

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4134
Summary Calendar

LLOYD RENEE MURRAY,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director, Texas
Department of Criminal Justice
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(6:90 CV 533)

(December 16, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

This appeal is from the denial of habeas relief to a Texas state prisoner. Lloyd Renee Murray pleaded guilty in Texas state court to one count of aggravated assault of a peace officer and one count of unauthorized use of a motor vehicle, and pleaded true to

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

the enhancement allegations in each indictment. He was sentenced to concurrent 25-year terms of imprisonment.

In his petition for a federal writ of habeas corpus, Murray alleges that he was denied effective assistance of counsel; that his guilty plea was involuntary; that his convictions violated the double jeopardy clause; that his arrest was illegal under the Fourth Amendment; and that he was denied due process because he was not given Miranda warnings and the prosecutor and peace officers engaged in misconduct. The magistrate judge recommended denying relief on the issues raised.

The magistrate judge noted, however, that the 25-year sentences may have been imposed in violation of the law because the judgments state the finding on enhancement is "n/a," which would limit the possible punishment for each conviction to 2 to 10 years or 2 to 20 years. See Tex. Penal Code §§ 12.34, 22.02, 31.07. He ordered the respondent to provide the court with some evidence that the enhancement allegations had been proven. The respondent provided the court with a Nunc Pro Tunc order correcting the judgment to reflect Murray's plea of true to the enhancement allegations. See Ex parte Pose, 751 S.W.2d 873, 876 (Tex. Ct. App. 1988).

In a supplemental report and recommendation the magistrate judge found that Murray had pleaded true to the two enhancement allegations, and that the Nunc Pro Tunc order properly reflected what actually occurred at trial. He recommended denying relief on

this claim. The district court adopted both reports and denied Murray habeas relief.

I

Murray argues that his guilty plea was not voluntary because the trial court failed to admonish him regarding the potential range of punishment for the two offenses. Before accepting a guilty plea the trial court must ensure that the defendant "has a full understanding of what the plea connotes and of its consequences." Taylor v. Whitley, 933 F.2d 325, 329 (5th Cir. 1991) (quoting Boykin v. Alabama, 395 U.S. 238, 244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)).

Murray's allegations are not supported by the record. The trial judge signed the "Defendant's Waiver of Rights" form indicating that he had informed Murray of the potential range of punishment and that Murray understood the potential penalty. The docket sheet also indicates that the trial judge admonished Murray on the range of punishment. These official documents are entitled to a presumption of regularity, Carter v. Collins, 918 F.2d 1198, 1202 n.4 (5th Cir. 1990); Hobbs v. Blackburn, 752 F.2d 1079, 1081 (5th Cir.), cert. denied, 474 U.S. 838 (1985), and are sufficient to establish that Murray understood the consequences of his plea. See Hobbs, 752 F.2d at 1081 (the defendant is fully informed of the consequences of the guilty plea if he is admonished of the range of punishment). This claim is therefore without merit.

II

Murray also argues that he was denied effective assistance of counsel because his court-appointed attorney told him he would receive two life sentences if he went to trial; never discussed trial strategy with him or informed him of the trial date; was unprepared for trial; and did not adequately investigate the case. A valid guilty plea waives all nonjurisdictional defects including an ineffective assistance of counsel claim, unless the ineffective assistance claim goes to the voluntariness of the plea. Smith v. Estelle, 711 F.2d 677, 682 (5th Cir. 1983), cert. denied, 466 U.S. 906 (1984). Murray voluntarily pleaded guilty, and therefore the only cognizable ineffective-assistance-of-counsel claim is the allegation that his attorney coerced him into pleading guilty by telling him he would receive two life sentences if he went to trial.

To establish an ineffective-assistance-of-counsel claim Murray must show that his counsel's performance was deficient and that there is a reasonable probability that, but for his attorney's deficient performance, he would not have pleaded guilty but would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 56-58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). On federal habeas review the state court's findings of fact on the ineffective-assistance-of-counsel claim are entitled to the presumption of correctness. 28 U.S.C. § 2254(d); Carter, 918

F.2d at 1202. The factual findings do not have to be made after a live evidentiary hearing, but can be supported by affidavits. Id.

The state habeas court ordered Murray's court-appointed attorney, John J. Eastland, to respond to Murray's allegations of ineffective assistance. Eastland submitted an affidavit stating that after Murray rejected a plea offer of two concurrent 10-year terms of imprisonment the district attorney reindicted him adding the enhancement allegations and that Eastland then advised him to accept a plea offer of 25 years because, based on his experience with these juries, the jury was likely to impose two life sentences if he went to trial. He further stated that he was prepared to go to trial if Murray refused the offer, and that the trial judge admonished Murray about the rights he was waiving and questioned him about the voluntariness of his plea and whether Eastland had represented him adequately. The state habeas court found that Eastland represented Murray adequately and that Murray's guilty plea was voluntary.

Murray has offered no evidence to rebut the state court's findings and they are entitled to the presumption of correctness. The record amply demonstrates that Eastland's representation was within the range of competence demanded of criminal attorneys, and the district court properly denied relief on this claim.

III

Murray next argues that his convictions and concurrent sentences for aggravated assault of a peace officer and

unauthorized use of a motor vehicle violated double jeopardy because both convictions arose out of the same set of facts. The double jeopardy clause prohibits multiple punishments for the same offense. Davis v. Herring, 800 F.2d 513, 516 (5th Cir. 1986). The test to determine whether conduct that violates two statutory provisions constitutes one or two offenses is "whether each provision requires proof of an additional fact which the other does not." Blockburger v. U.S., 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). Blockburger is satisfied if both offenses require proof of a different fact "even though there is substantial overlap in the proof offered to establish the crimes." U.S. v. Stovall, 825 F.2d 817, 822 (5th Cir. 1987) (citing U.S. v. Ball, 470 U.S. 856, 861-62, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)).

Blockburger is satisfied here. To establish the offense of aggravated assault of a peace officer the state was required to prove that Murray intentionally, knowingly, or recklessly caused bodily injury to a peace officer when he knew the victim was a peace officer and the peace officer was lawfully discharging an official duty. Tex. Penal Code § 22.02(a)(2) (Vernon 1991); Sneed v. State, 803 S.W.2d 833, 835 (Tex. Ct. App. 1991). To establish the offense of unauthorized use of a motor vehicle the state was required to prove that Murray intentionally and knowingly operated a motor vehicle without the effective consent of the owner. Tex. Penal Code Ann. § 31.07(a) (Vernon 1989); Chambless v. State, 776 S.W.2d 718, 721 (Tex. Ct. App. 1989). Each statute proscribes

different conduct and the fact that both violations involved the same incident does not alter the result. The district court properly dismissed this claim.

IV

Murray next argues that his sentences are illegal because there was insufficient evidence to prove the enhancement allegations. He contends that the state was required to introduce some evidence, such as penitentiary packets or finger prints, to prove the enhancement allegations.

Under Texas law, a stipulation is sufficient to support a finding of true on enhancement allegations. Harmon v. State, 649 S.W.2d 93, 95 (Tex. Ct. App. 1982). Murray signed a written stipulation admitting his prior felony convictions, and therefore this claim is without merit.

V

Murray raises additional claims that are not cognizable in this § 2254 petition. He argues that his arrest was illegal under the Fourth Amendment because the officers did not have probable cause to arrest him and it was a pretextual arrest. A state prisoner may not raise a Fourth Amendment claim in a federal habeas petition if the state provided a full and fair opportunity to litigate the claim. Stone v. Powell, 428 U.S. 465, 494, 98 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Murray raised his Fourth Amendment claim in a pretrial motion to suppress and in his state habeas

petition. He was given a full and fair opportunity to litigate his claim in state court, and Stone bars federal habeas review.

He also argues that he was denied due process because he was not given Miranda warnings and the prosecutor and peace officers engaged in misconduct. A guilty plea waives all nonjurisdictional defects, Smith, 711 F.2d at 682, and therefore Murray cannot raise these claims in this petition.

Finally, Murray seeks to supplement the record to include the transcript of his guilty plea hearing allegedly to demonstrate that there was insufficient proof to establish the enhancement allegations. This Court "will not ordinarily enlarge the record on appeal to include material not before the district court." U.S. v. Flores, 887 F.2d 543, 546 (5th Cir. 1989) (citation omitted). The record includes sufficient documentation to support the enhancement allegations, and these documents are entitled to a presumption of regularity. See Carter, 918 F.2d at 1202 n.4; Hobbs, 752 F.2d at 1081. The requested document is not material to the appeal and his motion is denied. See Harvey v. Andrist, 754 F.2d 569, 571 (5th Cir.), cert. denied, 471 U.S. 1126 (1985).

VI

For the reasons set forth in this opinion, the district court's denial of habeas relief to Lloyd Renee Murray is

A F F I R M E D.