

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4940
Summary Calendar

TERRY HUGO SALINAS,

Petitioner-Appellant,

VERSUS

WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent-Appellee..

Appeal from the United States District Court
for the Western District of Louisiana
CV 91 2701

April 29, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Terry Salinas appeals the denial of his state prisoner's habeas corpus petition brought pursuant to 28 U.S.C. § 2254. Finding no error, we affirm.

I.

In 1976, Salinas and his co-defendant, Rickey Fisher, were indicted for first degree murder and armed robbery. Salinas was

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 Pursuant to that rule, the court has determined that this opinion should not be published.

implicated in the offense by Fisher after Fisher was arrested on an unrelated burglary charge and found to be in possession of the gun used in the crime underlying the indictments. Fisher told police that Salinas was the triggerman, and the police subsequently arrested him.

After he was arrested, Fisher hired R.V. Burnes¹ as his defense counsel. Burnes offered to represent Salinas at no cost and allegedly told him that it would be best for Salinas and Fisher to be represented by the same counsel. Salinas accepted the offer because he could not afford an attorney.

Initially Salinas and Fisher both pleaded not guilty in the Thirteenth Judicial District Court of Louisiana. Following plea negotiations with the state, Salinas pleaded guilty to second degree murder. In exchange for his plea, the state dropped the armed robbery count. Salinas was sentenced to a mandatory life sentence. Fisher pleaded guilty to manslaughter and the unrelated attempted burglary. He received terms of twenty-one years and fifteen years, respectively, to be served concurrently.

After exhausting state remedies, Salinas filed a writ of habeas corpus in 1991 alleging that he had received ineffective assistance of counsel during plea negotiations and that his guilty plea had not been knowingly and intelligently made. In his report, the magistrate judge recommended denying Salinas's writ. The

¹ The magistrate judge's report and Salinas's brief refer to the attorney as Burns, while the trial transcript and documents signed by the lawyer show that his name is Burnes.

district court adopted the report and recommendation and dismissed Salinas's application.

II.

A.

Salinas argues that the district court erred in dismissing his application for habeas corpus because his counsel's assistance was ineffective and his plea was not knowingly and intelligently made. Salinas asserts that Burnes had a conflict of interest in representing him and Fisher. According to Salinas, Burnes had no intention of taking his case to trial. He contends that Burnes was interested only in negotiating a plea for Salinas that would benefit Fisher.

An examination of Salinas's rearraignment indicates that both he and Burnes were aware of the potential conflict attending Burnes's representation of both defendants. Salinas told the trial court that he was aware that his sentence would result in a life sentence and that his co-defendant was pleading to a lesser grade of homicide that would result in a sentence that was less than life. In response to the court's observation that Fisher was Burnes's paying client and would receive a lesser sentence, Salinas told the court that he believes Burnes had fairly represented him and made an equal effort for both of them. Burnes explained on the record the circumstances under which he represented Salinas. He stated that he told Salinas, the court, and the district attorney that Salinas was pleading to a more serious degree of homicide

because of the facts of the case. Salinas admitted to committing the offense, and the trial court found his plea to be free and voluntary.

A Sixth Amendment violation occurs if the defendant demonstrates "that an actual conflict of interest adversely affected his lawyer's performance." Barrientos v. United States, 668 F.2d 838, 841 (5th Cir. 1982) (quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)). "A potential conflict of interest or one which is merely speculative does not by itself make out a constitutional claim." Id.

Although Salinas asserts that he and Fisher had "antagonistic defenses," there is no suggestion of how they would have affected a trial or how Burnes was able to secure a lesser sentence for Fisher by having Salinas plead to a more serious offense. Further, Salinas admits that he, not Fisher, shot the murder victim. Salinas's suggestion that Fisher was more culpable because he supplied the rifle is ludicrous.

In short, Salinas's allegations are speculative at best. Any potential conflict of interest that existed prior to the plea was extinguished by Salinas's voluntary decision to plead guilty. Barrientos, 668 F.2d at 841. Setting aside the issue of which of them was more culpable, to the extent that Salinas implies that the trial court's sentencing determination was constitutionally infirm because of the disparity between his and Fisher's prison terms, "[a] defendant cannot rely upon his codefendants' sentences as a yard-stick for his own." United States v. Lindell, 881 F.2d 1313,

1324 (5th Cir. 1989), cert. denied, 493 U.S. 1087, 496 U.S. 926 (1990).

Counsel's assistance is ineffective if the defendant can show that his performance was deficient and that this substandard representation prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The Strickland test applies to challenges to guilty pleas based upon ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 58 (1985). There is no indication that Burnes "`actively represented conflicting interests'" or that "`an actual conflict of interest adversely affected . . . [the] lawyer's performance.'" Strickland, 466 U.S. at 692 (quoting Cuyler, 446 U.S. at 350, 348)). Nor is there any suggestion, in light of Salinas's admissions, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

B.

Because Salinas's second argument, that his plea was not knowingly and intelligently made, is premised on his first argument that his counsel's conflict of interest prejudiced his defense, it cannot succeed, for the reasons outlined above.

AFFIRMED.