IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1692

Summary Calendar

BOBBY TEMPLIN,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
Texas Dept. of Criminal Justice,
Institutional Division and
ATTORNEY GENERAL OF THE STATE
OF TEXAS,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(1:93-CV-032-C)

(October 3, 1994)

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Petitioner, Bobby Templin, appeals the district court's dismissal of his petition for writ of habeas corpus and its denial of his Rule 59 and 60 motions. We affirm except in one respect. The district court failed to examine the factual basis underlying

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

one of Templin's claim. We vacate and remand this claim to the district court for further proceedings.

I.

Bobby Templin was convicted in Texas state court of murdering his wife and was sentenced to 99 years in prison. Templin filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the district court listing numerous errors allegedly committed prior to and during his trial. The state filed a motion to dismiss pursuant to Rule 9(b) of the rules governing § 2254 cases. The state pled abuse of the writ on the grounds that petitioner had previously filed a writ challenging the sufficiency of the evidence supporting his conviction. On May 19, 1993, the district court dismissed Templin's petition as abusive of the writ. The district court noted that Templin filed no response to the state's motion by the deadline of May 14, 1993. The district court also said that Templin's pleadings failed to establish why the new grounds were not raised in the original petition and that the pleadings did not show a fundamental miscarriage of justice. On June 8, 1993, Templin filed a motion under Fed. R. Civ. P. 59 and 60 to set aside the judgment and attached his response to the Rule 9(b) motion. The district court examined Templin's pleadings and found that Templin had not shown cause for not bringing his claims in the earlier petition or made a colorable showing of actual innocence necessary for consideration of a successive petition in order to prevent a fundamental miscarriage of justice. The district court denied relief under both Rule 59 and 60. Templin filed a notice of

appeal and a motion for a certificate of probable cause (CPC). The district court denied CPC. This Court granted CPC.

II.

Rule 9(b) provides that "[a] second or successive petition may be dismissed . . . if new and different grounds are alleged, [and] . . . the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." The district court may not consider the merits of new claims unless the petitioner shows cause for failing to raise those claims in a prior petition and prejudice or shows that the failure to hear the claims will result in a fundamental miscarriage of justice. Sawyer v. Whitley, 112 S. Ct. 2514, 2518-19 (1992).

Petitioner asserts that the district court erred in dismissing his petition and also erred in denying his Rule 59 and 60 motions. Once a state pleads abuse of the writ, the burden shifts to the petitioner to show cause for failing to raise the claims in the prior writ action and prejudice. McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991). Templin failed to file his response by the deadline, so the only grounds for cause must appear in Templin's petition.

Without detailing the basis for its decision, the district court found that petitioner made no showing of cause and prejudice. We find the district court's decision to be supported by the record in all but one instance. Templin argues that his counsel failed to communicate a plea offer of 18 to 20 years and that had he received such an offer, he would have accepted it. In Templin's writ

petition, he states that he learned of this plea offer in July, 1990, after the court denied his first writ. The record before us does not reveal that the district court made any findings as to cause and prejudice on this issue; therefore, we remand this case to the district for appropriate proceedings.[1]

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

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[1] Note that in a separate habeas corpus proceedings, a state court found that Templin's counsel communicated all plea offers to his client. It may be appropriate for the district court to rely on these state court findings; however, the district court received the state court record after it dismissed Templin's writ petition and after it ruled on the Rule 59 and 60 motions.