

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4359
(Summary Calendar)

JESSE JAMES COPELAND,

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-560)

March 31, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Petitioner-Appellant Jesse James Copeland, a state prisoner, appeals the dismissal of his § 2254 habeas corpus petition grounded

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

in claims that his state indictment for aggravated robbery was so insufficient that the trial court lacked jurisdiction; that he was deprived of a fair trial because his counsel failed to interview and call certain witnesses; and that his counsel was constitutionally ineffective. Copeland also charges the district court with error for failing to hold an evidentiary hearing concerning his substantive allegations. Finding that all of Copeland's assignments of error are unmeritorious, we affirm the dismissal of his petition by the district court.

I

FACTS AND PROCEEDINGS

Copeland was indicted in a Texas court for "aggravated robbery; criminal episode and repetition of a felony." In plain English, he was charged with two counts of first degree aggravated robbery; and, for purposes of punishment enhancement, he was charged with one previous felony conviction. Copeland then pleaded "true" to the enhancement charge but "not guilty" to the other charges in the indictment. He went to trial and was convicted by the jury, receiving concurrent sentences of imprisonment for life and for 99 years.

Trial testimony revealed that within one hour Copeland robbed two convenience stores. After entering the first convenience store and lingering for awhile, he pulled a nylon stocking over his face, brandished a knife at the store attendant, and ordered him to open the register. When the attendant refused, claiming that he did not know how, Copeland stabbed him in the chest. Copeland then opened

the register, removed the money, and ordered the attendant to open the safe. After the attendant stated that he was unable to open the safe, Copeland left. The attendant then called the police.

Less than an hour later, Copeland entered another convenience store wearing the nylon stocking over his face. He approached the attendant and demanded all the money in the store. The attendant complied, opening the register and the cash box on the floor. Copeland repeatedly threatened to hit the attendant, but instead took the money, left the store, and drove off in a Ford LTD. The attendant noted the license plate number, which the police were able to trace. They found the Ford LTD parked in front of Copeland's "sister's house," with Copeland asleep inside. He was arrested on the spot.

Following his conviction, Copeland exhausted his state remedies, then filed a § 2254 petition in district court, attacking his indictment and alleging ineffectiveness of counsel and the failure of the trial court to give him a fair hearing. In response, the state moved for summary judgment. The magistrate judge recommended that Copeland's § 2254 petition be denied on its merits. The district court adopted the findings and conclusions of the magistrate judge and dismissed Copeland's § 2254 petition. Copeland timely appealed, and the district court granted a certificate of probable cause (CPC).

II

ANALYSIS

Copeland first argues that the state failed to provide an

adequate hearing, so that another evidentiary hearing was required to resolve disputed factual issues and conclusions of the state court. A state court's findings of fact, both explicit and implicit, are entitled to a presumption of correctness by federal courts. 28 U.S.C. § 2254(d); Sumner v. Mata, 449 U.S. 539, 544-47, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). Nevertheless, a federal habeas court may abandon the presumption of correctness afforded to factual determinations by state courts in certain enumerated circumstances. Id. at 544-45. One of these circumstances is that the state court's findings are not "fairly supported in the record." 28 U.S.C. § 2254(d)(8). "A federal habeas court must hold an evidentiary hearing if there are disputed facts and the petitioner did not receive a full and fair hearing in a state court, either at trial or in a collateral proceeding." Wiley v. Puckett, 969 F.2d 86, 98 (5th Cir. 1992).

When the state court has held a hearing, federal courts must presume the correctness of the state court's factual findings if they are supported by the record. 28 U.S.C. § 2254(d); Sumner, 449 U.S. at 546-47. Thus, a federal district court need not conduct an evidentiary hearing if the state record is sufficient to dispose of the issues. Joseph v. Butler, 838 F.2d 786, 788 (5th Cir. 1988). Section 2254(d) does not require states to hold live evidentiary hearings for the presumption to attach. See id. State courts may resolve factual disputes on the basis of competing affidavits. Lincecum v. Collins, 958 F.2d 1271, 1279 (5th Cir.), cert. denied, 113 S.Ct. 417 (1992). Whether a paper hearing is

appropriate to the resolution of the factual disputes underlying the petitioner's claim must be decided case by case. May v. Collins, 955 F.2d 299, 312-13 (5th Cir.), cert. denied, 112 S.Ct. 1925 (1992).

Copeland had such a paper hearing by affidavit on his state habeas corpus claims. The hearing was conducted by the same state judge who presided over Copeland's trial. Finding Copeland's claims without merit, that judge recommended denial of the habeas corpus petition. Copeland's petition was denied by the Texas Court of Criminal Appeals without written order.

Copeland argues to us that the following issues require an evidentiary hearing.

Uncalled Witness

Copeland claims that he was denied a fair trial because his counsel failed to call alibi witnesses to testify on Copeland's behalf.

The state court considered the affidavit submitted by Copeland's counsel, which indicated that 1) Copeland "did not want his sister or anyone else in his family to testify because of his sister's prior criminal record," 2) Copeland "stated on many occasions to his counsel that he was the only [one] that knew the truth and could testify to it," and 3) Copeland waited until his state habeas action to contend that he had an alibi.

Copeland did not submit an affidavit. Although he contended in his state habeas petition that counsel failed to call Copeland's sister as his "only hope to prove his innocence," he failed to

allege what her testimony would be. Copeland specifically mentioned only his sister as an uncalled witness in his state habeas petition, yet he subsequently contended in his § 2254 petition that his mother too could have testified for him.

Self-serving assertions about the testimony of uncalled witnesses are insufficient for post-conviction relief. United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984). The petitioner must provide more than his own speculation about such testimony. As complaints based on failure to call witnesses are highly speculative by nature, they are not favored by the courts. Id.

As it was entitled to rely on the presumption that the state court's findings were correct, the federal district court was not required to hold a live evidentiary hearing on Copeland's conclusional allegations. Given the information that was before the state court, we do not find meritorious Copeland's argument that he was denied a fair evidentiary hearing.

Neither do we conclude that this is a case in which failure of counsel to call a given witness or witnesses rendered a defendant's trial unfair. Copeland testified on his own behalf. He denied committing either robbery. Although he admitted being at the site of the second robbery, he denied being at the site of the first robbery or stabbing the attendant. Three witnesses clearly contradicted his testimony. The stabbing victim at the first location had ample opportunity to observe Copeland for later identification. And, even though Copeland's stocking mask

prevented full observation at the second location, the attendant reported the license plate number of the vehicle that the robber was driving and noted some of his physical characteristics, such as his height, that matched Copeland's.

For the first time on appeal, Copeland seeks to buttress his uncalled witness argument by submitting his sister's affidavit of what her testimony would have been had she testified. Copeland apparently seeks in this matter to "amend" his original § 2254 complaint for further consideration by this court. This tactic is unavailing. Issues not raised in the district court may not be raised for the first time in this court. Self v. Blackburn, 751 F.2d 789, 793 (5th Cir. 1985).

Faulty Indictment

In his pro se brief, Copeland argues that the indictment was defective because it failed to charge the requisite mental state, claiming that such a defect deprived the state court of jurisdiction. This argument too is without merit.

A defect in a state indictment is not grounds for habeas relief unless the indictment is so defective that the convicting court had no jurisdiction. Neal v. Texas, 870 F.2d 312, 316 (5th Cir. 1989). If the highest criminal appeals court of the state has held, either expressly or implicitly, that the indictment was sufficient under state law, the federal habeas inquiry is at an end. Alexander v. McCotter, 775 F.2d 595, 598-99 (5th Cir. 1985). When the Texas Court of Criminal Appeals refuses to hear a direct appeal and denies a writ of habeas corpus sought on the ground that

the indictment is insufficient, that court implicitly holds that the indictment is sufficient. Id. at 599.

The indictment charged that Copeland committed robbery "intentionally" and with the "intent" to obtain property by placing his victims "in fear of imminent bodily injury and death." The state trial judge rejected Copeland's contention that this indictment was defective. As the Texas Court of Criminal Appeals denied his habeas corpus petition without written order, the federal habeas inquiry need go no further. Similarly, as the district court did not err when it deferred to the state court's determination that the indictment was not defective, an evidentiary hearing is not necessary.

Ineffectiveness of Counsel

Copeland continues by arguing that counsel was ineffective for failure to interview and call requested witnesses and to correct the flawed indictment.

A claim that counsel has been ineffective will prevail only if the petitioner proves that such counsel was not only objectively deficient, but also that the petitioner was so prejudiced by counsel's errors that the trial was unfair or unreliable. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's trial tactics are generally presumed to be well chosen. See id. at 690. "[B]ecause the presentation of testimonial evidence is trial strategy," complaints regarding uncalled witnesses are disfavored. Cockrell, 720 F.2d at 1427. "Unreliability or unfairness does not result if the

ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." Lockhart v. Fretwell, ____ U.S. ____, 113 S.Ct. 838, 844 (1993). An ineffectiveness claim based on speculation or conclusional rhetoric will not warrant § 2254 relief. See Lincecum, 958 F.2d at 1279.

"Federal courts in habeas proceedings are required to grant a presumption of correctness to a state court's explicit and implicit findings of fact if supported by the record. Although the ultimate question of whether counsel's performance was deficient is a mixed question of law and fact, state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of section 2254(d)." Loyd v. Smith, 899 F.2d 1416, 1425 (5th Cir. 1990) (citations omitted); see Lincecum, 958 F.2d at 1279.

Here, the district court's determination that Copeland's ineffectiveness claim did not merit § 2254 relief was not error. Copeland raised numerous ineffectiveness claims in his state habeas petition. His counsel gave a sworn statement that put in question the validity of Copeland's allegations. The state judge reviewed the affidavits and rejected all of Copeland's ineffectiveness claims. See Ellis v. Collins, 956 F.2d 76, 79 (5th Cir.), cert. denied, 112 S.Ct. 1285 (1992); May, 955 F.2d at 314. We find no reversible error in this result.

Also without merit is Copeland's argument that counsel was ineffective for failure to notice and correct the errors in the

indictment. As set forth above. Copeland fails to show that counsel's performance was objectively deficient. We will not disturb the state court's decision upholding the validity of the indictment, so Copeland cannot show prejudice or that he was otherwise deprived of a fair trial.

To the extent that Copeland attempts to resurrect on appeal those ineffectiveness arguments that were not raised in district court, we need not address them even if they were raised in his state habeas petition. See Self, 751 F.2d at 793.

Finally, Copeland argues that counsel was ineffective for failure to instruct him that he could appeal in forma pauperis. This argument was also raised in his § 2254 petition but was not addressed by the district court, presumably because the claim does not raise an appropriate issue for a § 2254 proceeding. But more importantly, Copeland cannot show prejudice from counsel's alleged failure in this regard because Copeland moved to proceed in forma pauperis, and the court granted his motion.

In summary, Copeland has failed to show that counsel's alleged ineffective performance "permeates the entire trial with obvious unfairness." Garland v. Maggio, 717 F.2d 199, 206 (5th Cir. 1983). For the reasons set forth above, Copeland's claim that counsel was ineffective fails, as do his contentions that his indictment was so deficient as to deprive the state court of jurisdiction and that an evidentiary hearing is required. Thus, the district court's denial of Copeland's petition for habeas corpus is

AFFIRMED.