UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-1243
Summary Calendar

JUAN F. NAVARRO,

Petitioner-Appellant,

VERSUS

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

Respondents-Appellees.

Appeal from the United States District Court
For the Northern District of Texas

(6:92 CV 0079 C)

(August 13, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

Paragraph One of a 1991 three-paragraph Texas indictment charged Juan Flores Navarro with injury to a child 14 years or younger, which is a third degree felony. He was charged with

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

intentionally striking and kicking the child. Paragraphs Two and Three charged Navarro with enhancements for a 1986 burglary of a vehicle and a 1982 forgery.

Navarro and the state entered into a plea agreement in which Navarro agreed to plead guilty to Paragraph One and true to Paragraphs Two and Three and the state agreed not to charge him with murder and retaliation. He bargained for a prison term of 40 years. Navarro pleaded as agreed, he was sentenced as agreed, and no appeal was taken.

Navarro applied for a state writ of habeas corpus, complaining that his guilty plea was not knowing and voluntary because counsel was ineffective. He alleged the following: Counsel told him that a guilty plea was the only way for him to avoid a longer prison term, even though Navarro told counsel that he was not guilty. Navarro told counsel that he would not plead guilty to an offense under Tex. Code Crim. Proc. Ann. art. 42.12 § 3(g) (West Supp. 1993) because it would require the serving of "flat time" and preclude trusty status. Counsel assured him that he would not be pleading guilty to a § 3(g) offense. One James Dietz Logan witnessed this conversation between Navarro and counsel.

Navarro further alleged that his conviction was under Tex. Code Crim. Proc. Ann. art. 42.18(8)(c) (West 1993), which prohibits release on mandatory supervision if the sentence is for certain first degree felonies. The Texas Department of Criminal Justice, Institutional Division (TDCJ) denied him eligibility for "S.A.T. II status," or trusty status, because of his offense. He stated his

fear that sometime in the future he might be denied a furlough because of the nature of his offense.

Counsel allegedly performed on only one of Navarro's requirements for pleading guilty, which was that the sentence not come under § 3(g). Counsel allegedly did not seek to strike a plea bargain on a charge that would have met all of Navarro's requirements.

The state habeas trial court found that Navarro was not convicted of a § 3(g) offense and that his conviction was for a third degree felony, which would not preclude mandatory supervision under art. 42.18. That court also found that denial of "S.A.T. II" status must have had something to do with prison regulations but, in any case, had nothing to do with the effectiveness vel non of counsel. Additionally, the prospective denial of furlough was so speculative as to raise no issue. The Court of Criminal Appeals denied relief without written order.

Navarro petitioned for a federal habeas writ. The one alleged ground for relief was that the plea was not knowing and voluntary because counsel was ineffective. He made the same allegations that he made in state court and added the allegation that "counsel advised Petitioner that he was going to get him a good deal, and that he `would be home in the Spring of 1994.'" Navarro also filed a print-out from TDCJ that he says "clearly shows" that he has been denied mandatory supervision, which denial he assumes came about because he was convicted under art. 42.18.

The magistrate judge recommended that relief be denied. Over Navarro's objections, the district court adopted the magistrate judge's report and dismissed the petition.

OPINION

Navarro first argues that the magistrate judge and the district court misunderstood his allegations; he repeats most of them. In evaluating a state prisoner's habeas issues, this Court looks to whether the petitioner has shown a federal constitutional violation and prejudice. 28 U.S.C. § 2254(a); Carter v. Lynaugh, 826 F.2d 408, 409 (5th Cir. 1987), cert. denied, 485 U.S. 938 (1988).

To demonstrate ineffectiveness of counsel, Navarro must establish that counsel's performance fell below an objective standard of reasonable competence and that he was prejudiced by his counsel's deficient performance. Lockhart v. Fretwell, ___ U.S. ___, 113 S. Ct. 838, 842, 122 L. Ed. 2d 180 (1993). Judicial scrutiny of counsel's performance must be highly deferential, and courts must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The petitioner must affirmatively plead the actual resulting prejudice. Hill v. Lockhart, 474 U.S. 52, 60, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Navarro must demonstrate prejudice by showing that counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. Fretwell, 113 S.

Ct. at 844. To obtain an evidentiary hearing on whether counsel made unkept promises that induced a guilty plea that appears from the record to have been knowing and voluntary, a habeas petitioner must make specific allegations supported by the affidavit of a third person. Davis v. Butler, 825 F.2d 892, 894 (5th Cir. 1987).

In Texas, mandatory supervision refers to the release of a prisoner from physical custody to serve the remainder of his sentence under supervision. Tex. Code Crim. Proc. Ann. art. 42.18 § 2(2) (West Supp. 1993). Mandatory supervision is unavailable to prisoners who were convicted pursuant to Tex. Code Crim. Proc. Ann. art. 42.12 § 3(g) (West Supp. 1993) or were convicted of certain first degree felonies. Tex. Code Crim. Proc. Ann. art. 42.18 § 8(c) (West Supp. 1993).

Navarro seems to concede that he was not convicted of a § 3(g) offense but alleges that he was convicted of one of the first degree felonies that disqualifies him from mandatory supervision. This disqualification, he argues, was exactly what he told his counsel that he wanted to avoid in pleading guilty.

The state habeas court found that he was convicted of a third degree felony. "Federal courts in habeas proceedings are required to grant a presumption of correctness to a state court's explicit and implicit findings of fact if supported by the record. 28 U.S.C. § 2254(d)." Loyd v. Smith, 899 F.2d 1416, 1425 (5th Cir. 1990).

Intentional and knowing bodily injury to a child, with which Navarro was charged, is a third degree felony. Tex. Penal Code

Ann. § 22.04(f) (West Supp. 1993). Before the trial court accepted the plea, Navarro signed written admonishments that identify the offense as a third degree felony. The statement of plea bargain that he signed also identifies the offense as a third degree felony. Counsel could not have been ineffective for allowing him to plead guilty to a first degree felony when the plea was actually to a third degree felony.

Navarro also claims that he was denied trusty status because of the nature of the offense. Navarro concluded that the denial means that he did plead guilty to a § 3(g) offense or a first degree felony or that he is being treated as if he did. The state habeas court concluded that the denial, if actually based on the nature of the offense, must have been based on prison regulations. A lawyer's omission to review all regulations and contingencies that might apply to an inmate is not ineffective assistance of counsel. Navarro does not allege that he asked counsel to review prison regulations or that counsel should have or did not undertake such a review.

A similar analysis applies to Navarro's claim that he expects to be denied a furlough at some time in the future. In addition to the foregoing analysis, though, a furlough has not been denied yet.

In sum, counsel could not have been ineffective for allowing Navarro to plead guilty to an offense for which mandatory supervision is unavailable because the relevant statute does not preclude Navarro from mandatory supervision. The same applies to the other privileges that Navarro claims have been or will be

denied. Navarro has shown neither deficient performance nor prejudice.

Navarro also alleged in federal court, but not in state court, that counsel promised him that he would be home by spring 1994. The district court noted that this aspect of Navarro's ineffectiveness issue was not exhausted. Exhaustion normally requires that the federal claim have been fairly presented to the highest court of the state, either on direct review or in a post-conviction attack. Carter v. Estelle, 677 F.2d 427, 443 (5th Cir. 1982), cert. denied, 460 U.S. 1056 (1983). Petitions that contain both exhausted and unexhausted claims are required to be dismissed. Rose v. Lundy, 455 U.S. 509, 522, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982).

Navarro, however, does not argue either the merits of this aspect of his claim or the exhaustion issue. Accordingly, the issue is abandoned. Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985).

Navarro also argues that the district court did not adequately address the proof provided by his TDCJ records. He argues that "no matter what the sentence handed down in State court, Appellant was being treated by the State as a more serious offender."

Navarro's sole habeas issue is that his plea was not knowing and voluntary because his counsel was ineffective. His treatment at the hands of TDCJ, whether lawful or not, is irrelevant to the nature of his plea and the performance of counsel.

Navarro also argues that the magistrate judge and the district court ignored his allegation that Logan had witnessed Navarro's conversation with counsel. Logan allegedly heard counsel tell Navarro that he would not be pleading guilty to a § 3(g) offense or an offense that would deny him privileges or release. In fact, Navarro did not plead guilty to an offense that, by its nature, deprived Navarro of privileges that he allegedly told counsel to protect.

Logan provided no information or affidavit to the state habeas court or to the district court. Logan's testimony, however, even if entirely true and convincing, would not offer relief for Navarro. Nothing in the record indicates that counsel promised Navarro something that was not delivered.

Navarro also argues that the findings of the state habeas court should not be presumed correct because the judge who entered them was not the judge who presided over his criminal proceedings. Section § 2254(d) makes no distinction like that which Navarro would have this Court make.

Navarro asserts that the district court did not adequately review the record in response to his objections to the magistrate judge's report. Following a magistrate judge's report, a district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(B). Navarro's only basis for his accusation against the district court is that the

court's failure is "evidenced by the language of the Order of the Dismissal With Prejudice."

The language to which Navarro apparently refers is a line in the order stating, "This Court has made a de novo review of the Objections of the Petitioner." The order, however, evinces the district court's clear understanding of Navarro's allegations and the manner in which the magistrate judge proposed to handle them. The district court apparently merely made a mistake in its recitation of what it had reviewed.

For all of the foregoing reasons, we AFFIRM the district court's dismissal of the petition for habeas corpus.