IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3951
Summary Calendar

LEONARD DOWELL,

Petitioner-Appellant,

versus

C. M. LENSING, Warden, and
RICHARD P. IEYOUB, Attorney General,
State of Louisiana,

Respondents-Appellees.

Appeal from the United States District Court for the
Middle District of Louisiana
CA 90 1230 A M2

(June 23, 1993)

Before JOLLY, BARKSDALE, and E. GARZA, Circuit Judges.

PER CURIAM:*

Leonard Dowell appeals from the denial of his petition for a writ of habeas corpus. We AFFIRM.

I

A Louisiana jury convicted Dowell for simple burglary in 1981. Dowell had a prior conviction for felony theft, based on a 1977

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

guilty plea. The trial court sentenced him, as a second offender, to serve 12 years in prison. He completed service of his sentence in October 1992.

II

In his federal habeas petition which is the subject of this appeal, Dowell asserted eight claims, including 13 allegations of ineffective assistance of counsel. The magistrate judge conducted an evidentiary hearing on the merits of the petition. The magistrate judge recommended that Dowell's habitual-offender sentence be vacated, but recommended denial of relief on all other grounds. With the exception of the recommendation that Dowell's habitual-offender sentence be vacated, the district court adopted the magistrate judge's recommendation, and denied relief on all of his claims. The district court granted a certificate of probable cause for appeal.

III

A

Dowell contends that he is entitled to relief from his recidivist sentence for the 1981 burglary conviction, on the ground that his 1977 conviction for felony theft, which was used for enhancement, is invalid. He asserts that he was misled into pleading guilty to the theft charge by the State's erroneous advice that he had a right to a jury of six, five of whom would have to concur to reach a verdict. Dowell contends that Burch v. Louisiana, 441 U.S. 130 (1979), which requires that a six-person

jury reach a unanimous verdict for conviction, should be retroactively applied.

"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)) (emphasis added in Maleng). In Carafas v. LaVallee, 391 U.S. 234, 238 (1968), the Supreme Court held that a habeas petitioner who was in custody pursuant to a conviction at the time he filed his petition challenging that conviction, satisfied the "in custody" requirement, even though he was released from custody prior to completion of the litigation.

In Escobedo v. Estelle, 655 F.2d 613 (5th Cir. Unit A Sept. 1981), our court declined to extend Carafas to a situation similar to Dowell's attack on his 1977 theft conviction. Escobedo had challenged a 1970 conviction that was used to enhance his 1977 conviction, for which he was incarcerated at the time he filed his habeas petition. While the case was pending, however, Escobedo's sentence expired. Our court held that Escobedo did not satisfy the "in custody" requirement for purposes of challenging the 1970 conviction:

> ... [A] habeas petitioner does not meet the statutory "in custody" requirement when he is no longer (and was not at the time he filed his petition) in custody pursuant to the conviction he attacks, and neither is he presently in custody

> pursuant to another conviction that is positively and demonstrably related to the conviction he attacks; this is so despite the fact that he was in custody pursuant to the positively and demonstrably related conviction at the time he filed his petition.

Id. at 616-17.

Our court recently reaffirmed Escobedo in Thompson v. Collins, 981 F.2d 259 (5th Cir. 1992). There, Thompson challenged a 1978 conviction, on the ground that it was enhanced by an allegedly unconstitutional 1974 conviction. During the pendency of the litigation, his sentence for the 1978 conviction expired. The district court dismissed Thompson's petition, holding that he no longer satisfied the "in custody" requirement of the federal habeas statute. Our court affirmed, rejecting Thompson's contention that Maleng affected the validity of Escobedo, because "*Maleng* ... does nothing more than establish that a habeas petitioner meets the `in custody' requirement where he challenges a conviction used to enhance another conviction for which he is currently in custody." Id. at 260-61.

Pursuant to Escobedo and Thompson, Dowell is not entitled to relief on the ground that his 1977 theft conviction is invalid, because he does not satisfy the "in custody" requirement of 28 U.S.C. § 2254. Under Maleng, however, his completion of the sentence for the 1981 burglary conviction does not deprive us of jurisdiction to consider his remaining claims with respect to that conviction. We now turn to consider those claims.

B

(1)

Dowell contends that he is entitled to relief on the ground that the jury charge on reasonable doubt impermissibly reduced the state's burden of proof. He asserts that Cage v. Louisiana, 498 U.S. 39 (1990), should be applied retroactively. However, our court held in Skelton v. Whitley, 950 F.2d 1037, 1043-46 (5th Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 102 (1992), that Cage states a "new rule" which does not apply to convictions, such as Dowell's, which became final before Cage was decided. Therefore, Dowell also is not entitled to relief on the ground that his trial counsel was ineffective for not raising this point.

(2)

Dowell contends that even if Cage is not to be applied retroactively, he is entitled to relief on the ground that the charge deprived him of due process. The jury was instructed that:

> Reasonable doubt is doubt based upon reason and common sense. That is one founded upon a real, tangible, substantial basis and not upon a mere whim, fancy or conjecture. Reasonable doubt is present when, after you have carefully considered all the evidence, you cannot say you are firmly convinced of the truth of the charge.

The magistrate judge stated in her report that Dowell's claim based on Cage was the only claim he raised regarding the jury charge. Dowell did not file objections to that report, despite the fact that he was advised of the need to do so. Accordingly, we will not consider the merits of Dowell's due process contention.

Nettles v. Wainwright, 677 F.2d 404, 409-10 (5th Cir. Unit B 1982) (en banc). Moreover, this is not a purely legal question, and it is being raised for the first time on appeal. See Self v. Blackburn, 751 F.2d 789, 793 (5th Cir. 1985).

C

Dowell contends that the bill of information charging him with burglary is so defective that it violates due process. Specifically, he asserts that the information did not allege the specific offense he intended to commit upon entry into the structure.

The information alleges that Dowell "committed simple burglary of a structure at 684 North 39th Street, contrary to the law." Louisiana law defines simple burglary as the entering of any structure "with the intent to commit a felony or any theft therein." La. Rev. Stat. Ann. § 14:62 (West 1986). The Louisiana Supreme Court has held that an information was legally sufficient even though it did not allege the specific offense intended to be committed in the structure. State v. Taylor, 219 So. 2d 484-85 (La. 1969).

"[T]he sufficiency of a state indictment [or information] is not a matter for federal habeas corpus relief unless it can be shown that the indictment [or information] is so defective that the convicting court had no jurisdiction." Branch v. Estelle, 631 F.2d 1229, 1233 (5th Cir. 1980). "[S]tate law provides the reference point for determining an [information's] sufficiency." Morlett v.

Lynaugh, 851 F.2d 1521, 1523 (5th Cir. 1988), cert. denied, 489 U.S. 1086 (1989). "If the question of the sufficiency of the indictment is presented to the highest state court of appeals, then consideration of the question is foreclosed in federal habeas corpus proceedings." Id.

Dowell presented his claim regarding the information's sufficiency to the Louisiana Supreme Court. By denying his applications for writs, that court implicitly held that the information was not fundamentally defective. State ex rel. Dowell v. Hymel, No. 90-KH-0732 (La. Sup. Ct., Oct. 12, 1990). Accordingly, Dowell's claim for relief on this ground is foreclosed.

D

Finally, Dowell contends that his defense counsel provided ineffective assistance in numerous respects, including: (1) failure to object to the bill of information; (2) failure to adequately prepare for trial; (3) failure to file motions, particularly discovery motions; (4) failure to properly seek to suppress evidence of other crimes; (5) failure to object to evidence of a telephone call he allegedly made to the victim; (6) failure to call a witness to testify; (7) failure to properly cross-examine the victim; (8) failure to object to allegedly inadmissible evidence; and (9) failure to take a meaningful direct appeal.

The magistrate judge held an evidentiary hearing on the merits of these claims. Dowell did not file objections to the magistrate

judge's report and recommendation, even though he was advised of the necessity to do so. Accordingly, he is foreclosed from asserting on appeal that the district court's findings, in support of the ultimate ruling that counsel was not ineffective, are erroneous. Nettles v. Wainwright, 677 F.2d at 409-10.

Furthermore, Dowell has not requested the preparation of a transcript of the evidentiary hearing from either the district court or this court. It is the appellant's duty to include in the record any transcript of evidence relevant to his points on appeal. Fed. R. App. P. 10(b). "The failure of an appellant to provide a transcript is a proper ground for dismissal of the appeal." Richardson v. Henry, 902 F.2d 414, 416 (5th Cir.), cert. denied, 498 U.S. 901 (1990) and ___ U.S. ___, 111 S.Ct. 789 (1991).

IV

For the reasons we have stated herein, the judgment of the district court is

A F F I R M E D.