

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

---

No. 93-3032  
Summary Calendar

---

JOSE VANDERLINDER,

Petitioner-Appellant,

VERSUS

WILLIAM GUSTE, Attorney General  
State of Louisiana,

Respondent-Appellee.

---

Appeal from the United States District Court  
For the Eastern District of Louisiana

---

(CA 91 CV 2519)

---

(July 13, 1993)

Before HIGGINBOTHAM, SMITH, and DeMoss, Circuit Judges.

PER CURIAM:\*

**BACKGROUND**

On December 27, 1987, a call from a Delta Airlines employee prompted two detectives, Davis and Simone, to go to the New Orleans

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

airport to investigate a piece of mishandled luggage. Upon taking the suitcase to the baggage room to set up a "dog-sniffing line-up," the detectives noticed Jose Vanderlinder step out of the baggage claim line. After stepping out of line again, Vanderlinder motioned to a Juan Medina, and they hastily walked towards the exit. The detectives asked the two men for identification. They further requested that Vanderlinder and Medina accompany them to the baggage claim area where the detectives inquired whether they had any connection to the luggage. During the luggage line-up, a dog alerted on the bag and a key was found in Vanderlinder's pants pocket which opened the luggage. When the suitcases were opened, the detectives discovered two packets of cocaine.<sup>1</sup> The men were not advised of their Miranda rights prior to being questioned by the detectives nor prior to the opening of the luggage.

Vanderlinder and Medina were charged in state court with possession with the intent to distribute over 400 grams of cocaine. A jury found Vanderlinder guilty of the offense, and the court sentenced him to twenty-five years imprisonment. The state court of appeal reversed the conviction and remanded the case for a new trial.

On remand, Vanderlinder renewed his motion to suppress the evidence and confession and the motion was denied after an

---

<sup>1</sup> Because the record does not include a copy of the first state-court trial or the evidentiary hearing on the motion to suppress, the facts are recited as found in the published state court opinion. State v. Vanderlinder, 552 So.2d 1274, 1275 (La. Ct. App. 1989).

evidentiary hearing.<sup>2</sup> He then entered a guilty plea, reserving the right to appeal the suppression motion, and the court sentenced him to 15 years incarceration.

The court of appeal upheld the denial of the motion to suppress, concluding that the officers had reasonable suspicion for an investigatory stop. The confession issue was neither raised nor addressed. The Louisiana Supreme Court subsequently denied Vanderlinder's application for writ of certiorari.

Vanderlinder pursued, pro se, a habeas petition under 28 U.S.C. § 2254. The magistrate judge issued a report and recommendation which recommended that the petition be dismissed without prejudice for Vanderlinder's failure to exhaust his state remedies as to all of his claims, specifically his claim that the prosecution had failed to disclose evidence favorable to the defense. After Vanderlinder dismissed this claim, the magistrate judge recommended that the petition be dismissed with prejudice. The magistrate judge did not address the Fifth Amendment claim, although he acknowledged that petitioner was raising the issue. The district court adopted the recommendation and dismissed the petition.

#### **OPINION**

Vanderlinder contends that the court erred in dismissing his habeas petition because he had raised, not only a Fourth Amendment violation claim but, a Fifth Amendment violation claim as well. He

---

<sup>2</sup> Vanderlinder does not identify in his petition the substance of the confession that he made to the officers.

contends he was in police custody, interrogated, searched, and handcuffed without being advised of his Miranda rights. Vanderlinder also contends that any evidence seized pursuant to his arrest should have been suppressed during the state proceedings.

Vanderlinder's Fifth Amendment claim was not raised in the state appellate court. His appeal following his conditional plea raised only the validity of his arrest, not the Miranda issue. Therefore, the court of appeal's decision addressed only the Fourth Amendment issue. The district court addressed the merits of his petition without noting that the Fifth Amendment issue had not been exhausted. Instead of dismissing the petition on the merits, the district court should have dismissed the petition because the issue had not been raised in the state appellate courts. "In the regular and ordinary course of procedure, the power of the highest state court in respect of such questions should first be exhausted." Rose v. Lundy, 455 U.S. 509, 515, 102 S. Ct. 1198, 71 L. Ed. 2d (1982). The highest state court must be apprised of the federal rights that a petitioner alleges were violated and the claim(s) must be presented in a procedurally correct manner. Deters v. Collins, 985 F.2d 789, 795 (5th Cir. 1993). The district court erred in considering the merits of the petition prior to consideration of the Fifth Amendment claim by the state appellate courts. Id. at 797. The petition is remanded to the district court for dismissal without prejudice for failure to exhaust.