IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

93-2895
(Summary Calendar)

KERRY PATRICK DAUSSIN,

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-91-2189)

(September 26, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Petitioner-Appellant Kerry Patrick Daussin, a state prisoner who applied for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, appeals the district court's denial of the writ. Daussin

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

complains that he was not competent to stand trial, that he was denied due process because the district court did not sua sponte conduct a competency hearing, and because court appointed counsel was allegedly defective. Concluding that Daussin's claims of reversible error are not well founded, we affirm the district court's denial of the writ.

I

FACTS AND PROCEEDINGS

In state court, Daussin was convicted of aggravated robbery and sentenced to 99 years imprisonment. Daussin v. State, 640 S.W.2d 631, 632 (Tex. Ct. App. 1982). He filed a federal petition for writ of habeas corpus alleging that he was (1) denied effective assistance of counsel because his attorney failed to investigate adequately his insanity defense; (2) incompetent to stand trail; and (3) denied due process because the trial court failed sua sponte to conduct a competency hearing. The district court denied relief and dismissed the petition, and also denied Daussin's request for a certificate of probable (CPC). We granted CPC because it was unclear from the record whether there was sufficient evidence to support the finding that Daussin was competent to stand trial.

II

ANALYSIS

A. Competency to Stand Trial

Daussin urges that he was incompetent to stand trial. The test for competency is whether the defendant had "sufficient

present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he ha[d] a rational as well as factual understanding of the proceedings against him." Bouchillon v. Collins, 907 F.2d 589 592 (5th Cir. 1990) (internal quotation marks and citations omitted). In a federal habeas proceeding, the petitioner must demonstrate by a preponderance of the evidence that he was incompetent in fact at the time of the trial.[1] Id.

Prior to trial the defendant and the prosecutor filed a joint motion for a sanity/competency examination to determine Daussin's competency to stand trial and his sanity at the time of the offense, and the motion was granted. The examination was conducted by Dr. Nottingham on January 19, 1981, less than two months before Daussin's March 3 trial. Dr. Nottingham noted that Daussin was aware of the charges against him and the potential penalty if he were to be found guilty; that Daussin knew that he had a court-appointed attorney whose job it was "to beat the case;" that Daussin planned to plead not guilty; and that Daussin understood that the job of the jury was to hear the facts of the case and determine guilt. Dr. Nottingham also noted that Daussin was "sane" at the time of the alleged offense.

[1]The district court and the respondent both state that a habeas petitioner must establish incompetency by clear and convincing evidence. The correct standard, however, is a preponderance of the evidence. See Zapata v. Estelle, 585 F.2d 750, 751 (5th Cir. 1979) (en banc) (once a habeas petitioner has raised a substantial, threshold doubt about his competency at the time of trial by clear and convincing evidence, he must prove the fact of incompetency by a preponderance of the evidence).

Daussin argues that this report does not establish his competency to stand trial because Dr. Nottingham did not make an explicit finding on competency and the report did not include a complete description of Daussin's prior psychiatric history. Although Dr. Nottingham may not have reviewed Daussin's complete prior psychiatric history and may not have made an explicit finding of competency, the doctor was able to view Daussin within two months prior to his trial and was able to determine that Daussin understood the current proceedings. This report was sufficient to establish competency, even without recitation of the talismanic words of competency.

Daussin also urges, however, that his competency to stand trial could have changed between the time of the examination and the trial. He argues that his demeanor and behavior at trial indicated that he had become incompetent in the interim. The trial transcript includes various references to Daussin's disruptive behavior, and Daussin was eventually removed from the courtroom during the punishment phase of his trial. Other behavior during the trial, however, indicated that he was aware of the proceedings and that his dissatisfaction and disruptive behavior were due to his intention to pursue an insanity defense which his court-appointed counsel failed to present. His own counsel argued to the jury, during summation of the punishment phase, that the jury should not to be distracted by Daussin's behavior and should not consider it evidence of insanity. Daussin has not demonstrated by a preponderance of the evidence that his behavior at trial

established incompetency to stand trial. See Flugence v. Butler, 848 F.2d 77, 80 (5th Cir. 1988) (emotional outbursts and invocation of Deity are not so bizarre as to be necessarily reflective of incompetence).

B. Due Process and Sua Sponte Competency Hearing

Daussin also argues that, given his disruptive behavior at trial, the trial court should have ordered a competency hearing sua sponte. Due process requires the trial court to order a competency hearing sua sponte whenever the facts before the court raise or should raise a bona fide doubt concerning competency. See Pate v. Robinson, 383 U.S. 375, 385, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); Enriquez v. Procunier, 752 F.2d 111, 113 (5th Cir. 1984), cert. denied, 471 U.S. 1126 (1985). The petitioner has the burden of demonstrating that the objective facts known to the trial court were sufficient to raise a bona fide doubt as to the petitioner's competency. Enriquez, 752 F.2d at 113. To determine whether a Pate violation occurred, the trial court should consider any history of irrational behavior, the defendant's demeanor at trial, and prior medical opinion. Johnson v. Estelle, 704 F.2d 232, 238 (5th Cir. 1983), cert. denied, 465 U.S. 1009 (1984).

Although the competency/sanity report indicated that Daussin had a history of psychological problems, the report also indicated that Daussin was "sane" at the time of the offense, and that he understood the roll of his attorney and the jury, the charges against him, and the potential penalty if he was found guilty. Daussin again relies heavily on his behavior at trial to establish

that he was incompetent. As discussed above, however, despite Daussin's disruptive behavior he appeared to understand the proceedings and has not demonstrated that the facts known to the trial court should have raised a bona fide doubt as to his competency sufficient to mandate a competency hearing sua sponte. See Flugence, 848 F.2d at 80.

C. Ineffective Assistance of Counsel

Finally, Daussin argues that his attorney was ineffective because he failed to investigate adequately an insanity defense and failed generally to provide an effective defense. To establish an ineffective-assistance-of-counsel claim Daussin must demonstrate both cause and prejudice, i.e., that counsel's performance was deficient and that the deficient performance prejudiced Daussin's defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 74 (1984).

Daussin argues that his attorney should have raised an insanity defense because Daussin was intoxicated at the time of the offense and had a history of mental illness. Voluntary intoxication cannot support an insanity defense. See Tex. Penal Code Ann. § 8.04(a) (West 1974); Juhasz v. State, 827 S.W.2d 397, 406 (Tex. Ct. App. 1992). Daussin does not suggest that his intoxication was not voluntary and therefore cannot demonstrate that his attorney's performance was deficient for not raising an invalid defense. Also, the examining psychiatrist's report established that Daussin was sane at the time of the offense.

To the extent that Daussin argues that his attorney was

ineffective for failing to investigate whether $500 was present in the store when the robbery occurred and for failing to investigate Daussin's prior psychiatric history, these issues are raised for the first time on appeal. We do not address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

AFFIRMED.