UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-01431
Summary Calendar

LEONARD DUTY, JR.,

Petitioner-Appellant,

VERSUS

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

Respondent-Appellee.

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

(5:93 CV 18 C)

(January 13, 1994)

Before GARWOOD, SMITH and DeMOSS, CIRCUIT JUDGES.

PER CURIAM:[*]

BACKGROUND

Leonard Duty, Jr., was convicted of aggravated robbery by a jury in the 72nd District Court of Lubbock County, Texas. His conviction was affirmed on direct appeal.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Duty filed a federal petition for habeas relief in which he alleged that the state court erred by denying his motion to suppress the photograph used to identify him as the perpetrator of the robbery and that he received ineffective assistance of counsel.

The Director of the TDCJ urged that the petition be dismissed as successive and abusive because Duty had filed two prior federal petitions, CA-5-86-040 and CA-5-89-0071, that were denied on the merits. Petition CA-5-86-040 raised the issue of the withholding of evidence. The Director argued that an evidentiary hearing had been held by a magistrate judge in CA-5-86-040; habeas relief had been granted by the district court but reversed on appeal by this Court in Appeal No. 87-1726. In CA-5-89-0071, Duty had raised three issues: 1) involuntary confession; 2) the state's failure to produce two eyewitnesses; and 3) a Miranda violation. The Director asserted that the district court had denied Duty relief on the second petition by ruling on the merits of his claims without addressing the Rule 9(b) issue.

Duty responded that the State would not be prejudiced by the presentation of the claims, that the issue is not identical to those formerly raised, that the attorney who assisted him with the first petition was incompetent,[1] that he relied on the assistance of writ writers, and that he is untrained in the law.

A magistrate judge determined that Duty had not presented any new evidence or new legal theories upon which he was relying and

[1]The allegation of incompetent counsel is absurd; the district court **granted** habeas in the first petition.

that his ignorance of the law did not justify a successive petition. Also, the magistrate judge concluded that he had not made a claim of factual or actual innocence.

Over objections by Duty, the district court adopted the magistrate judge's report and recommendation and dismissed the petition as barred under Rule 9(b) as abusive. Duty filed a timely notice of appeal, and the district court granted a CPC.

OPINION

A district court's decision to dismiss a petition pursuant to Rule 9(b) is reviewed for an abuse of discretion. Hudson v. Whitley, 979 F.2d 1058, 1062 (5th Cir. 1992). A successive federal habeas petition may be dismissed if the petitioner alleges new or different grounds and "the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." Rule 9(b) of the Rules Governing 28 U.S.C. § 2254 Proceedings. The Supreme Court has delineated factors that are to be considered in determining whether a second petition is abusive. McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 1467-72, 113 L.Ed.2d 517 (1991). The McCleskey principles apply to pro se petitioners. E.g., Hudson v. Whitley, 979 F.2d 1058, 1063 (5th Cir. 1992); Saahir v. Collins, 956 F.2d 115, 118-19 (5th Cir. 1992).

After the issue of writ abuse arises, the petitioner bears the burden of demonstrating cause for not raising the new claims in a previous federal habeas petition and prejudice if the court does not consider them. Saahir, 956 F.2d at 118. "Cause" must be some

factor that is external to the defense. Id. An impediment such as governmental interference or the reasonable unavailability of an essential fact could qualify as "cause." Hudson, 979 F.2d at 1063. The "cause" question is whether the petitioner knew of the claim or, with reasonable diligence, could have known of the claim at the time of his first federal petition. Id. "Prejudice" is irrelevant if the petitioner does not show "cause." Saahir, 956 F.2d at 118. If the petitioner shows "cause," "prejudice" must be considered. Hudson, 979 F.2d at 1064.

Duty argues that the district court erred because the current petition is based on facts not known to him when the other petitions were filed. He asserts that because he was assisted by a writ writer instead of an attorney, he should not be held to the standard of attorneys or barred from urging his present petition. Duty raises the arguments presented in the instant habeas petition regarding the photographs and the ineffectiveness of his trial counsel.

The Director correctly asserts that the present issues could have been raised in the prior petitions because they were based on facts known to Duty at the time of the prior petitions. Duty justifies his failure to present these issues earlier by the fact that he was not represented by counsel, that he was merely assisted by inmate writ writers, and that he was untrained in the law. The "cause" question is whether the petitioner knew of the claim or, with reasonable diligence, could have known of the claim at the time of his first federal petition. Hudson, 979 F.2d at 1063.

Other than the insufficient arguments regarding his ignorance of the law and the fact that he was proceeding without counsel, Duty fails to show that the claims he raised for the first time in the instant § 2254 petition were not based on facts known by him when he filed his prior petitions. Duty has thus not shown "cause." Having failed to show "cause," this Court need not address the "prejudice" prong. Saahir, 956 F.2d at 118.

If Duty can show that "a fundamental miscarriage of justice would result from a failure to entertain the claim[s,]" the Court may still reach the merits of the present petition. McCleskey, 111 S.Ct. at 1470. This is a very narrow exception that is triggered when the alleged constitutional violation probably has caused an innocent person to be convicted. Id. at 1475.

"`[A]ctual innocence' means *factual*, as opposed to *legal*, innocence" resulting from a constitutional violation. Johnson v. Hargett, 978 F.2d 855, 859 (5th Cir. 1992), cert. denied, 113 S. Ct. 1652 (1993). To show "actual innocence," a petitioner is required to show that "there is a fair probability that, in light of all the evidence, a reasonable trier could not find all the elements necessary to convict the defendant of [a] particular crime." Id. at 860 (footnote omitted).

Duty alludes to his innocence by stating merely that he could not have been at two places simultaneously. In the reply brief, Duty asserts that the alibi testimony revealed that he was elsewhere when the robbery occurred and the fact that the victim failed to identify him during the trial as the perpetrator

intimates his innocence. None of the new claims demonstrates Duty's innocence or that a miscarriage of justice resulted. Thus, Duty has not made a colorable showing of factual innocence.

AFFIRMED.