

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 92-4418  
Summary Calendar

---

HARRY JUNIUS GRANGER  
and  
DAVID LYNN ALEXANDER,

Petitioners-Appellants,

VERSUS

JOHN P. WHITLEY,  
Warden, Louisiana State Penitentiary

Respondent-Appellee.

---

Appeal from the United States District Court  
for the Western District of Louisiana  
CA 91 0748

---

May 13, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Harry Granger and David Alexander appeal the denial of their state prisoner's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Finding no error, we affirm.

---

\* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Louis Gladu, the owner of Hasty Mart convenience store, was shot to death at the store on March 30, 1976. Alexander and Granger were indicted, along with John Collins, Herbert Derouen, and Rene Jackson, for first degree murder; the five men and Ronald Miller were indicted for armed robbery. Alexander and Granger were found guilty. State v. Alexander, 351 So. 2d 505, 507 (La. 1977). In affirming these convictions, the court gave the following synopsis of the shooting.

Following a pre-arranged plan, the defendants and four accomplices drove in separate cars to the Hasty Mart, a convenience store, for the purpose of robbery. All six entered but separated in the store. The owner, Louis Gladu, came from behind the counter and spoke with Alexander. Alexander pulled a gun from his waistband and shot Mr. Gladu. As he fell, Alexander shot him again. Before leaving the store they rifled the cash register.

Id. at 507. This evidence came largely from the testimony of Derouen, one of the original indictees, who was promised immunity from prosecution for his testimony.

Another key witness for the prosecution was Mary Arceneaux, who testified that she was with the six men at the robbery of the Hasty Mart and had been with them when they planned the robbery. Arceneaux testified that after the robbery, Alexander and Granger ran back to their car and that Alexander had a handgun and blood on his hand. According to Arceneaux, Alexander removed his T-shirt, wrapped the gun in it, and placed it on the floor of the car. As the three fled, the car's tailpipe began to drag on the ground, at which time Granger tied it in place with a coat hanger. A

photograph of the rear end of Alexander's car (showing the tailpipe and some type of dangling cord) was introduced into evidence.

After exhausting state habeas remedies, Granger and Alexander filed the instant petition in federal court. The magistrate judge issued his report and recommended that habeas relief be denied; the district court adopted the magistrate judge's report, added additional reasons of its own, and ordered that habeas relief be denied. The district court denied Alexander and Granger a certificate of probable cause (CPC); this court has granted CPC.

## II.

Alexander and Granger raise eight separate issues for appeal but inexplicably waive argument on six of them. The two remaining claims are that Alexander and Granger were denied their due process rights because there was insufficient evidence to convict because key testimony from two witnesses was later recanted and that the prosecution knowingly used the allegedly false testimony. While the argument supporting the first claim is couched in terms of Jackson v. Virginia, 443 U.S. 307 (1979), the argument made on appeal is not that the jury was not presented sufficient evidence to convict but that the evidence presented was false.

This is not a case simply of an allegation of perjury, but, as the magistrate judge noted, both Arceneaux and Derouen signed affidavits recanting their trial testimony and claiming they had been persuaded to lie by employees of the Iberia Parish Sheriff's Department. On appeal, Alexander and Granger have asserted their

innocence. It is implicit in their argument that a jury would not have found them guilty beyond a reasonable doubt without the recanted testimony of those two key witnesses.

In addressing the merits of the perjury claim, the magistrate judge concluded that Alexander and Granger had been given a full and fair hearing on the issue and that the finding of the state trial judge, that Derouen and Arceneaux had been telling the truth at the time of trial, was to be accorded a presumption of correctness which had not been rebutted. Section 2254(d) provides for the presumption of the correctness of state court factual findings but provides for eight circumstances in which the presumption will not be made; among them is whether "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing."

The state court gave petitioners a full and fair hearing, though its determination was based upon "affidavits, depositions and pleadings submitted by the parties." See Buxton v. Lynaugh, 879 F.2d 140, 142-47 (5th Cir. 1989), cert. denied, 497 U.S. 1032 (1990). Buxton stands firmly for the proposition that a full and fair hearing may be accomplished without live testimony. As in Buxton, the trial court made the factual determination in question and provided specific written reasons for that determination.

In May v. Collins, 955 F.2d 299 (5th Cir.), cert. denied, 112 S. Ct. 1925 (1992), we dealt with essentially the same issues and relevant fact pattern as in the case sub judice. In May, two important witnesses at trial recanted their testimony in affidavits

stating that prosecutors knowingly had coerced them into testifying falsely at trial. Without conducting a hearing, the state trial judge found the affidavits of the two witnesses unworthy of belief. We found that the procedures used constituted a full and fair hearing:

The level of insulation the law grants to a skeptical trial judge's assessment of recanting affidavits reflects the notion that trial judges are in the best position to compare a witness's earlier testimony with his new version of the facts. Thus, concerns about the inadequacy of a "trial by affidavit" are even more diminished in the context of a factual dispute rooted in witnesses' claims that they perjured themselves at trial.

Id. at 314-15 (footnote omitted).

This is the same situation that exists with respect to the trial court's factual finding that Derouen's and Arceneaux's recantations were not credible. As a result, these findings are entitled to the presumption of correctness, as held by the district court. These factual findings defeat both the claim that Alexander and Granger were convicted based upon false testimony and the claim that the prosecution knowingly used false testimony. See May, 955 F.2d at 315. Accordingly, the district court's judgment denying habeas relief is AFFIRMED.