UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1637
Summary Calendar

JAMES EARL SMITH,

Petitioner-Appellant,

VERSUS

WAYNE SCOTT, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-1195-T)

(September 30, 1994)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

James Earl Smith appeals, *pro se* and *in forma pauperis*, the denial of his application for a writ of habeas corpus under 28 U.S.C. § 2254. We **AFFIRM**.

I.

After a jury trial, Smith was convicted of aggravated robbery, and sentenced to 99 years' imprisonment. At trial, Oliver Roberson (the victim) testified as follows. On November 24, 1987, he was in

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

the parking lot of a gas station using a pay telephone when he saw Smith approach a woman and ask for money. Smith then approached Roberson and asked him for two dollars; Roberson told Smith that he did not have any money. Smith went to his car, retrieved a shotgun from the trunk, walked back to Roberson, and demanded all of his money. Smith robbed Roberson of about $16 and fled. A witness gave Roberson the license number of Smith's car; Roberson wrote it down and gave it to police.

Roberson testified also that approximately six weeks later, Detective Barclay came to Roberson's house with

> a stack of [six] photographs. He said, "Look through these and see if you recognize anybody in here." I looked through them, then I got the one [of Smith]. I laid it to the side and went to the rest of them. I said "This is the guy here."

Barclay testified that he obtained the photograph used in the array from a registration search using the license number; and that Roberson identified Smith from the array.

Smith testified that the first time he saw Roberson was at trial; that he has been misidentified on other occasions; that on the date of the robbery he was probably visiting Robert and Carol Nogle; and that he did not rob Roberson. On cross-examination, Smith admitted that he had been convicted of assault with intent to commit robbery and burglary of a habitation. Moreover, he conceded that he was unable to say with certainty that his car had not been at the gas station on November 24.

Robert Nogle was unable to confirm, however, that Smith visited him at Thanksgiving. And, Carol Nogle testified that she

remembered Smith visiting near Christmas, but that, although he might have been there a month earlier, she could not remember it.

Smith's conviction was affirmed on direct appeal. ***Smith v. State***, No. 05-88-00917-CR (Tex. App. -- Dallas [Fifth Dist.] July 13, 1989) (unpublished). After exhausting state remedies, Smith applied for habeas relief under 28 U.S.C. § 2254, alleging that his counsel was ineffective; that the pretrial identification was impermissibly suggestive; and that the prosecutor made improper arguments.

The magistrate judge recommended denial of the petition without an evidentiary hearing, determining, *inter alia*: Smith did not receive ineffective assistance, because he failed to demonstrate prejudice; there were sufficient indicia of reliability of Roberson's identification to satisfy due process requirements, and, because the state court's findings of fact (following a suppression hearing to determine the admissibility of the identification) were supported by the testimony of Barclay and Roberson, they should be accorded a presumption of correctness that Smith failed to overcome. The magistrate judge also concluded that the prosecutor's closing arguments did not violate state law or render the trial fundamentally unfair.

The district court overruled Smith's objections to the magistrate judge's findings, adopted those findings, and denied Smith's petition.

Smith appealed timely, but the district court denied a certificate of probable cause (CPC). This court granted Smith's motion for a CPC.

II.

A.

Smith contends that his counsel was ineffective because he did not object to Barclay's allegedly improper bolstering of Roberson's identification testimony, did not cross-examine the State's witnesses adequately, and called alibi witnesses who did not corroborate his testimony.[2]

To obtain habeas relief based on ineffective assistance of counsel, a petitioner must show not only that his attorney's performance was deficient but that this prejudiced the defense. *E.g.*, ***U.S. v. Smith***, 915 F.2d 959, 963 (5th Cir. 1990). Judicial scrutiny of counsel's performance must be highly deferential; there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish "prejudice,"

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[2] Smith also contends that it was error for the district court not to afford him a ***Spears*** hearing, ***Spears v. McCotter***, 766 F.2d 179 (5th Cir. 1985) to develop his ineffective assistance claims. ***Spears*** hearings were developed in the context 42 U.S.C. § 1983 litigation, not habeas petitions, *see* ***Spears***, 766 F.2d at 180-81. Further, they are but one option available to the magistrate judge to flesh out the allegations of a complaint; there is no right to such a hearing. *See* ***id.***; ***Wesson v. Oglesby***, 910 F.2d 278, 282 (5th Cir. 1990) (***Spears*** hearing may be used "if necessary"). In the habeas context, a hearing is not required "when the record is complete or the petitioner raises only legal claims that can be resolved without the taking of additional evidence." ***Lavernia v. Lynaugh***, 845 F.2d 493, 501 (5th Cir. 1988) (footnote omitted). In any case, Smith gives no indication of what other evidence he would have adduced at a hearing.

the petitioner is required to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694.

The record supports the district court's determination that, even assuming that counsel's failure to object to Barclay's testimony as improper bolstering was error, Smith did not demonstrate prejudice. Smith's assertion that he might not have been convicted had Barclay's testimony been excluded, is speculative; it is belied by the strong inculpatory evidence adduced at trial. Roberson testified that he had ample time to observe Smith in the parking lot before, during, and after the robbery, and that he made two unequivocal identifications of Smith (both from the photographic lineup (six weeks after the offense), and in court at trial). The license number of the getaway car matched that of Smith's car. Smith did not deny the car was in his possession on the date of the robbery; nor could he say with certainty that the car was not at the gas station that day. Finally, Smith's witnesses did not corroborate his alibi that he was with them on the day of the robbery. Smith has failed to show how the result of his trial was rendered unreliable or fundamentally unfair by counsel's failure to object to Barclay's testimony, given the ample evidence supporting the jury's verdict and its credibility determination. ***Lockhart v. Fretwell***, ___ U.S. ___, ___, 113 S. Ct. 838, 844 (1992).

Smith also asserts that trial counsel did not effectively cross-examine the State's witnesses (asking only two questions of

the victim and none of the other witnesses); and that counsel should not have called Smith's friends as defense witnesses, when they did not confirm his alibi. Smith fails to overcome the presumption that his counsel's decision not to cross-examine more extensively was sound trial strategy.

As the district court determined, "it was not unreasonable trial strategy to refrain from extensively questioning [the State's] witnesses during trial to avoid repeating the details of the offense and Roberson's identification of [Smith] in the presence of the jury." *See* ***Buckley v. Collins***, 904 F.2d 263, 265 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 532 (1990).

Smith's contention that trial counsel erred by calling Smith's friends to testify is similarly unavailing; Smith does not dispute that he insisted on a misidentification defense or that he supplied his own alibi and witnesses to corroborate it. *See* ***Strickland***, 466 U.S. at 691 (reasonableness of counsel's actions may be based on informed strategic choices made by defendant and on information supplied by defendant).

Smith has not demonstrated deficient performance.

B.

Smith further contends that the photographic identification procedure was impermissibly suggestive; specifically, that the time lapse between the robbery and the identification (six weeks) makes it likely that Roberson's in-court identification was based on the photograph of Smith from the lineup, rather than on Roberson's observation of Smith during the robbery. Smith also asserts that

the lineup was suggestive, noting that his photograph shows a profile view on the left and a full-face view on the right, while the others are full-face views on the left with profiles on the right. Also, he states that he was the only subject appearing without a shirt, and that his photograph appears more recent than the others. He concedes, however, that the aspects of the photographs that he finds impermissibly suggestive are "subtle."

"Whether identification testimony is constitutionally admissible is a mixed question of fact and law and is not entitled to a presumption of correctness under 28 U.S.C. § 2254(d)." ***Peters v. Whitley***, 942 F.2d 937, 939 (5th Cir. 1991) (citation omitted), *cert. denied*, 112 S. Ct. 1220 (1992). Factual findings underlying the determination of the admissibility of identification testimony are entitled to that presumption, however. ***Id.*** "[T]he appropriate inquiry is whether the pretrial identification was so unnecessarily suggestive and conducive to irreparable mistaken identification that [Smith] was denied due process of law." ***Lavernia v. Lynaugh***, 845 F.2d 493, 499 (5th Cir. 1988). In this inquiry, we first consider "whether the identification procedure was impermissibly suggestive, and if so, whether there was a substantial likelihood of misidentification. If the photographic line-up was not impermissibly suggestive, the inquiry ends." ***Peters***, 942 F.2d at 939 (citation omitted).

Following a hearing outside the presence of the jury, the trial court denied Smith's motion to suppress the photographic identification. At the hearing, Roberson's testimony about events

on the day of the robbery and about the photographic lineup was substantially the same as his trial testimony, discussed *supra*. He testified, *inter alia*, that he got a good look at Smith on the day of the robbery because he was only about three or four feet away from Smith. As for the photo array, Barclay testified that all the photographs were of men of the same age, height, weight, and physical description. Roberson testified that Barclay did not indicate that he should choose a particular photo.

The trial court overruled Smith's objection to the photographic lineup, finding that Roberson had

> adequate opportunity to view the defendant in a light that was suitable for viewing. That his attention was on the defendant ... from the time the defendant first approached him to the time the defendant walked away to his car and came back with a gun. That the witness was accurate as to the description of the defendant. That he was certain in his identification. That there is no evidence that he's identified any other person.
>
> And, furthermore, the Court finds his in-court identification is based upon actually viewing the defendant at the time and place of the offense and was not affected by the pictorial lineup. And the Court finds that the lineup was not suggestive or conducive o[f] mistaken identification. That the defendant was not denied due process of law.

Because the state court's factual findings are entitled to the presumption of correctness under § 2254(d), and because Smith has not shown that the array was "unnecessarily suggestive and conducive to irreparable mistaken identification," ***Lavernia***, 845 F.2d at 499, the district court did not err by not suppressing it.

C.

Smith asserts next that the prosecutor "committed `fundamental error' and `plain error' during final arguments [in the sentencing phase of the trial,] when he encouraged the jury to assess a greater sentence for crimes appellant committed in the past." Improper argument before the jury "does not present a claim of constitutional magnitude in a federal habeas action unless it is so prejudicial that the state court trial was rendered fundamentally unfair within the meaning of the Due Process Clause". ***Jones v. Butler***, 864 F.2d 348, 356 (5th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989).

At the sentencing phase, the prosecutor stated, in part:

> [W]e'll ask for a life sentence because the facts warrant it. You know from these convictions that he's had experience with the criminal justice system. That he's been to the penitentiary before. He's been to the penitentiary for robbery, for burglary, for four years for possession of firearms, by a felon[]. He's been in jail lots of times for assault and possession of weapons.
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> He likes guns. He likes to assault people.... That's the kind of person you['re] faced with when assessing the proper punishment in this case.

Smith pleaded "true" to two enhancement allegations in the indictment for burglary of a habitation and assault with intent to commit robbery; he conceded at trial that he had been convicted of those crimes; and at sentencing, he stipulated to the admission of records of his prior convictions for unlawful possession of a firearm by a felon and unlawfully carrying a weapon.

Accordingly, the prosecutor's remarks were fair commentary on evidence to which Smith had admitted. They were not error, much

less so prejudicial that the trial was fundamentally unfair. *See* ***Jones***, 864 F.2d at 356.

III.

For the foregoing reasons, the denial of habeas relief is **AFFIRMED**.