UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3968
Summary Calendar

WILFRED GREENUP,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary, ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CA 92 CV 2131)

(September 27, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA Circuit Judges.[*]

GARWOOD, Circuit Judge:

In this application for habeas corpus relief pursuant to 28 U.S.C. § 2254, petitioner-appellant Wilfred Greenup (Greenup) challenges the circumstances under which he pleaded guilty to attempted first degree murder. We affirm the district court's

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

denial of habeas relief.

Facts and Proceedings Below

In early 1985, Greenup was arrested and charged with the first degree murder of Sherman Walker, an officer with the Sheriff's Department in the parish of St. John the Baptist, Louisiana. On September 16, 1985, the day his trial was set to begin, and after the selection of several perspective jurors, Greenup's defense counsel reached an agreement with the prosecutor to allow Greenup to plead to a reduced charge of attempted first degree murder of Walker. Following some discussion with his counsel and the prosecutor, Greenup withdrew his former plea and pleaded guilty in open court to attempted first degree murder. The trial court accepted his plea and sentenced him to a term of imprisonment of forty years at hard labor in the custody of the Louisiana Department of Corrections.

Greenup filed an application for post-conviction relief in the state trial court, raising the claim that his guilty plea was involuntary. The trial court denied his application for relief and his request for an evidentiary hearing in February 1987. Both the Louisiana Court of Appeal, Fifth Circuit, and the Louisiana Supreme Court denied his petitions for review.

In 1988, Greenup, assisted by newly appointed counsel, filed in the state trial court a second request for post-conviction relief on the same grounds as his first. This time, the trial court granted his request for an evidentiary hearing. Hearings were held on June 20, 1990, July 6, 1990, and August 15, 1990. Again, the trial court denied relief, and again the Louisiana

appellate courts declined to grant review of that denial.[1]

Greenup thereafter filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Louisiana, pursuant to 28 U.S.C. § 2254, alleging two grounds for relief: (1) that his guilty plea was involuntarily entered, and (2) that he was denied due process of law when the state failed to amend the original indictment in writing. Although Greenup was represented by counsel in the second state proceeding, he has pursued his federal habeas action *pro se*.

The district court initially referred this matter to the United States Magistrate for hearings but later revoked this referral upon its determination that a federal evidentiary hearing was unnecessary because the state record was sufficient for adjudication of Greenup's claims. The district court denied Greenup's petition on the basis of the state court record. The court granted a certificate of probable cause and allowed Greenup to proceed on appeal *in forma pauperis*.

Discussion

I. Validity of the Guilty Plea

Greenup's first argument before this Court is that he did not enter his guilty plea to the charge of attempted first degree murder knowingly or voluntarily because he was never informed of the nature or consequences of the charge of attempted first degree murder, the elements of the offense, or the maximum penalty he

[1] The Louisiana Supreme Court's denial without opinion of the petition for review is recorded at *State v. Greenup*, 596 So.2d 203 (La. 1992).

might face. Greenup acknowledges in his federal habeas petition that the statutes of first degree and second degree murder, and manslaughter, as well as the attempt statute were read to him, but he claims that there is no evidence that he understood what he heard.

"On federal habeas review, a guilty plea which was voluntarily entered by a defendant who understood the nature of the charges and consequences of the plea will pass constitutional muster." *Hobbs v. Blackburn*, 752 F.2d 1079, 1081 (5th Cir.), *cert. denied*, 106 S.Ct. 117 (1985). Where the defendant had that understanding, the plea is not constitutionally defective merely because the trial court did not explain the elements of the offense. *Davis v. Butler*, 825 F.2d 892, 893 (5th Cir. 1987). In order to enter a knowing plea, the defendant must be aware of the relevant circumstances and understand the nature of the charges and the consequences of his plea; he need not understand the technical legal effect of the charges against him. *Taylor v. Whitley*, 933 F.2d 325, 329 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1678 (1992).

The transcript of the proceedings before the state trial court on September 16, 1985, reflects that the court informed Greenup of the charge against him and of rights he would waive if he pleaded guilty:

> "THE COURT: In the matter No. 85-0007, State of Louisiana Vs Wilfred Greenup, the defendant is present in Court with his attorney, Mr. Paul Aucoin, and I understand that the State moves for a re-arraignment of a lesser charge?
>
> MR. DALEY: That's correct, Your Honor. The State would move for re-arraignment on the charge of attempted first degree murder.

> THE CLERK READS: Wilfred Greenup, on the 23rd day of January 1985 you were charged with first degree murder. That has been reduced by the State to attempted first degree murder of a police officer. How do you plead?
>
> THE COURT: Mr. Greenup, before you say anything the Court has to make certain assurances that you fully understand your plea. Your lawyer and the district attorney inform me that you are going to enter a plea of guilty to these charges which -- let the record reflect he has not done at this time. If you so do, you are confirming to me that you received a copy of the charges and have discussed them fully with Mr. Aucoin. That in fact you are admitting to attempted murder of a police officer; namely, Mr. Sherman Walker, on or about the 6th day of November 1984. That you were an accomplice with others in this crime and that by entering a plea of guilty today you waive your right to a trial by jury and your right to be confronted with witnesses by the State, under oath, and your right against self-incrimination as well as your right to compel witnesses to be present to testify in your behalf; and you sign this plea and waiver agreement. Do you udnerstand [sic] all of those things that I have just itemized to you, sir?
>
> MR. GREENUP: Yes.
>
> . . .
>
> [THE COURT:] Now, knowing all of those things, how do you plea?
>
> [MR. GREENUP:] Guilty."

In his responses, Greenup acknowledged to the court that he understood the charges he was admitting to and the rights he was giving up by pleading guilty. These admissions are entitled to "a strong presumption of verity." *United States v. Stumpf*, 827 F.2d 1027, 1030 (5th Cir. 1987) (quoting *Blackledge v. Allison*, 97 S.Ct. 1621, 1629 (1977)).

In addition, Greenup has acknowledged in his habeas petition before the district court that he was read the statutes on attempt, as well as first degree murder, second degree murder, and

manslaughter.

Thomas Daley (Daley), the assistant district attorney in charge of Greenup's murder trial, testified at the August 1990 state court evidentiary hearing concerning the events surrounding Greenup's guilty plea.[2] He stated that he entered into a plea bargain with Greenup's counsel, Paul Aucoin (Aucoin), and that he was present during a conversation between Greenup and Aucoin concerning the plea bargain. "I was present when Mr. Aucoin went over the charges that were being levied against him. I was present when Mr. Aucoin read to him the Criminal Code Article on attempt, which set forth the fact that . . . the maximum for attempted first degree murder was to be fifty years." According to Daley, Aucoin took several measures to ascertain what a possible sentence might be, including conferring with the trial judge about acceptable sentences and calling the Louisiana Department of Corrections to ask about the effects of a guilty plea on a term of imprisonment; Aucoin related his information to Greenup.

Greenup contends that he could not have received a copy of the charge against him because the amended charge of attempted first degree murder of Walker was never reduced to writing. It is sufficient that Greenup, who had received the written charge of first degree murder of Walker, was informed of the elements of the

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[2] Greenup challenges Daley's testimony as self-serving. Both Greenup and Daley testified at the state evidentiary hearings. In denying Greenup's application for relief, the state court implicitly accepted Daley's testimony over that of Greenup. Findings of fact made after a state court evidentiary hearing on the merits of a petitioner's claim are entitled to a presumption of correctness in a federal habeas proceeding. 28 U.S.C. § 2254(d). Greenup does not attempt to rebut this presumption.

charge when his counsel read to him the statutes on attempt and first degree murder.

Next, Greenup complains that he did not understand the consequences of his plea because he was not informed of the maximum penalty he would face if he pleaded guilty. While the state trial judge did not inform Greenup of the maximum sentence for a conviction of attempted first degree murder before he accepted his guilty plea, this does not automatically constitute error requiring post-conviction relief. A state judge is not held to all the standards of FED. R. CRIM. P. 11(c), which directs the federal district court to ensure that a defendant understand the limits of penalty before accepting a guilty plea. *Stano v. Dugger*, 921 F.2d 1125, 1141 (11th Cir.) ("The plea colloquy, provided in Rule 11 . . . , constitutes the constitutional minimum requirements for a knowing and voluntary plea for federal courts, but that rule is not binding on state courts"), *cert. denied*, 112 S.Ct. 116 (1991).[3]

Moreover, there is evidence that Greenup was told of the maximum penalty in conversations with his counsel and the district attorney. Daley testified at the evidentiary hearing that Greenup was read the statute for attempt, which set forth the maximum penalty:

> "Q. Did you or Mr. Aucoin explain to Wilfred Greenup that, the maximum and minimum penalties for attempted first degree murder?
>
> A. . . . The attempt statute was read to him, which

[3] In this Court, Rule 11 does not set forth *constitutional* minima for a guilty plea in federal court. *See, e.g., United States v. Johnson*, No. 92-8057, slip op. 6416 (5th Cir. Aug. 26, 1993) (en banc).

> clearly says that if the sentence is life then he would receive a maximum of fifty years. I know that that was read to him at least twice.
>
> Q. And when it was read to him was it explained to him the minimum penalty available to him?
>
> A. Well, the statute is silent on the issue of minimum. What was discussed was the fifty years was the max. The Judge would accept forty. His choice was to accept the forty or to go forward with trial. And he agreed to accept the forty years."

The law of this Circuit makes clear that a defendant is fully aware of the consequences of his guilty plea as long as he understands the extent of the sentence he might possibly receive. *United States v. Santa Lucia*, 991 F.2d 179, 180 (5th Cir. 1993). Greenup was aware of the maximum sentence possible and, therefore, he was informed of the consequences of his plea.

There is sufficient evidence in the record before us to support a conclusion that Greenup was indeed informed of the nature of the charge against him and of the consequences of a guilty plea and that his guilty plea to the charge of attempted first degree murder was knowing and voluntary.

Greenup also claims before this Court that his plea was not voluntary because his counsel and the prosecutor threatened him with the death penalty if he refused to accept the plea bargain. Although he raised this issue before the state courts, Greenup did not pursue this claim in the district court. "[A] contention not raised by a habeas petitioner in the district court cannot be considered for the first time on appeal from that court's denial of habeas relief." *Johnson v. Puckett*, 930 F.2d 445, 448 (5th Cir.), *cert. denied*, 112 S.Ct. 252 (1991).

Even were we to reach this issue, prior decisions of this Court mandate that we conclude that the threat of the death penalty did not of itself render involuntary Greenup's decision to enter the offered plea bargain. "[I]t is well settled that a plea bargain is not invalid per se because it is induced by fear of receiving the death penalty or because in agreeing to the plea bargain the defendant averts the possibility of receiving the death penalty." *Spinkellink v. Wainwright*, 578 F.2d 582, 608 (5th Cir. 1978) (citing *Brady v. United States*, 90 S.Ct. 1463, 1468 (1970)).

II. Sufficiency of the Amended Indictment

Greenup claims that he did not plead guilty to a sufficiently amended indictment. The original indictment, charging him with first degree murder, was never amended in writing, but was verbally reduced to attempted first degree murder by the prosecutor during the plea proceedings.[4]

Greenup did not raise these claims in his state applications for post-conviction relief and has not exhausted his state court remedies. The State of Louisiana has not challenged his federal claim on the grounds that he failed to exhaust state remedies. The

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[4] The State prosecutor did not expressly announce an oral amendment to the indictment; instead, he informed the trial court that Greenup would be re-arraigned on a different charge:

> "THE COURT: In the matter No. 85-0007, State of Louisiana Vs Wilfred Greenup, the defendant is present in Court with his attorney, Mr. Paul Aucoin, and I understand that the State moves for re-arraignment of a lesser charge?
>
> MR. DALEY: That's correct, your Honor. The State would move for re-arraignment on the charge of attempted first degree murder."

exhaustion requirement is not jurisdictional but rather is based on principles of comity; it can, therefore, be waived. *Bradburn v. McCotter*, 786 F.2d 627, 629 (5th Cir.), *cert. denied*, 107 S.Ct. 167 (1986). Nevertheless, "[a] finding of waiver does not conclude our consideration, for a district court or a panel of this court may consider that it should not accept a waiver, express or implied." *McGee v. Estelle*, 722 F.2d 1206, 1214 (5th Cir. 1984) (*en banc*) (holding that a district court or a panel of this Court may, in its discretion, either accept or reject a state's waiver of exhaustion requirement, or notice *sua sponte* the lack of exhaustion).

Although we are not unmindful of the expense and time that have been expended in litigating this issue in the district court and in briefing it before this Court, we conclude that the proper course of action is to withhold consideration of this issue until the courts of Louisiana have had the opportunity to pass on it.

We reach this conclusion for two reasons. First, Louisiana law is uncertain as to whether an unobjected-to oral amendment of an indictment to state a reduced charge suffices to give the trial court jurisdiction of the offense charged by the amendment or whether a written amendment is necessary for that purpose. Second, Greenup's entitlement, if any, to federal habeas relief on this particular claim is entirely dependent on the correctness under Louisiana law of his assertion that the absence of a written amendment to the indictment wholly deprived the convicting trial court of jurisdiction. We have no reason to doubt that the Louisiana courts will afford Greenup relief if he is correct in his Louisiana law jurisdictional assertion in this respect; by the same

token, if he is not correct as to Louisiana law in this respect, then he has no conceivable basis for federal habeas relief on this particular claim.

Conclusion

For the reasons stated above, the district court's judgment denying habeas relief is hereby modified in the following respect only, *viz*, so far only as concerns the claim that the convicting court lacked jurisdiction because the indictment was not properly amended, the denial of relief is without prejudice to exhaustion of state remedies on said claim; in all other respects, and as to all other claims, the judgment (and denial of relief on the merits) is affirmed without modification. As so modified, the judgment is affirmed.

JUDGMENT MODIFIED IN PART, AND AFFIRMED AS MODIFIED.