

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8319
Conference Calendar

WILLIE JOHN CLAY,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. W-92-CV-8
- - - - -

March 17, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Willie John Clay argues that the district court erred by denying him relief because: 1) the trial court erred in refusing to instruct the jury about the lesser-included offense of voluntary manslaughter and 2) he was denied the effective assistance of counsel at trial. He is incorrect.

A state trial court's failure to give an instruction on a lesser-included offense in a non-capital case does not implicate

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the federal constitution. Valles v. Lynaugh, 835 F.2d 126, 127 (5th Cir. 1988). The district court did not err in denying relief to Clay on this issue.

To establish the ineffective assistance of counsel, Clay must show: 1) that counsel's performance was deficient and 2) that the deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to show prejudice, Clay "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Clay faults counsel with failure to object to a signed, written confession that Clay gave to the Waco, Texas, police department. He argues that the police violated Article 38.22 of the Texas Code of Criminal Procedure because his oral statement was not electronically recorded. Article 38.22 requires electronic recording only in the case of oral confessions. It does not apply to Clay's written confession. TEX. CODE CRIM. PROC. ANN. art 38.22 §§ 2 & 3. (West 1979 & Supp. 1992). Clay's counsel was not obligated to make the meritless objection Clay argues to be error. See McCoy v. Lynaugh, 874 F.2d 954, 963 (5th Cir. 1989).

Clay also contends that his attorney erred in failing to make a motion to limit the introduction of Clay's medical records to avoid disclosure of Clay's prior conviction. Clay's trial counsel introduced the medical records to bolster Clay's insanity defense with evidence of Clay's affliction with post-traumatic

stress disorder. At trial, defense counsel and the state stipulated to the introduction of Clay's medical records. The strategic decision to use the medical records to bolster the insanity defense falls within the deference given to counsel's performance. See Strickland, 466 U.S. at 689.

Even assuming that the evidence of the prior conviction in the medical reports prejudiced Clay's defense, the record reflects that the trial court admonished the jury that the evidence of the prior conviction could not be used as evidence of Clay's guilt in the murder of Giles. See United States v. Hopkins, 916 F.2d 207, 218 (5th Cir. 1990) (jurors are presumed to have followed the court's instructions).

Clay has failed to show that counsel was deficient and that he was prejudiced by the deficiency. Strickland, 466 U.S. at 687. The decision of the district court is AFFIRMED.