

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2365
Summary Calendar

RONALD ROTH,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 91 132)

(August 1, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Appellant Ronald Roth is serving a life sentence for killing his girlfriend. He asserts that had his attorney given him different legal advice, he would not have pleaded guilty and opted for a sentencing hearing by a jury, but instead would have accepted

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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 the state's plea bargain offers for sentences ranging from 33-45 years in prison. Roth also asserts claims based on alleged jury misconduct and the introduction of a prejudicial photograph at the sentencing hearing. We find no merit in these contentions and affirm the district court's denial of habeas relief.

Roth's crime was particularly callous. After a disagreement with his live-in girlfriend, he shot her in the chest while she was in the bathtub and waited for ten minutes as she died, screaming. He then stuffed her body into a bag, watched a ball game on TV, and tried to dispose of the body by casting it off a bridge after dark.

Roth asserts that his trial counsel Mr. McCaig rendered ineffective assistance because he failed to investigate the facts of Roth's prior conviction in Michigan and advised Roth incorrectly on his eligibility for probation in Texas. Roth told McCaig he had been placed on probation in Michigan for an offense involving use of another's credit card. Roth filed a sworn statement in the Texas court asserting that he had never been convicted of a felony. In fact, this statement was wrong, and McCaig was informed by the state during the jury sentencing hearing that Roth's Michigan conviction was indeed a felony. In Texas, a defendant is not eligible for probation if he has been previously convicted of a felony offense. Tex. Code Crim. Pro. Ann. art. 42.12 § 4(d)(3) (Vernon Supp. 1994). When McCaig learned that the prior conviction was a felony, he immediately withdrew Roth's application for probation, informing the court that he did not want to subject his

client to the possibility of a perjury charge. At the conclusion of the hearing, the jury assessed a life sentence.

In support of his motion for state habeas relief, Roth attached McCaig's affidavit, which stated:

I recall, and my file notes reflect, Mr. Roth was not interested in any [state plea bargain] offer that did not include probation. It was my feeling at the time, and my opinion now, that the details of the case were such that probation was not a likely sentence.

McCaig also points out that Roth had virtually no defense to this murder charge and offered more than one confession.

There is some initial confusion as to which constitutional standard of counsel ineffectiveness governs this case. The state contends that our decision is controlled by Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985), which sets the standard for reviewing ineffective counsel claims in the context of a guilty plea. Under Hill, a defendant must show that he received seriously defective professional representation and that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. See Hill, 474 U.S. at 58-59, 106 S.Ct. at 370. Recently, however, our court has suggested that Hill may not be appropriate in a non-capital case in which the defendant asserts that after pleading guilty, counsel's errors led to a seriously prejudicial sentencing determination. See Spriggs v. Collins, 993 F.2d 85 (5th Cir. 1993). Under Spriggs, the level of incompetence needed to meet the constitutional standard is the same as under Hill. Spriggs differs only by assessing prejudice by focusing on whether "the defendant's non-capital sentence would

have been significantly less harsh." Id at 88-89 (emphasis in original).¹

We need not here definitively resolve the choice of standard because Roth's claim cannot succeed under Hill or Spriggs. First, even if McCaig informed Roth that he might be eligible to receive probation -- a representation that seems unlikely in light of the above-quoted excerpt from McCaig's affidavit -- such error did not rise to the level of constitutional incompetence. McCaig had the right to rely on Roth's representation that his conviction in Michigan was for a misdemeanor, a representation Roth reinforced by filing a sworn statement to that effect in Texas court. An attorney is not professionally incompetent under the constitutional standard for failing to investigate the facts behind a sworn statement of his client. Counsel's actions are usually properly based on informed strategic choices made by the defendant and on information supplied by the defendant. See Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066 (1984).

Second, Roth's assertion of prejudice under either Hill or Spriggs cannot be taken seriously. As McCaig's affidavit reflects, the likelihood that Roth could possibly receive a sentence of probation for this vicious offense was nil. It cannot be believed, even if he was misinformed that probation was a

¹ In Spriggs, the court stated that "[i]n deciding whether such prejudice occurred, a court should consider a number of factors: the actual amount of the sentence imposed on the defendant by the sentencing judge or jury[,] the minimum and maximum sentences possible under the relevant statute or sentencing guidelines, the relevant statute or sentencing guidelines, the relative placement of the sentence actually imposed within that range, and the various relevant mitigating and aggravating factors that were properly considered by the sentencer." Spriggs at 88-89.

possible sentence, that Roth could have understood that probation was sufficiently likely at the hands of a jury to cause him to reject the proffered plea bargains.

Third, there is no prejudice under the Hill test because the evidence against Roth was so overwhelming that there is no likelihood that, if properly informed about the unavailability of probation, he would have pleaded guilty and would have insisted on going to trial. Further, even under Spriggs, the difference between a life sentence and the alleged plea bargain offers of the state does not appear significantly less harsh to raise a substantial question of prejudice. For all these reasons, we reject Roth's ineffective assistance of counsel claim.

Roth also urges that the state trial court failed in its duty to inquire into his allegations of jury misconduct. Roth's motion for new trial stated that one juror, Joyce Frederick Callaway, felt she was coerced into her verdict. The state court rejected the claim. In so doing, it is possible that it misinterpreted Tex. R. Crim. Evid. 606(b) as it was then construed. Whether or not there was an error of Texas law, however, the question in federal court is whether the trial court's ruling violated Roth's constitutional rights. See Drew v. Collins, 964 F.2d 411, 415 (5th Cir. 1992). It did not. There is no showing that the jury's deliberative process or result were fatally compromised in such a way as to deny fundamental fairness at the sentencing hearing.

Roth finally asserts that the trial court denied him due process and a fair punishment hearing by allowing into evidence a photo that depicted an investigator's finger submerged in the victim's wound. State evidentiary rulings merit federal habeas corpus review only if they are of such magnitude as to constitute a denial of fundamental fairness under the due process clause. See Bridge v. Lynaugh, 838 F.2d 770, 772 (5th Cir. 1988). The question is whether there is a reasonable probability that the verdict might have been different had the trial been properly conducted. See Guidroz v. Lynaugh, 852 F.2d 832, 835 (5th Cir. 1988). In this case, the state trial court did not err in admitting the photograph as a matter of its discretion. Further, the prejudicial effect of the photograph was matched by other, ample descriptive evidence indicating the brutality of the murder.

For the reasons stated, there is no merit in Roth's claims for federal habeas relief. The judgment of the district court is therefore AFFIRMED.