

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1001
Conference Calendar

ALLEN BRENT JOHNSTON,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:92-CV-183-Y

- - - - -
June 22, 1993

Before POLITZ, Chief Judge, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:*

Allen Brent Johnston argues that he was illegally denied the assistance of counsel at a pretrial line-up and that a witness's in-court identification of him was tainted by that line-up. He is incorrect.

Johnston was not entitled to the assistance of counsel at the line-up because the State had not initiated formal adversary proceedings against him. Kirby v. Illinois, 406 U.S. 682, 689-

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

90, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972).

The Texas appellate court's finding that Nurahmed Syed's in-court identification was of independent origin and was not tainted by the pretrial identification is entitled to a presumption of correctness. 28 U.S.C. § 2254(d); Sumner v. Mata, 449 U.S. 539, 549, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). To rebut the presumption, Johnston must show by convincing evidence that the state court's determination is not fairly supported by the record. Id. at 550. Johnston directs the Court to sections of the record where Syed stated that the pretrial identification helped him identify Johnston at trial. "One of the purposes of § 2254(d) was to prevent precisely this kind of parsing of trial court transcripts to create problems on collateral review where none were seen at trial." Wainwright v. Witt, 469 U.S. 412, 435, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The record indicates that Syed had an opportunity to view Johnston clearly for about two minutes before he was shot. Johnston has not presented convincing evidence to rebut the state appellate court's finding.

The decision of the district court is AFFIRMED.