

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5144

Summary Calendar

IBUKUN'OLUWA WASHINGTON,
Plaintiff-Appellant,
versus
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
6:91 CV 672

(June 17, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

On November 16, 1989, Ibukun'Oluwa Washington was found guilty of possession of a controlled substance, to wit, 28 grams of cocaine, by a Texas jury and sentenced to a term of ten years imprisonment. Washington did not appeal but sought and was denied state habeas relief on two occasions, thereby exhausting state procedures. No trial transcript was prepared.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Washington petitioned for habeas corpus relief in federal district court and the respondent moved for summary judgment. A magistrate judge recommended that the petition be dismissed with prejudice. After a de novo review of the report and the objections, the district court adopted the report and recommendation and denied the petition for relief.

Washington contends the court erroneously denied him the "absolute" right to subpoena a key witness in violation of the Sixth Amendment. He acknowledges that his second motion for a continuance of the trial to permit him to subpoena Michael Hannah, who was arrested at the time of his arrest, was submitted one day prior to trial but he argues that, because he was incarcerated, he could not locate the witness any sooner.

In ruling on Washington's first state petition for habeas relief, the state district court found as a fact that it had denied the motion for continuance and compulsory process because "the petitioner failed to demonstrate due diligence in securing compulsory process on Michael Hannah." The court held, as a conclusion of law, that Washington had not been denied his right of compulsory process because he waited to avail himself of the subpoena powers of the court until the day before trial. The federal district court adopted the magistrate judge's determination that Washington failed to show that the trial court abused its discretion in denying him a continuance of the trial and by denying him the restricted right of compulsory process.

Nearly four months had elapsed, therefore, the state trial court judge's discretion may have been reasonably exercised based on Washington's dilatoriness. Washington was indicted on July 20, 1989; the trial was set for November 15, 1989; and the motion for a continuance and request to subpoena was presented to the court on November 14, 1989. Additionally, although counsel moved for, and was denied, appointment of a specific investigator on September 20, 1989, that same investigator located Hannah's address, as well as those of other potential witnesses, on November 11 through 13, 1989.

The Sixth Amendment right to compulsory process of witnesses is not absolute. A defendant is "entitled to have compulsory process served only on as many witnesses as will assist him in receiving a fair trial under the circumstances of his case. And he must demonstrate to the Court that there is 'some colorable need for the [witnesses] to be summoned.'" Ross v. Estelle, 694 F.2d 1008, 1011 (5th Cir. 1983) (internal citation omitted).

To establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment, the petitioner is required to make some showing that the evidence lost would be both material and favorable to his defense. United States v. Valenzuela-Bernal, 458 U.S. 858, 867-68, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982). Such showing may be made on the basis of stipulated facts and the presentation of a legal argument by the defendant, or by the defendant or his counsel attesting to additional facts "consistent with facts already known to the court

or accompanied by a reasonable explanation for their inconsistency with such facts." Id. at 873. The Sixth Amendment suggests that more than mere absence of testimony is necessary to establish a violation of the right to compulsory process. Id. at 867.

Two factors are considered when determining whether a denial of a continuance in order to secure a witness violated due process, abuse of the court's discretion and prejudice based on a need for the testimony. Schrader v. Whitley, 904 F.2d 282, 288 (5th Cir. 1990).

In his habeas petition, Washington asserts that his attorney had just located the witness, Hannah, who was willing to testify but was in another state. His attorney's motion for a continuance made a written statement that Hannah was the only vital witness for the defense based on his presence at the time of the arrest and his personal knowledge that Washington did not knowingly possess a controlled substance. As Hannah was the driver of the vehicle that was stopped and searched, counsel indicated that he would verify that discovery of the controlled substances evolved several hours after their detention and arrests.

Washington argues that Hannah's testimony was vital to his defense and that he was prejudiced by the lack of his testimony. While the district court's conclusion that "Washington has failed to show to what this witness would have testified," is problematic, the record supports the trial court's discretionary ruling that Washington was dilatory in seeking to locate his witness and undeserving of a continuance.

Washington contests the admission into evidence of a matchbox that contained cocaine on the basis that it was discovered during an illegal search. Washington asserts that after pulling Hannah's vehicle over, police officers conducted two or more warrantless searches of him and Hannah which did not result in the discovery of any controlled substances within the following hour. After they were taken into custody, they were again searched immediately. Washington argues that more time elapsed, he was separated from Hannah, and the officers subsequently discovered some drugs that they stated were hidden in his sock. In his initial petition filed in district court, Washington challenged the search of the vehicle. In subsequent pleadings, he clarified that he was challenging the later search of his person.

The district court held that, as a passenger, Washington had no standing to challenge the search of the vehicle. Also based on Washington's representation that the judge declined to rule on the suppression motion before trial, the district court held that Washington had procedurally defaulted these claims by not obtaining a ruling.

We do not reach these arguments. Stone v. Powell, 428 U.S. 465, 494, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

Washington challenges the sufficiency of the evidence underlying his conviction contending (1) the admission into evidence of the matchbox; (2) the fact that the substance in the matchbox was not documented as a controlled substance; and (3) the

fact that the substance in the matchbox was the only incriminating evidence presented.

"Under Texas law, sufficiency of the evidence claims not raised on direct appeal are procedurally defaulted; they may not be raised in state collateral proceedings." Brown v. Collins, 937 F.2d 175, 178 (5th Cir. 1991). Federal review of the issue is barred unless Washington can demonstrate cause for the default and prejudice from the violation of federal law or that failure to consider the claim will result in a fundamental miscarriage of justice. Coleman v. Thompson, ___ U.S. ___, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991). A fundamental miscarriage of justice is the conviction of one who is actually innocent. Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Washington has presented no cause for the default.

Federal habeas corpus relief is ordinarily unavailable if the last state court to consider the claim expressly and unambiguously based its denial of relief on a state procedural bar. Young v. Herring, 938 F.2d 543, 546 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 1485 (1992). Washington asserted a sufficiency of the evidence challenge in his first state petition. The state district court ruled that Washington was barred from collaterally attacking the sufficiency of the evidence. The Court of Criminal Appeals adopted that reasoning. Therefore, he is barred from raising a sufficiency challenge in federal court. Young v. Herring, 938 F.2d at 546.

Washington maintains that there is no procedural bar because his claim that the state relied on a substance that was not tested and proved as cocaine is exculpatory and renders his conviction a miscarriage of justice. This amounts to arguing that a challenge to the sufficiency is not waived if the evidence is in fact insufficient.

AFFIRMED.