

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1800
Summary Calendar

JAMES HOWARD, JR.,

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
(3:91-CV-1229-H)

(July 28, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Appellant Howard, sentenced to a term of imprisonment of 25 years for murder, filed a pro se, in forma pauperis petition for federal habeas corpus relief. He alleged that his guilty plea was involuntary because (1) he was incompetent and could not understand the proceedings and (2) counsel provided ineffective assistance

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

because Howard did not know that the plea contained an affirmative finding of the use of a deadly weapon.

The magistrate judge appointed the Federal Public Defender to represent Howard. Following an evidentiary hearing, the magistrate judge concluded that Howard had failed to show that he was incompetent to plead guilty or that, had counsel informed him of the affirmative finding, he would have insisted on proceeding to trial.

The district court considered Howard's objections to the magistrate judge's report, reviewed the record de novo, and adopted the magistrate judge's report as the findings and conclusions of the district court. The district court declined to issue a certificate of probable cause (CPC), but this court granted the motion. Having reviewed the case on appeal, we affirm.

Howard asserts that he was incompetent; therefore, his guilty plea violated due process. He argues that he did not have a rational and factual understanding of the guilty-plea proceedings and that his testimony before the magistrate judge at the evidentiary hearing demonstrated his inability to understand the proceedings against him. As examples of his misunderstanding of the process, Howard cites the following: he believed that the jury imposed a 25-year sentence; he thought that arraignment was a bond hearing; he did not know the function of a prosecutor; he could not explain the difference between the prosecutor and his defense attorney; he understood that a judge was a person who sentenced him; he thought that the people in the audience could punish him as

well as a jury. Howard contends that he could not read the plea agreement and could not spell the key phrase "affirmative finding."

"Due process prohibits the conviction of a person who is mentally incompetent." Bouchillon v. Collins, 907 F.2d 589, 592 (5th Cir. 1990) (footnote omitted). "The test of incompetency is whether a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." Id. (internal quotation and citation omitted). "In a federal habeas proceeding stemming from a state court conviction, the burden is on the petitioner to prove, by a preponderance of the evidence, that he was incompetent in fact at the time of the plea." Id.

As proof of his incompetence in state court, Howard offered an assessment report prepared by the Windham School System, which is part of the Texas Department of Criminal Justice, after his incarceration. The report indicated that Howard tested below a second grade level in reading, math, and writing skills. The full scale results of the tests placed him within the mentally retarded range of intelligence with verbal and performance abilities two standard deviations below the mean.

The respondent argues that the "mere presence of mental disability alone does not automatically indicate that a defendant is legally incompetent at the time he pleaded guilty." see Bouchillon, 907 F.2d at 593.

At the hearing, Howard testified that his attorney, Brad Lollar, initially met with him and explained that he would speak with the "DA" concerning the evidence against him. Although Howard could not define the functions of a prosecutor, he did not express a misunderstanding of the role of the "DA." Further, Howard understood that the judge could set bail and impose a sentence, that his attorney would represent him and tell him "what kind of chances" he had, that he would receive a jury trial if he chose to plead not guilty, and that he was going to receive a 25-year sentence. He was confused concerning the role of the "people[] in the audience" in sentencing him. Howard also understood that an aggravated offense indicated an affirmative finding of the use of a deadly weapon, but he asserted that an affirmative finding was not part of the plea agreement that he signed. Responding to a question posed by the magistrate judge, Howard acknowledged that he filed some state court papers, including a request to have Lollar relieved as his attorney.

The district court adopted the magistrate judge's determination that the evidence supported a finding that although Howard was mentally handicapped with below average intelligence, he had not demonstrated by a preponderance of the evidence that he was incapable of comprehending his situation and consulting with his attorney. see Bouchillon, 907 F.2d at 592. The district court's findings of competency are supported by the evidence and are, thereby, not clearly erroneous. Id. at 594.

Howard also contends that he was deprived of his Sixth Amendment right to effective assistance of counsel. He argues that counsel failed to recognize that he was incompetent to understand the charges and proceedings against him and, alternatively, that counsel failed to inform him that an affirmative finding of a deadly weapon was part of the plea agreement.

To support this claim, Howard must prove two components: (1) that his counsel made errors that were so serious that they deprived him of his Sixth Amendment guarantee and (2) that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The test enunciated in Strickland "applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). The "prejudice" requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Id. at 59. "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id.

Howard contends that Lollar "should have spent sufficient time with Howard to learn that Howard could barely read and write, had below third grade learning ability and was mentally handicapped with a below average intelligence." He argues that counsel's failure to recognize the depth of his mental problems and lack of

understanding of the judicial process constitutes deficient performance. He further asserts that he was prejudiced by counsel's failure to recognize his incompetence and proceed to trial.

In an affidavit presented in Howard's state habeas proceeding, Lollar stated that Howard "appeared at all times to be competent to stand trial." According to Lollar, Howard understood the charges against him and chose to accept the plea bargain. Id.

At the federal evidentiary hearing, Lollar recognized Howard, but he did not "independently recall" much about Howard's case. Lollar stated that he had been involved in thousands of criminal cases both as a prosecutor with the district attorney's office and as a defense attorney. Counsel described his usual practice when he was appointed to represent a defendant in a criminal case:

I would have at [the time I introduced myself] gone through with him the inditement [sic] in the case, the charges against him, the penalty range, discussed the facts of the case, as both the prosecutor would have explained to me what their side would be, and I would ask the client what his side of the story was. I would convey any plea bargain offers to the client. I would discuss what the plea bargain offer meant, and particularly in this type of case where a deadly weapon was alleged in the inditement [sic] I would explain that that plea bargain offer would require the serving of so much per year on the sentence before they become eligible for parole.

In this particular case I'm sure I did all of those things, and during the course of my discussions with him I never had the sense that he was not understanding what I was talking about. I never felt that he was incompetent to stand trial. He seemed to understand the plea bargain offer, the penalty range and certainly the charge against him.

Counsel stated that, in appointed cases, he particularly looks out for competency to avoid a later assertion of insanity or incompetency. He testified that, if there is a problem, there are usually "hints" from the defendant's dealings with jail personnel, the defendant's demeanor at the initial meeting, or the nature of the offense.

Based on this testimony, the evidence supports the finding that Howard was able to consult with his attorney concerning his options and to choose to plead guilty. Howard has not demonstrated that counsel's performance in assessing his client's ability to understand and participate in the process was anything but reasonable "under prevailing professional norms." See Strickland, 446 U.S. at 690-91. Even if counsel had investigated his client's competence, Howard has not shown that "there was a reasonable probability that he was in fact incompetent." Theriot v. Whitley, 18 F.3d 311, 314 (5th Cir. 1994).

Assuming he was competent to enter a plea of guilty, Howard argues that counsel failed to inform him that the plea agreement included an affirmative finding of the use of a deadly weapon. He contends that, had he known that the sentence would be "aggravated," he would never have pleaded guilty. Blue brief, 16.

The plea agreement included the handwritten, additional provision of an "affirmative finding of a deadly weapon" and was signed by Howard and his counsel. However, Howard asserts that the agreement he signed did not contain that language. Counsel testified at the evidentiary hearing that the provision that there

was an affirmative finding of a deadly weapon was a part of the plea agreement when he and Howard signed it and that he recalled Howard signing the agreement. Moreover, consistent with the testimony, counsel stated in his state-court affidavit that Howard "fully understood that the Court would make an affirmative finding in that regard."

Howard has not demonstrated that the credibility determinations of the district court are clearly erroneous. Hence, he has not carried his burden of showing that counsel's performance in advising him to plead guilty was deficient.

For these reasons, the judgment of the district court denying habeas corpus relief is **AFFIRMED**.