

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-8137
Summary Calendar

HUBERT LAWRENCE WESTBROOKS,

Petitioner-Appellant,

VERSUS

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

Respondent-Appellee.

Appeal from the United States District Court
For the Western District of Texas

W 90 CV 328

(April 21, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Hubert Lawrence Westbrook, a prisoner at the Texas Department of Criminal Justice, was convicted in state court by a jury for delivery of a controlled substance, Dilaudid, and received a life sentence. That conviction was affirmed by a Texas court of appeals

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

in an unpublished opinion. On remand for discretionary review, the state court of appeals again affirmed. Westbrooks then sought habeas corpus relief which was denied by the state court of criminal appeals.¹

Westbrooks filed a § 2254 petition in United States District Court (district court) which was dismissed for failure to exhaust state remedies. Westbrooks eventually exhausted state remedies and filed a second § 2254 petition, raising the four issues discussed herein. The magistrate judge recommended that Westbrooks's petition be denied. The district court, noting that the parties' failure to file objections to the report barred de novo review on appeal under Cay v. Estelle, 789 F.2d 318 (5th Cir. 1986), adopted the magistrate judge's "Findings and Recommendation" and denied Westbrooks's petition.

Westbrooks filed a variety of objections and motions after entry of judgment. He then filed a notice of appeal and a "Motion for a Certificate of Probable Cause (CPC)." This Court dismissed the appeal because the district court had not yet ruled on a pending Fed. R. Civ. P. 59(e) motion. Several months later, the district court, noting that the "case had been closed for some time," denied Westbrooks's posttrial motions as moot. Westbrooks timely appealed. The district court granted Westbrooks's CPC.

Uncorroborated testimony/cautionary instruction

¹The procedural history in state court is not in dispute and is set forth in the magistrate's report.

Westbrooks argues that his "rights under due process" were violated when his conviction was based on the uncorroborated testimony of a drug addict, working on a contingent-fee basis and without police supervision, who bought a controlled substance from him.

This Circuit has addressed the use of paid Government informants in *federal* criminal trials and holds that "an informant who is promised a contingent fee by the government is not disqualified from testifying in a federal criminal trial." United States v. Pruneda-Gonzalez, 953 F.2d 190, 197 (5th Cir.), cert. denied, 112 S. Ct. 2952 (1992). Because the testimony of such informants might be unreliable due to the taint of "self-interest" and "fabrication," see United States v. Gonzalez, 491 F.2d 1202, 1207 (5th Cir. 1974), the fee arrangement should be promptly disclosed to the trial court with the requisite cautionary jury instructions. See Pruneda-Gonzalez, 953 F.2d at 197-98. The Government may not "deliberately use or encourage the use of perjured testimony." Id. at 197.

The informer, James Dennis, testified in the state court trial that he approached Westbrooks, whom he had seen "numerous times," and asked him if he had any cocaine or dilaudids. Westbrooks told him that he had no cocaine, but that he did have some dilaudid. Dennis gave Westbrooks \$35 and Westbrooks gave Dennis one tablet. The police department gave Dennis \$20 when he delivered the tablet to them.

Because the informer in Westbrook's case was being paid on a contingency basis, he seeks to distinguish this Court's decision in Webster v. Collins, No. 90-8385 (5th Cir. Jan. 15, 1991), involving an unpaid informer. This argument lacks merit.

In Webster, the defendant charged that an informer's uncorroborated testimony alone could not support his federal conviction. Moreover, the defendant contended that, because the informer was an "accomplice," Texas law required corroboration to support a conviction. This Court found "ample" corroboration and, without deciding whether the defendant was an accomplice, held that, in any event, there was no federal constitutional requirement of corroboration, citing Thompson v. Lynaugh, 821 F.2d 1054, 1062 (5th Cir.), cert. denied, 483 U.S. 1035 (1987). Although the informer was not paid, Webster never held that a paid informant's testimony is per se unconstitutional, nor would Webster overrule contrary en banc decisions by this Court.

The state court of appeals held that, because the informer was not an accomplice under state law, the informer's uncorroborated testimony was sufficient to convict Westbrook. Even if that ruling were incorrect, federal constitutional law governs this habeas action. Under Thompson, Westbrook had no right to corroboration.

Cautionary instructions

Westbrook also argues that, because the state trial court failed to instruct the jury that the informant's testimony should

be given extra caution, he did not receive a fair trial. This argument also collapses.

Having conceded that he did not object to the state court's jury instructions, Westbrooks points to the plain error standard under Fed. R. Crim. P. 52(b), arguing that the instructions were so deficient that there was a "likelihood of a grave miscarriage of justice." "Plain error" would result under that standard if testimony is both uncorroborated and unreliable. United States v. Jones, 673 F.2d 115, 119 (5th Cir.), cert. denied, 459 U.S. 863 (1982). Although the testimony in this case does not cross that line, the "plain error" standard is only used for matters on direct appeal; and thus does not apply in a habeas corpus case.

A petitioner making a collateral attack on a state jury instruction must demonstrate that the instruction "so infected the entire trial that the resulting conviction violates due process." Henderson v. Kibbe, 431 U.S. 145, 154, 97 S. Ct. 1730, 52 L. Ed.2d 203 (1977). The petitioner's burden is even heavier in cases where, as here, the alleged prejudice is based on the failure to give an instruction rather than on an erroneous instruction. Id. at 155. "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Id. "The significance of the omission of . . . an instruction may be evaluated by comparison with the instructions that were given." Id. at 156.

As noted by this Court in Webster, a cautionary instruction is unnecessary under Texas state law if "the jurors are instructed

that they are the exclusive judges of the credibility of the witnesses and of the weight to be given their testimony." The trial court gave such an instruction when it charged that "[y]ou are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given to their testimony. . . ."

Information elicited at trial did not leave the jury uninformed regarding the potential defects in Dennis's testimony. See Pruneda-Gonzalez, 953 F.2d at 197-98. Dennis testified on direct examination regarding his use of drugs, beginning with Talwin, and his addiction to Dilaudid. Dennis also testified that he was no longer addicted to any drugs. Dennis admitted his arrest for possession of drug paraphernalia.

During cross examination, Dennis also admitted that he had lied to doctors so he could obtain drugs. Although he stated on direct examination that he was not using drugs at the time he approached the police for purposes of becoming an informant, he testified on cross examination that he contacted police in order to make money to support his drug addiction. Defense counsel also told the jury during his final argument that Westbrook's conviction hinged on the jury's assessment of the informer's credibility.

The district court held that, consistent with Webster, "[t]he jury was made fully aware of the suspect nature[] of the informer's testimony and of the circumstances surrounding it." The district court concluded that Westbrook was not prejudiced by the trial court's failure to give a cautionary instruction. In light of the

above testimonial evidence together with the jury charge, the failure of the trial court to give a cautionary instruction did not "so infect[] the entire trial that the resulting conviction violate[d] due process." Kibbe, 431 U.S. at 154. The ruling of the district court was thus not error.

Batson violation

Westbrooks contends that the state prosecutor used his peremptory strikes to discriminate against blacks, eliminating them from the jury. Westbrooks argues that white individuals similarly situated were not stricken. Westbrooks requests that this Court make an independent finding whether the prosecutor's assertions that he was not using the strikes in a discriminatory manner were credible.

The Equal Protection Clause prohibits the prosecution in a criminal case from challenging potential jurors solely on the basis of their race or on the premise that black jurors would be incapable of being impartial to black defendants. Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); United States v. Moreno, 878 F.2d 817, 820 (5th Cir.), cert. denied, 493 U.S. 979 (1989).

In this Circuit, the process for examining a Batson objection requires the following: "(1) a defendant must make a prima facie showing that the prosecutor has exercised his peremptory challenges on the basis of race, (2) the burden then shifts to the prosecutor to articulate a race-neutral reason for excusing the juror in question, and (3) the trial court must determine whether the

defendant has carried his burden of proving purposeful discrimination." United States v. Clemons, 941 F.2d 321, 324 (5th Cir. 1991) (citing Hernandez v. New York, ___ U.S. ___, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)).

This Court has refused to set out a specific procedure to be followed in evaluating Batson objections. Clemons, 941 F.2d at 323. A race-neutral reason is determined by the "facial validity" of the prosecution's explanation of how the challenge was based on factors other than race. Id. at 325.

Factual determinations by state courts, with a few exceptions, are presumed correct for purposes of § 2254 review. See 28 U.S.C. 2254(d); Sumner v. Mata, 449 U.S. 539, 547-49, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981). The determination of discriminatory motive under Batson involves a factual finding of the credibility of explanations offered by prosecution to support its strikes. Clemons, 941 F.2d at 323-25. The credibility determination made by the court of appeals is viewed with deference, United States v. De La Rosa, 911 F.2d 985, 991 (5th Cir. 1990), cert. denied, 111 S. Ct. 2275 (1991), and reviewed under a clearly erroneous standard. Clemons, 941 F.2d at 321. Section 2254(d)(1-8) sets forth eight exceptions that, if shown, would collapse the presumption of correctness of the state court's findings. See id. Those factors address the adequacy of state court proceedings to provide the defendant with a fair determination of the contested issues. Id.

The Batson issue was raised during voir dire when defense counsel challenged the propriety of the prosecutor's use of

peremptory challenges to strike three black prospective jurors. The prosecutor provided race-neutral reasons for striking prospective black jurors six, seven, and eighteen.

Westbrooks's Batson objection was overruled by the trial court. The state court of appeals affirmed, holding that Westbrooks failed to show that the trial court abused its discretion when it considered but then overruled Westbrooks's objection. The Batson issue was remanded to the state court of appeals by the state court of criminal appeals. The court of appeals again found that the record supported the "trial court's failure to find racial discrimination." The court of criminal appeals denied Westbrooks's later state habeas application without written order.

Peremptory strikes are limited in number. Because of this limitation, it is impossible to strike every prospective juror that only vaguely or partially meets a stated race-neutral basis for striking others. Because the record reflects that the prosecutor adequately weighed race-neutral variables when striking prospective jurors twenty-seven and six, the credibility findings of the trial court were sufficient to merit the presumption of correctness.

Westbrooks also argues that, because the prosecutor claimed that jurors number seven (black male; 29 years old; single; unemployed) and number twenty-two (white male; 28 years old; auto parts worker) were stricken for the same reason, that reason must have been their young age. Westbrooks then argues that, if the prosecutor's explanation was correct, it also would have stricken

another white juror, number eight (white male; 22 years old; electrical construction), who was young.

The prosecutor gave the following explanation:

Number seven and number twenty-two were struck for pretty much the same reasons, because they were young. The record will reflect number twenty-two is a white male who is twenty-eight years old. The male that was twenty-two -- number twenty-two that we struck in this case ... also had an occupation. Number seven who we struck did not list any occupation at all, which tends to show less roots in the community.

The prosecutor's failure to strike juror number eight does not automatically suggest that he failed to show a race-neutral basis for striking black jurors. "Pretty much the same reasons" includes reference to number seven's lack of occupation, showing "less roots in the community." The prosecutor might also have been referring to other factors which he failed to articulate. Although the prosecutor's explanation was a bit confusing, it is clear that the prosecutor was considering more than just age when he was deciding which prospective jurors to strike.

For the above reasons, the fact that the prosecutor did not strike number eight allows an inference that the prosecutor might have considered another factor such as occupation, as he did with juror seven (none listed) and eighteen ("none"). See e.g., Clemons, 941 F.2d at 325. The occupational profile of jury members largely consisted of working or retired professionals in skilled occupations. Although much younger than juror number seven (29) and twenty-two (28),² juror number eight (22) was already employed

²This factor was apparently not considered by the court of appeals because it erroneously characterized prospective juror

in "electrical construction," clearly more conforming to the profile than "unemployed" and arguably more so than "auto parts worker." Nor does such employment at a young age suggest "less roots in the community." The credibility findings by the state trial court are thus entitled to a presumption of correctness.

Westbrooks had a fair hearing, where he had an opportunity to articulate the basis for his Batson challenge. Most important, the trial court was in the position to determine the credibility of the prosecutor's race-neutral explanations and had the privilege of observing the jurors. Clemons, 941 F.2d at 323-25. The state court of appeals, after reviewing "the evidence in the light most favorable to the trial court's rulings ... [to] determine if the rulings are supported by the record," rejected Westbrooks's Batson challenge.

The district court ruled that, in light of the "high measure of deference" afforded to the state court's findings, both explicit and implicit, Westbrooks's Batson contention was unfounded. Nor has Westbrooks raised any claim sufficient to trigger the exceptions set forth under § 2254(d)(1-8). For reasons set forth above, the district court did not err when it deferred to the ruling of the state courts.

number twenty-two as twenty-two rather than twenty-eight years old.

Chronology of enhancement offenses

Westbrooks argues that one of his underlying enhancement convictions was not final prior to a second conviction for enhancement purposes.

Westbrooks fails to brief this issue, claiming that he needs state records in order to adequately brief it. Westbrooks thus attaches a "Motion that Respondent Comply with Court Order," directed to the district court, and moves this Court to "grant the applicant's Motion" and order the appellee to send him a copy of state trial records.

Although this Court need not address issues that are not briefed, see Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987), because Westbrooks's failure to brief it may be linked to his lack of access to the records he seeks, we elect to review this issue.

Texas law requires the trial court to impose a sentence "for life, or for any term of not more than 99 years or less than 25 years," if a defendant convicted of a felony has previously been convicted of two felony offenses and the underlying conduct resulting in the second conviction was committed after the first conviction became final. See Tex. Penal Code Ann. § 12.42(d) (West Supp. 1993). "The chronology of the commission of prior felonies is an essential element of section 12.42(d)." French v. Estelle, 692 F.2d 1021, 1024 (5th Cir. 1982), cert. denied, 461 U.S. 937 (1983).

The district court rejected Westbrook's contentions. The indictment listed two previous convictions, one for possession of a controlled substance occurring on December 17, 1985, and another for possession of over four ounces of marijuana on May 18, 1979. State exhibits show that Westbrook's conduct occurring on July 12, 1985, resulted in his second conviction on December 17, 1985. This occurred years after Westbrook's first conviction became final on September 8, 1977 and his probation was revoked on May 18, 1979.

Our review indicates that there was no error in Westbrook's classification as a habitual criminal under § 12.42(d) in accordance with the standard set forth in French. The prosecutor need only produce evidence of the chronology of offenses to support enhancement. French, 692 F.2d at 1024. We conclude, therefore, that the district court's ruling that Westbrook's habitual criminal status was based on the requisite chronology of offenses was not error.

Judgment of the district court is AFFIRMED.