

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-1385

WILLIAM WALLACE CAMPBELL,

Petitioner-Appellant,

VERSUS

WAYNE SCOTT, Director,
Texas Dept. of Criminal Justice
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-1050-R)

(February 9, 1995)

Before JONES, DUHÉ and STEWART, Circuit Judges.

PER CURIAM:¹

Pro se Appellant appeals from the dismissal of his writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. For the reasons set forth below, we affirm.

I. BACKGROUND

Appellant is currently incarcerated by the Texas Department of Criminal Justice pursuant to a judgment and sentence entered by the Criminal District Court No. 4 of Dallas County, Texas in Cause No.

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

F81-11073-IK, styled The State of Texas v. William Wallace Campbell. Campbell was arrested and charged with aggravated rape, aggravated sex abuse and aggravated kidnapping. Campbell entered a plea of guilty to aggravated kidnapping, and the state dismissed the remaining charges. At the time of his plea, Campbell tendered a signed judicial confession in which he admitted his guilt. After trial to the bench, at which Campbell testified, the court adjudged Campbell guilty and sentenced him to 50 years confinement.² Under the terms of the plea agreement, Campbell waived his right to appeal the conviction, and no direct appeal was taken.

Campbell has perfected three state petitions for writs of habeas corpus challenging his conviction. Campbell filed his first state writ pro se. Therein he alleged, inter alia, that trial counsel's representation had not been constitutionally adequate. The trial court entered findings of facts and conclusions of law and recommended that the writ be denied. In so doing, the court specifically found that the averments in the sworn affidavit of Ron Poole--Appellant's trial attorney--were credible. According to Poole's affidavit,

Mr. Campbell confided in me that he believed a judge or a jury would give him the maximum sentence of life, and asked me if I could get the recommendation [of 60 years] lowered because he did not want a trial. He also stated that he did not want to go to the penitentiary on a sex offense.

The Prosecutor agreed to change the recommendation

² Campbell's co-defendant, Herbert Sollars, elected to proceed to a trial by jury. At trial, Sollars was convicted of aggravated rape and subsequently sentenced to 50 years confinement. See Sollars v. State, 664 S.W.2d 726 (Tex.Ct.App. 1983).

to 50 years for a plea of guilty and to dismiss the two aggravated sex offenses if Mr. Campbell wanted to plead to the Aggravated Kidnapping case.

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I explained to Mr. Campbell that the Aggravated Kidnapping was a second degree felony and that the state would have to offer some evidence that the victim was not voluntarily released alive and in a safe place in order for Mr. Campbell to receive 50 years.

On the day of the plea I prepared the stipulation of evidence....I wrote down only the allegations contained in the indictment. When I presented the stipulation of evidence to the Prosecutor for his signature, he used his pen and, in his own handwriting, he wrote a deadly weapon allegation and aggravated kidnapping allegations for enhancement of punishment. I showed the additions to Mr. Campbell and he agreed to the additions prior to entering his plea of guilty.

My investigation of the offense had revealed that the victim was found in the custody of the co-Defendant and was released at that time. Therefore, the statement added by the Prosecutor was in fact true.

The Texas Court of Criminal Appeals denied the writ application "without written order on findings of the trial court without hearing."

Campbell's second state petition, filed with the aid of an attorney, again challenged the adequacy of trial counsel's representation. With regard to the adequacy of Poole's representation, the trial court stated that Appellant had made no new arguments, and essentially incorporated its previous findings of fact and conclusions of law. Two new issues were also raised in the petition. The trial court ruled that Appellant could not complain that the language of his judicial confession failed to track the language of the indictment, but did find merit in the Appellant's complaint that he had not received adequate notice of

the state's intention to seek a deadly weapon enhancement. The court recommended that the writ be granted regarding the deadly weapon finding, and that such finding be excised. The Court of Criminal Appeals, however, declined to follow the recommendation, and denied the petition "without written order."

Appellant's final state petition raised no new issues, and the trial judge recommended that it be denied for abuse of the writ. The Court of Criminal Appeals again denied the petition without written order. Appellant, acting pro se, filed the instant petition pursuant to 28 U.S.C. § 2254. The Magistrate Judge entered a recommendation that the petition be denied. The district court adopted the recommendation of the Magistrate and denied the petition. Appellant timely appealed.

We asked the parties to brief whether the "presumption of correctness" mandated by 28 U.S.C. § 2254(d) applied to a state district court's findings of fact where such findings had not been expressly adopted by the Court of Criminal Appeals. However, upon careful examination of the record, we find that we need not reach this issue.

II. ANALYSIS

Appellant essentially raises two issues on appeal: 1) Whether his trial counsel was constitutionally ineffective, and 2) Whether Appellant was given proper notice that the state intended to seek a deadly weapon finding. We address these issues seriatim.

A. Ineffective Assistance of Counsel

Although he constructs his argument under several separate

assignments of error, Appellant essentially advances the single contention that he was denied effective assistance of counsel. We evaluate his attorney's performance with regard to prevailing professional norms, employing the two-prong test enunciated in Strickland v. Washington, 466 U.S. 668 (1984). First, we determine whether the attorney's performance was deficient, giving "a heavy measure of deference to counsel's judgment." Green v. Lynaugh, 868 F.2d 176, 178 (5th Cir. 1989). Second, we determine whether even a deficient performance resulted in actual prejudice to the defendant. Strickland, 446 U.S. at 687.

Appellant's arguments revolve around his contention that trial counsel failed to adequately inform him of his rights and potential penalties prior to his plea of guilty. The same arguments were rejected by the state district court in Appellant's first state petition. While the district court did not specifically discuss the presumption of correctness afforded to the written findings of a state court under 28 U.S.C. § 2254(d), we find that such presumption is applicable here.

As noted above, the Court of Criminal Appeals specifically adopted the trial court's findings of fact in denying the first habeas petition. In those findings, the trial court made a specific credibility determination, on the basis of Poole's affidavit, and concluded that counsel had correctly informed Appellant of his rights and potential penalties. Though Appellant's second and third state petitions raised similar issues, the trial court never revisited the issue, nor has the Court of

Criminal Appeals overruled its adoption of the trial court's initial findings.

The transcript of Appellant's plea of guilty supports the trial court's findings, and Appellant has failed to contend that any of the § 2254(d) exceptions apply. Based on the presumption of correctness we must impart to the written findings of the state court, we conclude that Appellant's trial counsel was not constitutionally ineffective. Appellant's petition for writ of habeas corpus on the basis of ineffective assistance of counsel shall be denied.

B. Deadly Weapon Finding

In his final assignment of error, Appellant contends that the state trial court's affirmative deadly weapon finding violated his rights because he was not given adequate notice of the state's intention to seek such a finding. While the state trial court recommended that the Appellant's second writ be granted on this issue, the Court of Criminal Appeals rejected the recommendation. Therefore, no statutory presumption of correctness attaches to the trial court's written finding.

The district court concluded that Appellant had adequate notice, and further concluded that counsel's failure to object to the finding was not prejudicial, because Appellant would have plead guilty regardless. We find, however, that we need not address the propriety of the district court's decision because Appellant cannot show any actual prejudice as a result of the finding. Under the Texas Code of Criminal Procedure in effect in 1981, a conviction

for aggravated kidnapping has the same affect on Appellant's eligibility for parole as the affirmative deadly weapon finding. Under Tex. Code Crim. Proc. Ann. art. 42.12 § 15(b) (West 1979),

If a prisoner is serving a sentence for the offenses listed in Section 3f(a)(1) of this Article or if the judgment contains an affirmative [deadly weapon] finding under Section 3f(a)(2) of this Article, he is not eligible for release on parole until his actual calendar time served, without consideration of good conduct time, equals one-third of the maximum sentence or 20 calendar years....

(emphasis added). Aggravated kidnapping is one of the offenses enumerated in Section 3f(a)(1). As a result, Appellant can show no prejudice resulting from the finding, and we need proceed no further in our analysis. See e.g. Clark v. Maggio, 737 F.2d 471, 475-76 (5th Cir. 1984) (denial of writ affirmed, even though evidence was insufficient to convict of first degree murder, where evidence was sufficient to convict for second degree murder and punishment was the same), cert. denied, 470 U.S. 1055 (1985).

III. CONCLUSION

For the foregoing reasons, we find that the district court correctly concluded that Appellant's petition was without merit. Accordingly, we AFFIRM.