

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4416
Summary Calendar

MICHAEL LEE POLING,
a/k/a RALPH G. DAVIS,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana
(CV88-3004-"M")

April 19, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

The question on this appeal is whether Poling is entitled to relief on grounds that the district court's findings that he knowingly and voluntarily waived counsel are clearly erroneous.

Appellant Poling was convicted on his plea of guilty relative to two simple burglaries, in the Sixth Judicial District Court in

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Madison Parish, Louisiana. At the beginning of the proceeding in open court, the following colloquy occurred:

JUDGE RAGLAND: All right. Mr. Poling, who is your attorney?

MICHAEL POLING: I don't have one. I'm representing myself.

Nothing else was said concerning whether Poling may have desired to be represented by counsel. After the court told Poling that he would have a jury trial if he pleaded not guilty, he replied: "Well, it is my desire to enter a plea of guilty on both charges. Before I enter a plea of guilty I would like to review the warrant and Bill of Information." After pleading guilty on both counts, Poling stated to the court: "As far as a notice, I served the District Attorney's office of my intention to enter a plea of guilty, you know, which I would like to stipulate that I waive a presentence investigation. Also I waive all appellate review, and I request that I be sentenced today and be transferred back to the Louisiana Prison System immediately." The court sentenced Poling to serve a 12-year term and a consecutive six-year term, and there was no direct appeal.

In the earlier appeal of this federal habeas case, Poling alleged entitlement to relief on grounds that (1) his trial court failed to advise him of his right to appointed counsel if he was indigent; (2) he did not knowingly and voluntarily waive the assistance of counsel; (3) the court failed to comply with Boykin; and (4) he did not understand what was being said in the courtroom

because of his deafness. The magistrate judge recommended denial of relief without an evidentiary hearing. The district court, effectively adopting the magistrate judge's report, denied habeas relief over Poling's objections.

On appeal, this court affirmed the judgment except as to whether Poling had knowingly and intelligently waived his right to counsel. The court vacated and remanded for an evidentiary hearing on that issue. Poling v. Whitley, No. 90-4193 (5th Cir., May 22, 1991) (unpublished).

Upon remand, the magistrate judge appointed counsel and held an evidentiary hearing at which Poling testified. The only other witness was Debra Hopkins, who served as the court reporter when Poling pleaded guilty in Madison Parish. She testified that on the basis of his response in court, she had no doubt that Poling knew he had the right to have an attorney appointed to represent him. Both Poling and the respondent-appellee also introduced documentary evidence.

At the hearing, Poling introduced medical and psychiatric records relative to his new allegation that he did not understand what he was doing when he pleaded guilty. He testified that when he pleaded guilty in 1981, he could not have appreciated his right to counsel because he was depressed and had a nervous condition. He stated further that he had been held in solitary confinement and that he wanted to plead guilty as soon as possible in order to be transferred from the Madison Parish jail.

The magistrate judge stated that Poling "appeared to be very nervous all during the hearing." However, "[d]uring [a] 1988 hearing, Mr. Poling appeared to not be the least bit nervous, was very self-confident and handled the questioning, his objections, and his arguments very well." The transcript of Poling's 1981 plea proceedings in Madison Parish indicates that he also was self-confident, decisive, articulate, and composed at that time.

As the magistrate judge notes, about a month before Poling pleaded in Madison Parish, he pleaded guilty in DeSoto Parish to one count of simple burglary and one count of unauthorized use of a movable, i.e., a vehicle. Poling testified at the magistrate judge's hearing "that he had been told by the judge in DeSoto Parish that he could have a lawyer appointed to represent him on those charges, and that the judge appointed Claude Sledge at Poling's request." Poling also testified that Mr. Sledge negotiated a guilty plea for him in DeSoto Parish.

The magistrate judge noted that on October 16, 1981, the day after he was sentenced in DeSoto Parish, he was transferred to Madison Parish to face the two burglary charges pending there. On that day, he was informed by a Miranda rights form that if he could not "afford a lawyer, one will be appointed for you before any questioning if you wish." Poling signed the waiver on the form, which states that he had full understanding of these rights. The next day, Poling sent a handwritten communication to the Madison Parish District Attorney notifying him of Poling's "intention to

enter a plea of Guilty to Simple Burglary, accept the appropriateness of a proposed sentence, waive appellate review ... and further, with the expressed agreement that I'd be transferred immediately to the Louisiana Department of Corrections." The letter is dated October 17, but at the hearing he testified both that he did and did not write this letter two days after pleading guilty in DeSoto Parish. Poling pleaded guilty in Madison Parish on November 17, 1981.

Based on the DeSoto Parish proceedings, the magistrate judge found that "Poling had to know that he also had a right to have a lawyer appointed to represent him on the two simple burglary charges that he faced in Madison Parish, and ... that an appointed attorney might be able to negotiate a plea agreement for Poling in Madison Parish." Considering also the Miranda waiver Poling signed, his letter to the district attorney, and his response to Judge Ragland when she asked who was representing him, the magistrate judge found that Poling voluntarily waived his right to court-appointed counsel.

The magistrate judge found further that Poling knowingly and intelligently made the tacit or implied waiver. Based on Poling's experiences in the DeSoto Parish court, the magistrate judge found that "Poling knew the nature of the charges in Madison Parish, the consequences of the proceedings in Madison Parish, and the meaning of the right to appointed counsel that he was waiving in Madison Parish." This finding is supported by the transcript of the DeSoto

Parish plea proceedings. The magistrate judge found further that Poling's Madison Parish pleas were not coerced by Madison Parish jail conditions, considering that he expressed his intention to plead guilty the day after he arrived there. This finding is supported by the letter dated October 17, 1981, which Poling concededly wrote.

Poling introduced medical and psychiatric documents to the effect that he had episodes of depression prior to November 1981, and that while in a Texas prison in 1976 he either tried to kill himself or feigned such an attempt. At the hearing, Poling testified that in 1981 he tried to commit suicide by attempting to drive his vehicle into a trailer truck, but that he missed the truck and ran off the side of the road. Upon investigating that accident, Mississippi authorities learned that he was wanted in DeSoto Parish for burglary. Poling also introduced evidence of a March 1966 study done at the Medical Center for Federal Prisoners, which stated that his I.Q. was only 66, that he was mentally deficient, and that he was subject to seizures and antisocial acting out. The magistrate judge found this evidence too stale to be of any probative value, since it related to Poling's mental condition more than 15 years before his Madison Parish court appearance. The magistrate judge concluded that Poling had failed to prove that in November 1981 he was suffering from any psychiatric or psychological problems that would have caused him to be unaware of his rights.

Poling filed objections to the report, pro se and through counsel. The district court, adopting the magistrate judge's report, denied habeas relief to Poling. The district court also denied CPC.

In Poling's previous appeal, we held that "if it be shown that [Poling was] aware of the constitutional right [to appointment of counsel] it is not necessary that there be an open court recital of the right. The relevant inquiry is whether [he] knew of the right and knowingly and intelligently waived it." Slip op. 5-6 (citation omitted). This holding is in accord with the rule that a petitioner who was not informed of his Boykin rights when he pleaded guilty is not entitled to federal habeas relief if evidence at a postconviction hearing shows that in fact he knew his rights. See McChesney v. Henderson, 482 F.2d 1101, 1107-09 (5th Cir. 1973), cert. denied, 414 U.S. 1146 (1974).

Poling contends that the district court's findings that he knowingly, intelligently, and voluntarily waived counsel relative to his 1981 Madison Parish prosecution are clearly erroneous. He concedes, however, that the DeSoto Parish judge told him that he could have a lawyer to represent him and that the judge appointed Attorney Sledge at Poling's request. Poling also agrees that he testified at the magistrate judge's recent hearing that Mr. Sledge negotiated a plea for him whereby he would not be charged as a multiple offender and he would be transported to Angola as soon as possible.

This evidence, Poling's signed Miranda waiver, his letter to the Madison Parish District Attorney, and his participation in both the Madison Parish and DeSoto Parish proceedings amply support the district court's findings that he voluntarily and understandingly waived the appointment of counsel relative to his Madison Parish prosecution. The transcripts of both 1981 proceedings show that at those times he was in full possession of his faculties and of at least average intelligence, whatever his condition may have been in 1966. By proceeding pro se and waiving a presentence investigation, he avoided being sentenced as a multiple offender. The court also allowed Poling's sentence to run concurrently with his DeSoto Parish sentence, apparently pursuant to an agreement he had negotiated. In short, the record fully supports that Poling has suffered no constitutional deprivation. The judgment of the district court is therefore

A F F I R M E D.