

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4429
(Summary Calendar)

THOMAS J. HOLLY,

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
(89-CV-101)

(November 4, 1993)

Before SMITH, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Petitioner-Appellant Thomas J. Holly, a state prisoner in Texas, appeals the district court's denial of federal habeas corpus relief under 28 U.S.C. § 2254. Holly asserts as grounds for relief

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

ineffective assistance of counsel and suppression of exculpatory Brady evidence. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

In May 1985, Holly pleaded guilty to murder in Polk County, Texas. His plea was accepted and he was sentenced pursuant to the prosecutor's recommendation to thirty-five years in prison. Holly did not appeal the conviction but later filed a petition for a state writ of habeas corpus. The trial court held an evidentiary hearing on Holly's ineffective assistance of counsel claim after which the trial court entered findings of fact and conclusions of law, and denied the petition. The Texas Court of Criminal Appeals denied the petition without written order, based on the findings of the trial court.

Holly then filed the instant petition seeking federal habeas corpus relief. The petition was referred to a magistrate judge who recommended denying the petition. The district court overruled Holly's written objections, then denied the petition, but granted Holly a certificate of probable cause to appeal the denial.

II

ANALYSIS

A. Ineffective Assistance of Counsel

To demonstrate ineffectiveness of trial counsel, a petitioner must establish that counsel's performance fell below an objective standard of reasonable competence and that the petitioner was prejudiced by his counsel's deficient performance. Lockhart v.

Fretwell, _____ U.S. _____, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993). Judicial scrutiny of counsel's performance must be highly deferential, and courts must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Holly argues that the performance of his attorney (trial counsel) was constitutionally deficient for his failure properly to investigate the facts surrounding Holly's case and to advise Holly of any of the laws applicable to his case. When arguing that counsel was constitutionally ineffective for failing to investigate, a petitioner must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case. See United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989). Holly alleges that his appointed counsel made no mention of the law of self-defense, failed to explain the state's burden of proof and, in particular, failed to investigate the background of the victim through interviews with witnesses who knew of the victim's criminal record, propensity for violence, and death threats he had made against Holly. Such an investigation, argues Holly, would have raised the possibility of asserting a self-defense argument.

As the Supreme Court noted in Strickland, "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgment."

Strickland, 466 U.S. at 691. Trial counsel testified at the evidentiary hearing that he did not investigate beyond his review of the prosecution's evidence -- which included Holly's statement, Holly's common-law wife's statement, the offense report, and the investigatory report -- because Holly made it clear from the outset that he wanted to plead guilty if trial counsel could arrange certain conditions. Also, trial counsel's preliminary assessment was that Holly probably could not sustain a self-defense argument under Texas law because he had killed the victim by firing a second shot into the back of his head.

The record does reflect that trial counsel did not simply "abdicate[] his responsibility to advocate his client's cause," Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (citation omitted). Moreover, the very facts that Holly claims his counsel was deficient for failing to discover via an adequate investigation -- the victim's criminal history, propensity for violence, and death threats against Holly -- were known to Holly at the time he was in prison attempting to negotiate a plea bargain. Yet there is no evidence that he imparted any of this information to trial counsel during their discussions about his case.

Holly's awareness of the basic proposition that he could legally defend himself if someone was trying to kill him, and his own failure to inform trial counsel of the facts known about the victim are significant. Although that does not conclusively establish the reasonableness of trial counsel's conduct, it weighs in favor of a finding that the level of representation was not

constitutionally insufficient. See, e.g., Johnson v. Cabana, 805 F.2d 579, 581 (5th Cir. 1986) ("`Counsel's actions are usually based, quite properly, . . . on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.'" (quoting Strickland, 466 U.S. 668, 691)).

On the other hand, even though trial counsel's testimony does reveal that he believed that a self-defense argument did not appear promising, his sole reason for not investigating any such claim was that Holly wanted to plead guilty. Trial counsel testified that he would have investigated the possibility of arguing such a defense if the case had gone to trial. When counsel's failure to investigate results from an omission, and not from a tactical decision, courts are less likely to find such representation reasonable under Strickland. See, e.g., Cook v. Lynaugh, 821 F.2d 1072, 1078-79 (5th Cir. 1987) (ineffective assistance found where failure to investigate was not a strategic decision).

When, as here, the deficiency (or lack thereof) of counsel's performance cannot be determined with reasonable certainty, we examine the second, or prejudice, prong of the Strickland test. See, e.g., Martin v. McCotter, 796 F.2d 813, 819 (5th Cir. 1986), cert. denied, 479 U.S. 1057 (1987).

Even when we assume, arguendo, that trial counsel's performance fell short of constitutional standards, we conclude that Holly has failed to sustain his burden of establishing the requisite prejudice resulting from his counsel's allegedly

deficient performance. Under the prejudice prong of Strickland, in the context of a guilty plea, the petitioner must establish a "reasonable probability" that, but for his counsel's errors, he would not have pleaded guilty and would have insisted upon going to trial. Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993). Moreover, when the alleged error is counsel's failure to advise of an affirmative defense, "the outcome of the prejudice element of the test will depend largely on whether the affirmative defense likely would have succeeded at trial." Id. (internal quotations and citation omitted).

Holly does make the allegation on appeal that he would not have entered the guilty plea if trial counsel had conducted the appropriate investigation and properly advised Holly regarding the law of self-defense. He did not, however, make this assertion at the state evidentiary hearing. Rather, Holly testified at the hearing that the plea was not coerced and that he entered into the plea so his "girlfriend could get out of jail[.]" The testimony of both Holly and trial counsel strongly indicates that Holly, using the jail captain as an intermediary, was more involved than trial counsel in the plea negotiation process.

The record also reveals that Holly was able to negotiate a favorable deal with the prosecution: Holly's sentencing exposure was limited to thirty-five years even though he was charged with first-degree murder and, based on his prior criminal record, could have received up to 99 years in prison if convicted. The prosecution also arranged for a pending burglary count against

Holly and his wife to be dropped. Even though Holly now insists that he would have gone to trial had trial counsel properly investigated the facts, the record of the state evidentiary hearing clearly belies this assertion.

Moreover, Holly has not demonstrated that the affirmative defense of self-defense would have been likely to succeed at trial. Nelson, 989 F.2d at 850. Under Texas law, the use of deadly force to protect oneself is permitted if it is based upon a reasonable belief that such force is necessary to prevent the use or attempted use of unlawful deadly force by another, and if a reasonable person in the defendant's situation would not have retreated. TEX. PEN. CODE ANN. §§ 9.31, 9.32(2) (West 1974); Sternlight v. State, 540 S.W.2d 704, 705-06 (Tex. 1976); see also Lerma v. State, 807 S.W.2d 599, 601 (Tex. Ct. App. 1991).

Texas law also provides that the reasonableness of a defendant's action in shooting first is a factual finding for the jury. Likewise, under the retreat rule the justification of defendant's action in continuing to shoot is also subject to the jury's determination. See Sternlight, 540 S.W.2d at 706; see also Alvarado v. State, 821 S.W.2d 369, 373 (Tex. Ct. App. 1991). The victim's prior record, propensity for violence, and threats against Holly, in addition to the circumstances surrounding the victim's death -- the two men were struggling for the victim's gun when he was shot by Holly the first time -- could raise the possibility that Holly was acting in self-defense when he shot the victim the first time. See Kolliner v. State, 516 S.W.2d 671, 673-74

(Tex. 1974). The reasonableness of Holly's actions in continuing to shoot, however, is seriously called into question by the fact that Holly fired his second shot directly into the back of McCarney's head.

As Holly has not demonstrated that a self-defense argument "likely would have succeeded at trial," Nelson, 989 F.2d at 850, he has not established the requisite prejudice under Strickland. We therefore affirm the district court's rejection of Holly's ineffective assistance claim.

B. Suppression of Exculpatory Evidence

Holly also contends that the prosecution suppressed exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In order to prevail on a Brady claim, Holly must prove that the evidence in question (1) was suppressed, (2) was favorable to him, and (3) was material either to guilt or punishment. United States v. Ellender, 947 F.2d 748, 756 (5th Cir. 1991). Holly contends that the prosecution suppressed evidence of the victim's criminal record and reputation for aggressiveness. Holly's argument fails on the first factor: There is no evidence that the prosecution suppressed possibly exculpatory material in violation of Brady.

The state trial court reached this conclusion following the evidentiary hearing. The evidence from the hearing supports the finding that trial counsel was given access to the prosecution's files. Moreover, as noted previously, Holly was aware of all of the facts that he now claims the prosecution suppressed -- evidence

of the victim's criminal record and reputation for violence. Awareness of the information purportedly suppressed neutralizes any otherwise impropriety for purposes of a Brady claim implicating evidence of that information. After all, this is the very same evidence which formed the basis of Holly's contention that his counsel was ineffective for failing to investigate. As with that claim, we affirm the district court's denial of Holly's Brady argument.

For the foregoing reasons, the district court's denial of Holly's petition for a writ of habeas corpus is
AFFIRMED.