IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8515
Summary Calendar

LEON SANDERS,

Petitioner-Appellant,

v.

LEO SAMANIEGO,
Sheriff of El Paso County, Texas,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
EP 91 CV 126

(March 12, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:[*]

Leon Sanders, a state prisoner in the custody of the El Paso County Sheriff, Leo Samaniego, appeals from the district court's denial of Sanders' pre-trial habeas corpus petition seeking to bar the State of Texas from retrying Sanders for murder. Finding no error, we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On February 12, 1980, Leon Sanders stabbed Ismael Rivera to death. After he was arrested, Sanders was examined by a number of psychiatrists and psychologists, who concluded that he was a severe and chronic schizophrenic. A jury empaneled to determine Sanders' competency found that he was incompetent to stand trial and would remain so into the foreseeable future. Sanders was, thus, committed to a state psychiatric hospital in 1980. Over a year later, he was ultimately found competent to stand trial. A jury convicted Sanders of murder and sentenced him to fifty years' imprisonment. The Texas Court of Appeals affirmed his conviction in an unpublished opinion. Sanders thereafter sought habeas corpus relief.

In 1988, the federal district court for the Western District of Texas granted Sanders' first petition for habeas corpus, finding that the state prosecutor's remarks during the closing arguments at the guilt/innocence phase denied Sanders due process of law. See Sanders v. Lynaugh, 714 F. Supp. 834 (W.D. Tex. 1988).[2] Because the district court granted the writ on this ground, it saw no need to reach Sanders' claim that the State's evidence was insufficient to support a rational jury's finding that Sanders was sane at the time of the crime. See id. at 838. The court further held that its grant of the writ of habeas

[2] In particular, the district court held that Sanders was denied due process by the prosecutor's repeated admonishment to jurors that if they found Sanders not guilty by reason of insanity they would be "cutting [him] loose" into society. Id., 714 F. Supp. at 836-37.

corpus on the prosecutorial misconduct claim did "not preclude a retrial of the Petitioner's case . . . ." Id. Neither the State nor Sanders appealed the district court's order. Rather, the case was remanded to the state trial court, permitting the State to decide whether to retry Sanders.

The State declared that it intended to retry Sanders for murder. Before the retrial could proceed, however, Sanders filed a plea in bar, arguing that the Double Jeopardy Clause prevented retrial. Sanders' double jeopardy argument was two-fold. First, he contended that because he presented evidence at the first trial to establish insanity "as a matter of law,"[3] Sanders' first trial should be treated as an acquittal for purposes of double jeopardy. Second, he argued, because the federal district court's issuance of the writ of habeas corpus was the "functional equivalent" of a declaration by the state trial court of a mistrial based on prosecutorial misconduct intended to provoke a mistrial, the State is barred from seeking a retrial under the Double Jeopardy Clause.[4] The state courts denied pre-trial habeas relief on these grounds, and the federal district court likewise denied Sanders' second writ of habeas corpus. The

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[3] In making this argument, Sanders relied on Texas authority that holds that in certain cases involving uncontroverted expert testimony that a defendant was insane at the time of the crime, insanity is established "as a matter of law." See, e.g., Van Guilder v. State, 709 S.W.2d 178 (Tex.Crim.App. 1986).

[4] In making this argument, Sanders relied on the well-established rule that prosecutorial misconduct that intentionally provokes a mistrial bars retrial under the Double Jeopardy Clause. See Oregon v. Kennedy, 456 U.S. 667 (1982).

district court did, however, grant Sanders a certificate of probable of cause to appeal.

II.

On appeal to this court, Sanders reasserts his two-pronged double jeopardy argument. Because this circuit's precedent clearly forecloses his claims, we affirm the district court's denial of the writ of habeas corpus.

A. Double Jeopardy Based on the Insufficiency of the Evidence of Sanity

With respect to Sanders' argument that the evidence presented at his first trial established insanity "as a matter of law," we observe that the Texas Court of Appeals, on appeal from the state trial court's denial of pre-trial habeas relief, was willing to entertain Sanders' argument that double jeopardy would prevent retrial if the evidence at Sanders' original trial established "as a matter of law" that he was insane at the time of the crime. See Sanders v. State, 771 S.W.2d 645, 649 (Tex.App.--El Paso 1989). The court simply found that "it appears that a rational jury could have properly concluded that [Sanders] was legally sane at the time of the offense." Id. The federal district court denied Sanders' petition for federal habeas relief for the same reason.

In United States v. Miller, 952 F.2d 866, 870-74 (5th Cir. 1992), cert. denied, 112 S. Ct. 3029 (1992), this court held that a criminal defendant may not raise a double jeopardy claim based on alleged insufficient evidence presented at his original trial in attempting to prevent a retrial, cf. Burks v. United States,

437 U.S. 1 (1978),[5] if the defendant failed to secure a ruling of insufficiency on his first appeal. That is, even if the evidence at a defendant's original trial was insufficient to support his conviction, the defendant cannot raise the insufficiency claim as a double jeopardy bar to a retrial unless a court reviewing the original conviction found the evidence constitutionally insufficient.[6] Furthermore, if the defendant raised an insufficiency claim on the prior appeal, the rule in Miller still applies even if the previous appellate court or courts failed to address the sufficiency claim and instead reversed on other grounds. See Evans, 959 F.2d at 1229 (noting that original state appellate court rejected the defendant's insufficiency argument while reversing on other grounds).

In the instant case, Sanders raises an insufficiency claim based on the evidence presented at his first trial.[7] Because

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[5] In Burks, the Supreme Court held that the Double Jeopardy Clause bars retrial of a criminal defendant if an appellate court overturns the original conviction based on insufficient evidence.

[6] Although Miller was a federal criminal direct appeal, we see no reason not to apply its holding in the context of federal habeas review of a state criminal case. At least one other circuit has adopted this approach. See Evans v. Court of Common Pleas, 959 F.2d 1227 (3rd Cir. 1992). We also note, however, that at least one other circuit has rejected our position in Miller. See United States v. Haddock, 961 F.2d 933, 934 n.1 (10th Cir. 1992).

[7] Ordinarily, our review of such an insufficiency claim is based on the straight-forward standard enunciated in Jackson v. Virginia, 443 U.S. 307, 319-20 (1979) -- namely, whether a rational trier of fact could find every element of the charged offense beyond a reasonable doubt. The parties, however, have never mentioned the Jackson standard and have instead mainly cites cases concerning the Texas standard governing proof of insanity.

this is a habeas appeal -- albeit a pre-trial appeal -- concerning Sanders' retrial, we may not reach the merits of the insufficiency claim underlying his double jeopardy claim. Although the district court thus erred in addressing the merits of this claim in the first place, we nevertheless affirm the court's denial of the writ.

B. Double Jeopardy Based on Prosecutorial Misconduct

In the second prong of Sanders' double jeopardy claim, he argues that we should treat the district court's grant of the habeas writ based on prosecutorial misconduct as the "functional equivalent" of a declaration of mistrial caused by calculated prosecutorial misconduct. The premise of Sanders' claim is the Supreme Court's decision in Oregon v. Kennedy, 456 U.S. 667 (1982), in which the Court held that double jeopardy bars retrial when a prosecutor intentionally provokes a mistrial. Sanders ignores that this court has, for over a decade, limited the rule

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Although we refuse to apply it in the instant case, we note that, in the context of an insanity defense, a federal court applying the standard in Jackson v. Virginia must first look to how state law treats the question of sanity at the time of the crime. In Texas, insanity is an affirmative offense, which the defendant must establish by the preponderance of the evidence. See Texas Penal Code § 8.01(a). A defendant's sanity -- a question which directly implicates the mens rea of murder, an essential element of the crime -- is a rebuttable presumption under Texas law. Thus, our sufficiency review in a Texas case in which the insanity defense was raised at trial simply asks whether, by a preponderance of the evidence, a rational jury could find the defendant sane at the time of the crime. See Fulghum v. Ford, 850 F.2d 1529, 1532-34 (11th Cir. 1988), cert. denied, 488 U.S. 1013 (1989) (Jackson review of insanity defense raised under Georgia law, which likewise requires a defendant affirmatively to establish insanity by a preponderance of the evidence).

in Kennedy to cases in which a mistrial has actually been declared by the trial judge. See United States v. Singleterry, 683 F.2d 122 (5th Cir. 1982), cert. denied, 459 U.S. 1021 (1982); but see United States v. Roberts, 640 F.2d 225 (9th Cir. 1981); United States v. Rios, 637 F.2d 728 (10th Cir. 1980); cf. United States v. Curtis, 683 F.2d 769, 774 (3d Cir. 1982).[8] Thus, Sanders' claim must fail.

III.

For the foregoing reasons, we AFFIRM the district court's denial of the writ of habeas corpus.

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[8] In Singleterry, the defendant made an argument quite similar to Sanders'. We distinguished the narrow rule in Kennedy by noting, "under Kennedy, the double jeopardy clause is concerned only with prosecutorial misconduct that is intended to provoke a mistrial. When a mistrial is not declared, . . . the prosecutor's efforts have been unsuccessful. The dangers that the Kennedy exception was intended to prevent -- that the defendant might lose his `valued right to complete his trial before the first jury' [citation omitted], and that the prosecutor might be seeking a more favorable opportunity convict [citation omitted] -- are more attenuated when the defendant is convicted by the first jury but an appellate court reverses for prosecutorial misconduct." Singleterry, 683 F.2d at 124.