

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2551
Summary Calendar

ANTHONY TODD ROBINSON,

Petitioner-Appellant,

versus

WAYNE SCOTT, 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-CV-2354)

March 15, 1995

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Appellant Robinson is serving a 27-year term of imprisonment after conviction of aggravated sexual assault. He pursued a state petition for habeas corpus relief, which was rejected after hearing by affidavit. The Texas Court of Criminal Appeals denied the petition without written reasons. The federal district court ultimately granted summary judgment against

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Robinson's claims, leading to this appeal. Finding no error, we affirm.

In his pro se brief on appeal, Robinson lists five issues that he attempted to raise in the state and federal district courts. He does not, however, brief the merits of those issues, as is required by our court. Consequently, his contentions on the merits are waived. Yohey v. Collins, 985 F. 2d 222, 225 (5th Cir.), cert. denied, (1993).

Robinson's real complaint seems to be that the district court denied his numerous requests for discovery to produce documentary and testimonial evidence in support of his claims. These requests spanned the gamut of evidence that was or could have been introduced at trial. What Robinson evidently misunderstands, however, is that a federal habeas corpus proceeding is not a second criminal trial, but only a search for whether the record of the real trial was infected with constitutional error. Thus, 28 U.S.C. § 2254(d) states that findings of the state trial courts shall be presumed correct unless a showing is made of particular deficiencies in fact finding procedures, none of which Robinson has shown here.¹ Moreover, under Rule 8 of the Rules Governing Section 2254 Cases, district courts need not conduct an evidentiary hearing when the record is complete or the petitioner raises only legal claims that can be resolved without taking of additional evidence.

¹ The district court opinion in this case is somewhat unclear by its reference to the standards of Rule 56 summary judgment procedure without mentioning the presumption of correctness accorded state findings by 28 U.S.C. § 2254(d). Nevertheless, it is evident that the district court applied the proper standard.

Lavernia v. Lynaugh, 845 F.2d 493, 501 (5th Cir. 1988). Most importantly, to obtain an evidentiary hearing, a federal habeas corpus petitioner must also show cause for his failure to develop the facts in state court proceedings and actual prejudice resulting from that failure. Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1721 (1992). In short, only in an unusual federal habeas corpus proceeding should a federal district court permit discovery and hold an evidentiary hearing of its own.

None of Robinson's claims required the federal court to develop evidence. The district court's summaries of these claims show why this is so. First, his claim of a warrantless arrest and an unconstitutional admission of evidence were barred from review in the federal courts because Robinson had a full and fair opportunity to litigate the claim in state court. Stone v. Powell, 96 S. Ct. 3037 (1976). Second, his assertion that the state suppressed favorable evidence is groundless: the state made available its entire state investigatory file, which the defense attorney reviewed several times in preparation for Robinson's defense. The state made no fingerprints at the scene, and had no duty to search for allegedly favorable police radio or telephone transmissions. Johnson v. Pittman, 731 F.2d 1231, 1234 (5th Cir. 1984), cert. denied, 469 U.S. 1110 (1985). Third, all of Robinson's contentions concerning counsel's alleged ineffectiveness were resolved against him in the state trial court, many of them on the basis of an affidavit of his own trial counsel. Robinson has not established that a factual dispute exists concerning

ineffective assistance of counsel claims which, if resolved in his favor, would entitle him to relief; nor has he shown cause for his failure to develop the facts further in the state proceedings so as to warrant a federal evidentiary hearing. Fourth, contrary to his assertion, Robinson had no legal right to file a pro se brief in the Texas courts, nor any constitutional right to do so. Finally, Robinson's challenge to the identification by the victim is meritless: she identified him positively, according to Robinson's counsel, twice shortly after the assault. There was no prejudice.

Robinson's other challenges to the district court's procedure lack merit. He was not entitled to counsel in a federal habeas corpus proceeding. Pennsylvania v. Findley, 107 S. Ct. 1990 (1987). Under the Federal Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B), the appointment of counsel is discretionary, and the district court's denial of Robinson's request for counsel did not abuse that discretion. Further, although Robinson may not have received the 10-day notice required to a non-movant for summary judgment under Rule 56, our court has held that Rule 8(a) of the Rules Governing Section 2254 Cases renders application of that notice unnecessary. Rule 8(a) authorizes a district court summarily to dismiss a habeas petition if, after review of the record, the court determines that no evidentiary hearing is required. Young v. Herring, 938 F. 2d 543, 561 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1485 (1992).

For the foregoing reasons, the district court's judgment denying habeas relief is **AFFIRMED**.

