

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8253
Summary Calendar

THOMAS KENT FOREMAN,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(MO-91-CA-184)

(November 19, 1992)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Appellant Foreman challenges the district court's denial of his petition for writ of habeas corpus under 28 U.S.C. § 2254. Finding no error in the court's judgment, we affirm.

Foreman argued that his conviction for aggravated sexual assault was constitutionally deficient because there was

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

insufficient evidence to convict him under state law and his counsel was deficient. We review each claim in turn.

In his petition in the district court, Foreman relied on a now-discredited line of Texas cases to assert that the state did not sufficiently prove that he committed aggravated sexual assault. See e.g., Rucker v. State, 599 S.W.2d 581 (Tex. Crim. App. 1979) (interpreting now-repealed Texas Penal Code § 21.03(a)(2), aggravated rape). The Texas Court of Appeals rejected Foreman's argument on direct appeal, pointing out that Rucker has been legislatively overruled by a broader statutory definition of aggravated sexual assault. Texas Penal Code § 22.021(a)(2); Foreman v. State, 743 S.W.2d 731, 732 (Tex. App. -- El Paso 1987). Foreman's argument about a subjective or objective standard of proof is based only on state law. However, it is not our place as a federal habeas court to question the Texas court's interpretation of state law.

We also reject Foreman's contention that the state did not prove both "acts and words" that placed the complainant in fear that death, serious bodily injury or kidnapping would be imminently inflicted on her or her daughter by Foreman if she did not succumb to his assault. Whether this is a requirement of proof under state law makes no difference, because the state amply demonstrated both direct death threats to the complainant and her daughter by Foreman and his repeated struggles with them as they attempted to evade his attack. There was clearly constitutionally sufficient evidence to convict him of aggravated sexual assault.

In arguing that his attorney was constitutionally ineffective, Foreman makes three points: that his attorney failed to timely discover a police report on hair samples from the scene of the crime and failed to call the maker of the report as a witness; that counsel should have called Foreman's common law wife as a witness; and that counsel failed to challenge his identification in a post-arrest lineup. As Foreman's brief acknowledges, the Strickland standard for ineffective counsel requires him to show not only that counsel's performance was seriously deficient, but that he was prejudiced in some way by the alleged deficiency. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). Under this demanding conjunctive test, none of his allegations can survive. First, the hair sample report was admitted in evidence. In light of this fact, neither its earlier discovery by counsel nor the calling as a witness of the report's maker was critical to Foreman's defense. Whether the report's maker would have furnished better testimony than the report itself is entirely speculative.

Second, defense counsel's failure to call his common law wife was neither prejudicial nor deficient. In the district court, Foreman alleged only that she would have testified that a cut on his face was inflicted during an altercation with her, i.e., apart from the sexual assault. This testimony of his wife simply could not have overcome the victim's identification of Foreman as her assailant. In this court, for the first time, he suggests that his wife and an unidentified friend would have provided alibi

testimony. We will not, however, consider allegations that were not raised in the district court. Self v. Blackburn, 751 F.2d 789, 793 (5th Cir. 1985).

Finally, trial counsel did not err by failing to challenge the line-up identification process for two reasons. First, even if Foreman held the only non-sequential number card in the line-up, this fact could not have created an impermissible suggestion in the victim's mind. Second, Myron Gibson definitely identified Foreman at trial based on her view of him during the sexual assault. Both victims had spent considerable time with him and had viewed him in a lighted living room. There is virtually no likelihood that Foreman was misidentified, and counsel cannot be faulted for not making a worthless objection.

The judgment of the district court is AFFIRMED.