

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7544
Summary Calendar

BOBBY LEONARD ORTEGA,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
Texas Department of Criminal
Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Texas
(M-91-CA-212)

(July 29, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

GARWOOD, Circuit Judge:

Petitioner-appellant Bobby Leonard Ortega, alias Leonard Perez Ortega (Ortega), an inmate in the Texas state prison system, appeals the district court's denial of his petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. Ortega challenges his state conviction for burglary of a habitation on grounds of

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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 double jeopardy; he complains that the district court should have granted him an evidentiary hearing on his Sixth Amendment claim, as well as a claim that his conviction stemmed from an illegal search, seizure, and arrest. We affirm.

State Conviction Proceedings

On August 12, 1986, Ortega and a co-defendant entered the residence of Margarita Gonzales, without her consent, and stole approximately \$1,400 cash, jewelry, and a truck. Stemming from this offense, Ortega was charged in two separate indictments with (1) burglary of the habitation of Margarita Gonzales (Cause No. CR-035-87-E); and (2) aggravated robbery (Cause No. CR-029-87-E). He was charged in a third indictment with two counts arising from a separate burglary: (a) burglary of the residence of Alicia Parlatto in August 1986, and (b) appropriation of stolen property from the Parlatto burglary in December 1986 (Cause No. CR-023-87-E). Although he originally requested separate trials on each of the three indictments, Ortega later changed his mind and consented to a consolidated bench trial, of all three indictments, before the state trial court, the Honorable Hector J. Villarreal.

The state trial court acquitted Ortega of the aggravated robbery charge, as well as of the burglary of the Parlatto residence. The court convicted Ortega of the burglary of the Gonzales residence, the conviction underlying this present action. Finally, Ortega pleaded guilty to the appropriation of stolen property charge. Based on a prior conviction, the court sentenced Ortega as a repeat offender to ninety years' imprisonment on the

Gonzales residence burglary charge, to run concurrently with a ten-year sentence on the appropriation of stolen property charge.

Ortega appealed his burglary conviction and sentence to the Texas Court of Appeals for the Thirteenth Judicial District. In *Ortega v. State*, No. 13-87-260-CR (unpublished), that court reversed for reassessment of his sentence, holding that the trial court had erred in sentencing Ortega as a repeat offender because of a lack of proof of the finality of the prior conviction used for enhancement. The court also found fault with the trial court's affirmative finding that Ortega's offense involved a deadly weapon, as the use of a gun had not been charged in the indictment. On remand, the trial court¹ resentenced Ortega to sixty years' imprisonment; the court made no finding of the use of a deadly weapon. On May 4, 1989, the state court of appeals affirmed Ortega's sentence.² *Ortega v. State*, No. 13-88-533-CR (unpublished). Thereafter, the Texas Court of Criminal Appeals denied his petition for discretionary review in October 1989.

Habeas Corpus Proceedings

In his only state writ of habeas corpus, Ortega challenged his burglary conviction on grounds of, *inter alia*, violation of his Fourth Amendment rights to be free from warrantless arrests and

¹ In the interim between his first sentencing and the remand from the appellate court, Judge Villarreal had resigned. Judge Robert F. Barnes presided over Ortega's second sentencing hearing.

² On petition for discretionary review, the state Court of Appeals later issued an unpublished opinion correcting an erroneous statement that Ortega's sentence had been ordered to run consecutively to a sentence imposed on a federal conviction. *Ortega v. State*, No. 13-88-533-CR.

searches, double jeopardy, improper consolidation of his three indictments, and ineffective assistance of counsel. At the request of the state trial court, Ortega's original trial counsel, Juan Manuel Ramirez (Ramirez), filed an affidavit with the court responding to Ortega's Sixth Amendment claim. Ortega's state habeas petition was denied by the Court of Criminal Appeals on the findings of the state trial court on June 12, 1991.³ *Ex parte Ortega*, No. 22,427-01.

Ortega followed with the instant petition for habeas relief in the United States District Court for the Southern District of Texas; he again raised issues of unconstitutional search and seizure, double jeopardy, and ineffective assistance of counsel. The district court, accepting the report and recommendation of the magistrate judge, denied relief and dismissed his petition on July 22, 1992. The district court granted a certificate of probable cause and allowed Ortega to proceed *in forma pauperis*.

Discussion

Ortega pursues only two claims in this appeal: the failure of the district court to grant him an evidentiary hearing on his Fourth and Sixth Amendment claims, and the alleged violation of his right to be free from double jeopardy.

I. Evidentiary Hearing

Ortega complains that the district court erred in not granting an evidentiary hearing to resolve factual issues pertaining to his search and seizure and ineffective assistance of counsel claims.

³ Judge Juan R. Partida was the state trial judge who ruled on Ortega's habeas petition.

"In order to be entitled to an evidentiary hearing before the district court, a habeas petitioner must allege facts which, if proved, would entitle him to relief." *Taylor v. Maggio*, 727 F.2d 341, 347 (5th Cir. 1984). Ortega is not entitled to a hearing "if his claims are merely "`conclusory allegations unsupported by specifics' or `contentions that in the face of the record are wholly incredible.'" *Young v. Herring*, 938 F.2d 543, 560 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1485 (1992) (quoting *Blackledge v. Allison*, 97 S.Ct. 1621, 1629 (1977)).

A. *Sixth Amendment Claims*

Ortega raises a variety of complaints against his state trial counsel, including that Ramirez (1) failed to conduct an independent investigation of the case; (2) did not interview witnesses prior to trial; (3) did not adequately present the criminal history of the victims, the Gonzales family; (4) did not challenge the consolidation of the three indictments; and (5) failed to call the maid of the Gonzales family to testify.⁴

The Supreme Court established a two-part test to evaluate claims of ineffective assistance of counsel in *Strickland v. Washington*, 104 S.Ct. 2052, 2064 (1984). In order to establish such a claim, a defendant must meet both prongs of this test. First, the defendant must show that his counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment." *Id.* A lawyer's

⁴ Ortega was represented by Joseph A. Connors, III, for his state appeals. He pursues habeas relief *pro se*.

representation is deficient only if it falls below an objective standard of reasonableness, measured under prevailing professional norms. *Id.* at 2064, 2065.

Second, the defendant must show that his defense was prejudiced by the deficient performance. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 2064. In order to establish prejudice, he must show that there is a reasonable probability that a different result would have occurred but for the deficient representation. *Id.* at 2068. In assessing counsel's decisions, we must afford his performance a high degree of deference. *Id.* at 2065.

In this habeas corpus proceeding, the burden of proof is upon Ortega to demonstrate ineffectiveness by a preponderance of the evidence. *Martin v. Maggio*, 711 F.2d 1273, 1279 (5th Cir. 1983), *cert. denied*, 105 S.Ct. 447 (1984).

Ortega complains that his counsel improperly moved to consolidate the three indictments for a single trial. At the pretrial conference, before Ortega was present in court, Ramirez moved to consolidate two of the three cases for trial.⁵ The State did not object, and the court agreed to consolidate all three cases. Following a recess to have Ortega brought to court, the proceedings continued. Ramirez stated that he had conferred with Ortega about the consolidation, and explained to him the

⁵ Ramirez did not seek to consolidate the indictment stemming from the burglary of the Parlato residence and the subsequent appropriation of stolen property, as it arose from a different transaction.

consequences of trying each case separately.⁶ Ortega indicated that he did not want to consolidate the cases for trial, and that he would exercise his right to a jury trial. The court rescinded its earlier ruling consolidating the cases.

The court questioned Ortega concerning his wishes:

"Q. (By the Court) Mr. Ortega, I am not going to go into any of the facts of any of these cases, sir. You have been present in the courtroom while your attorney, your Court appointed attorney, has made these representations to the Court. Is it your desire to try these cases individually?

"A. Yes, sir.

"Q. Do you understand the consequences of that, if you were to be found guilty, sir?

"A. I do, sir.

"Q. Okay. Do you make this election, in spite of the fact that the motion was made previous to this, freely, and voluntarily?

"A. I didn't understand that, sir.

"Q. Do you choose to try these cases individually of your own free will?

"A. Yes, sir."

The court explained to Ortega the possible sentences on each charge and the consequences of proceeding individually on the three indictments. The court then asked him whether he would elect to go to a jury or to the court for the punishment phase of the case.

⁶ Texas law provides that where a defendant is convicted in a single trial of multiple offenses arising from the same criminal episode, the sentences must be concurrent. TEX. PENAL CODE ANN. § 3.03 (Vernon 1974). If, however, the defendant exercises his right to sever the offenses for trial, the provisions of section 3.03 do not apply, and the sentencing court, in its discretion, may order the sentences to run concurrently or consecutively. *Id.*, § 3.04.

Ramirez requested a moment to confer with Ortega, and then informed the court that his client not only wished the court to assess his punishment, but also to assess his guilt or innocence of the charges in the indictments. The court questioned Ortega to clarify his intentions, and to explain to him the consequences of waiving his right to a jury. Ortega then changed his mind about consolidation:

"Q. (By the Court) . . . From the representations you've just made to me, sir, it is my understanding that you wish to waive a jury, is that correct?

"A. Yes, sir.

"Q. All right. And you still wish to try these cases individually, is that correct?

"A. Yes, sir. Your Honor, I will take them altogether, [sic] at the same time.

"THE COURT: Well, you can't have it both ways, Mr. Ortega. You want them together, or you don't want them together. Either you want a jury or you don't want a jury. I have a great amount of patience, but even my patience has limits.

"THE DEFENDANT: Okay. I want all cases tried together. I will waive the jury."

After lengthy questioning by the state trial court regarding Ortega's waiver of a jury trial for each of the three indictments, the court continued:

"Q. (By the Court) Now, further, sir, even though you have no legal right to a consolidation of these three cases, is that what you are asking at this time, that all three case [sic] be tried at the same time?

"A. Yes, sir.

"THE COURT: Any opposition from the State?

"MS. ARISPE: Your Honor, the State would not oppose the consolidation, at this time.

"THE COURT: The Court will grant your motion, Mr. Ramirez, based on representations of your client to consolidate these cases."

Other than conferring with Ortega and explaining to the court Ortega's desire to waive a jury trial, Ramirez did not participate in these discussions with the court. He allowed Ortega to explain to the court, in his own words, what he wanted to do about his right to a jury trial. It was in this explanation, and during the subsequent conversation with the court, that Ortega expressed his desire to consolidate the cases. It was thus Ortega himself, not Ramirez, who ultimately requested and received a consolidated trial.

Furthermore, Ortega cannot show that any prejudice resulted from the consolidation of the three indictments for trial. Although he was convicted of the Gonzales burglary, he was acquitted both of the aggravated robbery charge arising from the Gonzales burglary and of the burglary of the Parlatto residence. He voluntarily pleaded guilty to the appropriation of stolen property charge.

Ortega also claims that his defense attorney should have called the Gonzales's maid, Rita Olguin, to testify on his behalf. He alleges that it was Rita who let him into the Gonzales residence, on the belief that he was a friend of the family. Ortega offers no evidence of the substance of the potential testimony, although presumably he is alleging that she would testify that he had her consent to enter the Gonzales residence and therefore did not commit the offense of burglary, as he did not enter without consent. Ortega does not explain why an employee of

the Gonzales family would testify on his behalf. We must presume that defense counsel's failure to call the maid as a witness was a strategic decision.⁷ *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984); *Taylor v. Maggio*, 727 F.2d at 347 ("the failure to present a particular line of argument or evidence is presumed to have been the result of strategic choice").

Ortega does not appear to have raised this issue before the state courts, either during his trial and subsequent appeals or as part of his state habeas proceeding. He did not raise it below until his objections to the magistrate judge's report. Even had Ortega raised this argument earlier, failure to call the maid as a witness does not render his conviction invalid. The Texas burglary statute makes it an offense to enter a habitation "without the effective consent of the owner." TEX. PENAL CODE ANN. § 30.02(a) (emphasis added). Although the maid may have consented to his entry, she was not the owner of the house. In addition, Ortega gained entry under the false pretense that he was a friend of the family; such consent is not "effective."

Finally, Ortega claims that Ramirez rendered ineffective assistance because he failed to challenge Ortega's warrantless arrest and search and seizure. The state habeas judge found, upon a review of the state trial record, that "[Ortega's] warrantless arrest was entirely proper, since he committed the offense of unlawfully carrying a weapon within the peace officers' view." The

⁷ Indeed, Ortega refers in his reply brief before this Court to the loyalty of the maid to the family. His counsel may well have decided against calling the maid as a witness on the assumption that she would not testify favorably for Ortega.

court further found that the warrantless search of Ortega's trailer was proper because the law enforcement officers obtained Ortega's consent. We can discern no failure in Ramirez's performance at trial where Ortega does not allege any basis upon which his trial counsel could have challenged either the search or the arrest. *Taylor v. Maggio*, 727 F.2d at 348. The district court need not have granted an evidentiary hearing on this claim, as the state record is adequate to dispose of the issue.

Ortega's other claims of ineffective assistance of counsel are conclusory and likewise without merit. He fails to show how Ramirez's actions were deficient or how other actions would have resulted in a different outcome at trial. The district court need not have granted him an evidentiary hearing to pursue these conclusory, unsupported claims.

B. Fourth Amendment Claims

Ortega's claim that he should have been granted a hearing on his Fourth Amendment claims arising from the allegedly illegal warrantless arrest and illegal search and seizure must fail. Where a state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner is not eligible for federal habeas relief on a claim that evidence introduced at trial was obtained in violation of the Fourth Amendment. *Stone v. Powell*, 96 S.Ct. 3037, 3050-3053 (1976). Ortega had the opportunity to litigate these claims in his trial and on appeal in the Texas courts. He does not contend that he was prevented in any way from raising these issues before the state courts. Because he has shown no basis for relief, the district court was under no

obligation to grant him an evidentiary hearing on these claims.

II. Double Jeopardy

Ortega challenges his conviction on double jeopardy grounds, claiming that his acquittal on the offense of aggravated robbery precludes his conviction of the Gonzales burglary, because burglary of a habitation is a lesser included offense of aggravated robbery.

The longstanding test for determining whether violations of two statutes constitute one or separate offenses was set forth by the Supreme Court in *Blockburger v. United States*, 52 S.Ct. 180, 182 (1932):

"The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

This rule applies even where the defendant is acquitted of violating one of the statutes. "`A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'" *Gavieres v. United States*, 31 S.Ct. 421, 422 (1911) (quoting *Morey v. Commonwealth*, 108 Mass. 433) (quoted in *Blockburger*, 52 S.Ct. at 182).

Ortega relies on *Grady v. Corbin*, 110 S.Ct. 2084 (1990), in which the Court held that to avoid double jeopardy, a subsequent prosecution, in addition to satisfying the *Blockburger* "same element" test, must also pass a "same conduct" test. The Court overruled *Grady* in *United States v. Dixon*, 113 S.Ct. 2849, 2860

(1993). In *Dixon*, the Court implicitly reaffirmed *Blockburger's* "same element" test as the standard by which to determine whether a subsequent prosecution is barred by double jeopardy.

Following *Blockburger*, it is clear that the district court did not err when it held that Ortega's double jeopardy rights had not been violated. Ortega was charged with violations of the Texas burglary and aggravated robbery statutes; each statute requires proof of an additional fact which the other does not. The burglary statute requires proof that the defendant entered a habitation or building, without the effective consent of the owner, with the intent to commit a felony or theft.⁸ TEX. PENAL CODE ANN. § 30.02(a)(1). The entry with criminal intent is key; the felony or theft need not be accomplished. A charge of aggravated robbery, on the other hand, requires proof that a theft was actually committed, and that, in the course of committing the theft, the defendant caused serious bodily injury to another or that he used or exhibited a deadly weapon.⁹ TEX. PENAL CODE ANN. § 29.03(a).

⁸ TEX. PENAL CODE ANN. § 30.02 (Vernon 1989) provides:

"(a) A person commits an offense if, without the effective consent of the owner, he:

"(1) enters a habitation . . . with intent to commit a felony or theft;

* * *

"(d) An offense under this section is a felony of the first degree if:

"(1) the premises are a habitation"

⁹ The version of the aggravated robbery statute in effect at the time of Ortega's conduct, conviction, and sentencing provided:

Because the crimes of burglary and aggravated robbery each contain elements not included in the other, they are not the same offense, and Ortega's conviction for burglary of a habitation following his acquittal of the aggravated robbery charge does not offend double jeopardy principles.¹⁰

"(a) A person commits an offense if he commits robbery as defined in Section 29.02 of this code, and he:

- "(1) causes serious bodily injury to another; or
- "(2) uses or exhibits a deadly weapon.

"(b) An offense under this section is a felony of the first degree." TEX. PENAL CODE ANN. § 29.03 (Vernon 1989).

Section 29.02 defines robbery as follows:

"(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 of this code and with intent to obtain or maintain control of the property, he:

- "(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

- "(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

"(b) An offense under this section is a felony of the second degree." TEX. PENAL CODE ANN. § 29.02 (Vernon 1989).

The aggravated robbery statute was amended in 1989 but the amended statute applies only to offenses committed on or after September 1, 1989. *Id.*, § 29.03 (Vernon 1994 Supp.).

¹⁰ Ortega also claims that the joinder of his property offenses in a single trial violates double jeopardy. He cites *Callins v. State*, 780 S.W.2d 176 (Tex. Crim. App. 1986), in which the Texas Court of Criminal Appeals made clear that the mandatory right to severance, under TEX. PENAL CODE ANN. § 3.04, applies only to joinder of property offenses.

As discussed above, however, Ortega voluntarily waived his right to separate trials on each of the three indictments and requested a joint trial. He cannot now complain that this joinder was improper or that his constitutional rights were violated thereby.

Conclusion

For the reasons stated above, the judgment of the district court denying Ortega's petition for a writ of habeas corpus is

AFFIRMED.