

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 92-8201

---

LEWIS ELLIOTT,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

---

Appeal from the United States District Court  
for the Western District of Texas  
(MO 91-CA-164)

---

(February 18, 1994)

Before JONES and DeMOSS, Circuit Judges and KAZEN\*, District Judge.

PER CURIAM:\*\*

Appellant Lewis Elliott, now serving a sentence of 50 years in prison following a guilty plea to attempted capital murder, sought federal habeas relief from his conviction. He alleged that his counsel was unconstitutionally ineffective by permitting Elliott to plead guilty to a defective indictment, and

---

\* District Judge of the Southern District of Texas, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

that counsel also ineffectively failed to object to the trial court's affirmative finding on the use of a deadly weapon. The district court denied relief and also denied Elliott's request for an evidentiary hearing. On appeal, we find neither any substantive error in the district court's judgment nor any material factual dispute that would have required a hearing in federal court. The apparent evidentiary shortcomings in the habeas proceedings in state court are irrelevant to proper analysis of this case.

In 1987, Elliott was indicted for attempted capital murder of a sheriff's deputy. The indictment provided in pertinent part that:

. . . that Lewis Elliott, hereinafter called defendant, on or about the 25th day of March, 1987, in Andrews County, Texas, did then and there with the specific intent to commit the offense of capital murder of an individual, to-wit: Sam H. Jones, do an act, to wit: attempt to shoot Sam H. Jones, said act amounting to more than mere preparation that tended but failed to effect the commission of the said capital murder. (emphasis added).

Elliott's counsel negotiated a plea bargain whereby he pleaded guilty to attempted capital murder in exchange for the dismissal of three other indictments. The trial court sentenced Elliott to 50 years in prison and found that Elliott had used a deadly weapon. The trial court's finding on the use of the deadly weapon had the effect of increasing the time before which Elliott would be eligible for parole.

Elliott sought a new trial on the grounds that his counsel had given him erroneous advice regarding his parole eligibility. The trial court granted the motion, a new attorney

was appointed, and trial proceeded with a new indictment charging the same offense. The new indictment charged, however, that Elliott did "shoot at SAM H. JONES with a deadly weapon, to wit: a firearm." The jury found Elliott guilty and sentenced him to 60 years in prison. Elliott pleaded guilty to a second indictment and was sentenced to 40 years, to be served concurrently. On state habeas, Elliott argued that the trial court did not have jurisdiction to grant a new trial because the motion for new trial was untimely filed. The Texas Court of Criminal Appeals agreed and set aside the second conviction. It also held, however, that the first conviction had not been properly set aside and therefore remained in effect.

Elliott then challenged the first conviction on state habeas. Elliott argued that he received ineffective assistance of counsel in that his trial attorney permitted him to plead guilty to a defective indictment and did not object to the affirmative finding on use of a deadly weapon. The trial court instructed the parties to submit affidavits by March 30, 1991 on the petitioner's claims. Elliott asserts he did not receive notice of the order until April 16, 1991, and he filed no timely affidavit. Thus, the trial court relied solely on an affidavit from Elliott's trial attorney, who said he had discussed the defective indictment with Elliott and that Elliott made an informed choice to plead guilty.

The trial court found that Elliott's attorney did discuss the indictment with him and that Elliott made an informed choice to plea bargain. The Court of Criminal Appeals denied relief.

Elliott then brought his habeas claim to federal district court, which also denied relief, he has timely appealed, raising the same issues that he did in state court.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). A petitioner must satisfy both prongs of this test before he is entitled to relief. Moreover, there is a strong presumption that counsel rendered adequate assistance.

Relying on the state habeas results, the federal district court found that Elliott was informed of potential defects in the indictment and notwithstanding those defects, he elected to plead guilty. Elliott contends that the district court incorrectly deferred to the state trial court's habeas fact finding because the state court procedures did not give Elliott an adequate opportunity to respond to his attorney's affidavit. We need not decide the question of the appropriate scope of § 2254(d) deference, however, because the district court's ultimate decision was correct for another reason.

Elliott argues that his indictment was defective because it failed to specify that a weapon had been used in the offense and that his victim was a peace officer, making the crime a capital offense. Consequently, he asserts, his attorney was

unconstitutionally incompetent for permitting him to plead guilty to a defective indictment. This claim does not satisfy either prong of the Strickland standard, much less both. Initially, the indictment does not appear to have been defective under Texas law; therefore failure to object to it cannot have been professionally unreasonable. In Texas, an indictment that tracks the statutory language for the offense charged is sufficient to provide notice to the defendant. See Bollman v. State, 629 S.W.2d 54, 55 (Tex. Crim. App. 1982). The original indictment, as quoted above, did indeed track the statutory language for a criminal attempt. Texas Penal Code Ann. § 15.01 (Vernon Supp. 1989). The language almost surely sufficed, in the absence of a motion to quash, to charge attempted capital murder. Colman v. State, 542 S.W.2d 144, 145-46 (Tex. Crim. App. 1976).

But in any event, on habeas this court is not free to review the sufficiency of a state criminal indictment unless the defect robbed the trial court of jurisdiction. Morlett v. Lynaugh, 851 F.2d 1521, 1523 (5th Cir. 1988). The State Court of Criminal Appeals implicitly held that the trial court had jurisdiction here, because, after being presented with Elliott's arguments that his counsel erred by permitting him to plead guilty to a defective indictment, it denied habeas relief. See Liner v. Phelps, 731 F.2d 1201, 1203 (5th Cir. 1984); Alexander v. McCotter, 775 F.2d 595, 598 (5th Cir. 1985).

If the indictment could be considered defective, and counsel's failure to object to it was unreasonable, Elliott is

utterly unable to show prejudice. In Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366 (1985), the Supreme Court explained that in order to prove Strickland's "prejudice" component in the context of a guilty plea, "the defendant must show 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." This court has described the test as "objective" and has evaluated "what a reasonable person in the defendant's shoes would do." United States v. Smith, 844 F.2d 203, 209 (5th Cir. 1988).

It is difficult to see what advantage Elliott would have gotten if he had refused to plead guilty because of the allegedly defective indictment. The state could easily have reindicted him and cured the defect. There was thus no prejudice to Elliott even if his plea was unknowing, misinformed and involuntary because of counsel's neglect. See also Norman v. McCotter, 765 F.2d 504, 508 (5th Cir. 1985) (erroneous legal advice regarding defective indictment held not prejudicial). And in this case, there is no need to speculate on whether Elliott would "objectively" have been better off going to trial. He persuaded his attorney to seek a new trial; he was retried under a new, corrected indictment; and the jury sentenced him to 60 years, ten more than he got under the first indictment, verifying counsel's sound judgment that Elliott was better off with a guilty plea. There is no reasonable probability that counsel's failure to object to the first indictment prejudiced Elliott in any way.

Elliott next asserts that his trial counsel was ineffective because he did not object to the affirmative deadly weapon finding entered with the guilty plea judgment. According to Elliott, the indictment did not give him adequate notice that such a finding would be made. Nowhere does the first indictment specifically mention a deadly weapon or any weapon at all. He says that the error prejudiced him because the affirmative deadly weapon finding had the effect of increasing his incarceration time before he would be eligible for parole.

Elliott argues that if counsel had objected to the indictment on this basis, the trial court could not have found that a deadly weapon was used in the crime. This argument assumes that a Texas court would have held that the indictment insufficiently pled that Elliott used a deadly weapon when he attempted to shoot the police officer. Under Strickland, these contentions fail. First, the fact that the indictment does not mention a deadly weapon does not prevent a Texas judge who is the trier of fact on punishment issues from making an affirmative deadly weapon finding. Fann v. State, 702 S.W.2d 602, 604-05 (Tex. Crim. App. 1986). The state trial court had the authority to find from the evidence before him that a deadly weapon was used during the commission of the offense.

Second, Elliott had adequate notice that the use of a deadly weapon would be a fact issue at trial. Defendants are only entitled to notice "in some form" that the use of a deadly weapon will be contested. Grettenberg v. State, 790 S.W.2d 613, 614 (Tex.

Crim. App. 1990), citing Ex parte Beck, 769 S.W.2d 525, 526 (Tex. Crim. App. 1989). Elliott tries unsuccessfully to distinguish Grettenberg on its facts because it involved two indictments, one of which did mention the use of a deadly weapon. This rejoinder fails, however, to come to grips with the plain meaning of the language in the first indictment in this case. The indictment charged Elliott with attempted capital murder by "shooting" Sam H. Jones. As Grettenberg noted, any allegation which avers an attempt to cause the death of a person by the use of a named weapon or instrument, necessarily includes an allegation that the named weapon or instrument was, in the manner of its use or intended use, capable of causing death. 790 S.W.2d at 614. The same principle holds true here, where the act in which Elliott engaged, i.e. attempting to shoot and kill the officer, necessarily connoted use of a weapon that could inflict shots of a deadly nature. Elliott therefore knew that a judge or jury might decide that he used a firearm to shoot and that the firearm was capable of inflicting a deadly wound.

Since under Texas law the affirmative deadly weapon finding was not flawed either by insufficient pleading or lack of notice to Elliott, it cannot be maintained that his attorney's failure to complain about the finding was professionally unreasonable. This claim fails the first prong of the Strickland test.

For these reasons, the district court's judgment denying habeas relief is AFFIRMED.