

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4725
Summary Calendar

KELLY MACK LAMBETH,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(CA6-89-371)

(January 19, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Kelly Mack Lambeth appeals from the district court's denial of his petition for a writ of habeas corpus. We **AFFIRM**.

I.

During jury selection in his trial for capital murder, Lambeth entered into plea negotiations. He pleaded guilty to murder and,

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.

in October 1987, was sentenced to a term of imprisonment of fifty years. He did not appeal.

In his first state habeas application in April 1988, Lambeth asserted that the prosecution violated the plea agreement by obtaining an affirmative finding from the trial court that a deadly weapon was used in the commission of the murder. But, the state trial court found that the prosecution and the defense had agreed, as part of the plea bargain, that there would be such a finding. The Texas Court of Criminal Appeals denied the application without written order.

In his second state application in November 1988, Lambeth contended, among other grounds, that his guilty plea was involuntary and that he had ineffective assistance of counsel. The trial court found that the application did not present any controverted, previously unresolved facts material to the legality of Lambeth's confinement. The Texas Court of Criminal Appeals denied relief without written order, based on the findings of the trial court.

Lambeth then filed a petition for a writ of habeas corpus in federal court in June 1989, raising the same grounds raised in his second state application. In support of its motion for summary judgment, the State submitted the affidavit of Lambeth's defense counsel, who stated that he advised Lambeth that the deadly weapon finding would require Lambeth to serve one-third of his sentence prior to becoming eligible for parole and that the finding was part of the plea agreement.

The district court in October 1991 adopted the magistrate judge's recommendation that the petition be dismissed, but granted Lambeth's request for a certificate of probable cause to appeal.²

II.

Lambeth seeks relief on two bases: that his plea was involuntary and that he had ineffective assistance of counsel. Needless to say, we review state prisoner habeas applications only for violations of the "Constitution or laws or treaties of the United States". 28 U.S.C. § 2254(a).

A.

Lambeth contends that his plea was involuntary, because he did not understand the parole consequences of the deadly weapon affirmative finding.³ He contends that, instead, he "understood" that a fifty-year "non-aggravated" sentence was being imposed. Under Texas law in effect at the time Lambeth committed the murder, the deadly weapon finding rendered a defendant ineligible for

² The State contends that Lambeth has abandoned his claims, because he failed to include any issues in his request for CPC. However, the cases cited by the State, **Anderson v. Butler**, 886 F.2d 111 (5th Cir. 1989), and **Beasley v. McCotter**, 798 F.2d 116 (5th Cir. 1986), *cert. denied*, 479 U.S. 1039 (1987), involved denial of CPC requests by the district court, and the petitioners had requested CPC from this court. **Anderson**, 886 F.2d at 112-13; **Beasley**, 798 F.2d at 118. Under those circumstances, a petitioner "must assert in his [CPC] motion to this Court ... all issues which he desires to present on appeal." **Beasley**, 798 F.2d at 118 (internal quotation and citation omitted). Because Lambeth obtained a CPC from the district court, which was quite familiar with the issues, he was not required to seek CPC from this court. See 28 U.S.C. § 2253; Fed. R. App. P. 22(b). Therefore, the cases cited by the State are inapplicable.

³ In his reply brief, he concedes he was given notice that the State would seek the finding.

parole until he had served the lesser of one-third of his sentence or 20 calendar years. See **Smith v. State**, 774 S.W.2d 280, 283 (Tex. App. 1989).

"The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant". **Hill v. Lockhart**, 474 U.S. 52, 56 (1985) (internal quotation and citation omitted). The United States Constitution does not require "the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary". *Id.*; see also **Czere v. Butler**, 833 F.2d 59, 63 (5th Cir. 1987). Therefore, Lambeth's plea was not rendered involuntary because he was not specifically advised by the court or the State with respect to his parole eligibility in light of the affirmative finding.

Nor is Lambeth's plea involuntary because he "understood" that a "non-aggravated" sentence was being imposed.⁴ "An accused's mere 'understanding' that he will have to serve a lesser sentence ... will not invalidate a guilty plea." **Smith v. McCotter**, 786 F.2d 697, 701 (5th Cir. 1986).

⁴ Lambeth argues for the first time on appeal that he specifically advised his counsel that he would be willing to plead guilty only to a non-aggravated fifty-year term. Because this argument was not raised in the district court, it is not subject to review on appeal. **United States v. Smith**, 915 F.2d 959, 963, 964 (5th Cir. 1990)

B.

Lambeth asserts that he was denied effective assistance of counsel because his counsel did not advise him that his sentence would be "enhanced" as a result of the affirmative finding. He maintains that he would not have pleaded guilty if he had known that the plea would postpone parole eligibility.

"[T]he two-part *Strickland v. Washington* [, 466 U.S. 668 (1984)] test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill*, 474 U.S. at 58. Accordingly, Lambeth must show that (1) "counsel's representation fell below an objective standard of reasonableness", *id.* at 57; and (2) "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial". *Id.* at 59.

Our court has expressed doubt that the Sixth Amendment imposes on counsel an affirmative obligation to inform clients of the parole consequences of their pleas, but has not decided the issue. See *Czere*, 833 F.2d at 63 n.6.⁵ We need not decide whether counsel's performance was deficient, because Lambeth has failed to demonstrate prejudice.⁶

⁵ *But cf. Carter v. Collins*, 918 F.2d 1198, 1201, 1203 (5th Cir. 1990) (affirming conclusion that counsel's representation was not deficient because counsel had given accurate advice regarding parole eligibility).

⁶ We note, however, that trial counsel stated in his affidavit that he advised Lambeth of the effect a deadly weapon finding would have on parole eligibility.

Lambeth asserted in his habeas application that he pleaded guilty based on his understanding that he would be eligible for parole within six years of the 1987 proceeding. However, at the guilty plea hearing, Lambeth acknowledged that he was not eligible for parole until the year 2000 with respect to his previous convictions, and further indicated his awareness that the federal government might detain him after that date. Lambeth also acknowledged at the hearing that, as a result of the plea, additional time would be added to his sentence, and that counsel did not promise him that he would be released on a specific date.

"Ordinarily a defendant will not be heard to refute his testimony given under oath when pleading guilty." ***United States v. Fuller***, 769 F.2d 1095, 1099 (5th Cir. 1985) (citations omitted). At the time he entered his plea, Lambeth was aware that he would not be eligible for parole for at least 13 years. He chose to plead guilty to murder, rather than face a possible capital murder conviction, knowing that the State's evidence included his written confession to the murder.⁷ Lambeth has not shown a reasonable probability that, had his attorney informed him that he would not be eligible for parole for approximately 17 years, he would not have pleaded guilty.

⁷ In his confession, Lambeth stated that he murdered the victim because he knew that she was going to provide information to law enforcement officers regarding an armed robbery he had committed.

III.

The judgment of the district court is

AFFIRMED.