineffective assistance.

Gray has attempted to characterize his trial counsel's unsuccessful investigation as a Nealy-type "failure to

investigate." Trial counsel's performance, however, must be measured considering what he knew at the time of his investigation. Trial counsel had the name of one witness and the partial name of another. Gray could not supply addresses or phone numbers; he simply provided a general location where the witnesses might be found. The investigator made four trips to the area to locate the potential witnesses. Despite his reasonable efforts, trial counsel and the investigator were prevented for reasons beyond their control, such as the closure of the bar and the non-cooperation of area residents, from locating Collins or the other alleged witness.

Unlike the situation in Nealy, trial counsel and his staff followed up the leads provided by Gray. Unlike the situation in Sullivan, trial counsel possessed neither the complete names nor the addresses of the people he sought. Unlike the situation in Code, trial counsel had no assurance that further investigation would reveal either their whereabouts or even their existence. Trial counsel's performance, therefore, cannot be characterized as ineffective assistance.

In addition, Gray has not shown prejudice by the failure to locate the witnesses. The victim testified that she was raped in a vacant building by Gray alone. She also testified that she bled a lot from a blow to the head. At the habeas hearing, however, Collins never testified to having been present at such a scene nor to having seen the victim bleeding. Neither did he mention seeing the other alleged witness. In short, the evidence indicates that

the charged rape occurred after Collins says that he left Gray and the victim; consequently, the testimony sought by Gray would not have offered refutation to the victim's testimony. Gray, therefore, has failed to show that the outcome of his trial was "fundamentally unfair or unreliable." See Fretwell, 113 S.Ct. at 842.

Gray also argues that the district court erred in believing the testimony of his trial counsel and the investigator to be credible in light of certain omissions from the case file. The determination of credibility falls within the peculiar competence of the district court. U.S. v. Webster, 960 F.2d 1301, 1305 (5th Cir. 1992).

V

We thus conclude that Lloyd Gray was not unconstitutionally deprived of effective counsel and accordingly affirm the judgment of the district court dismissing Gray's petition for habeas corpus.

A F F I R M E D.