IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3209

AUSTIN HERNANDEZ,

Petitioner-Appellant,

v.

ED DAY, Warden, Washington Correctional Institute, and RICHARD P. IEYOUB, Attorney General, State of Louisiana,

Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 90 1217 G 6)

(June 15, 1994)

Before KING and SMITH, Circuit Judges, and KAZEN,[*] District Judge.

PER CURIAM:[**]

Austin Hernandez, proceeding pro se and in forma pauperis, appeals the district court's denial of his petition for habeas corpus relief. We affirm the judgment of the district court.

[*] District Judge of the Southern District of Texas, sitting by designation.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. BACKGROUND

The petitioner, Austin Hernandez, was convicted by a jury in Louisiana state court of possession with intent to distribute marijuana and possession of cocaine. Hernandez was sentenced to ten years of imprisonment for the marijuana conviction and to thirty years of imprisonment for the cocaine conviction; he was also fined $65,000 for both offenses.

Hernandez first appeared in the trial court for arraignment on January 26, 1984, and informed the court through an interpreter that his attorney, Charles Elloie, was not present. The court reset arraignment and made arrangements for Elloie to be notified.[1]

On February 10, 1984, Hernandez appeared for arraignment and pleaded not guilty to the charges against him. Both a court-appointed interpreter and his attorney, William Ary, were present. The court then ordered a hearing to determine counsel, and Ellioe appeared as counsel at that hearing on April 25, 1984.

On May 25, 1984, Hernandez, once again represented by Ary, appeared in court for hearings on pre-trial motions, including a motion to suppress that Ary had filed. After the hearing on the motion to suppress, in which Ary called Hernandez's arresting officer to testify, the court denied the motion.

[1] The record indicates that arraignment was originally reset for February 3, 1984, but that it was subsequently reset for February 10, 1984. No reason for the subsequent rescheduling is set forth in the record.

On June 26, 1984, the first trial date, Hernandez and an interpreter appeared before the court. The court then ordered another hearing for July 10, 1984, to determine counsel. At this hearing, Hernandez told the court through his interpreter that his new attorney was Martin Regan. The court reset the determination-of-counsel hearing for the next day.

On July 11, 1984, Regan told the court that he had not been retained by Hernandez. The court then appointed Kendall Green to represent the petitioner, and trial was set for August 14, 1984. Because of an ongoing trial, however, Hernandez's trial was subsequently reset as a priority trial for September 27, 1984.

On September 27, 1984, Hernandez appeared with Milton Masinter, who informed the court that he was the counsel of record. The court informed Masinter that the trial would go forward six weeks later on November 7, 1984, and that no more continuances would be allowed.

On November 7, 1984, Hernandez and Masinter appeared before the court. Masinter moved for a continuance, advising the court that after he had become counsel of record for Hernandez, he had an out-of-town trial which unexpectedly lasted two weeks instead of just one. Hernandez informed the court, through an interpreter, that Masinter had not consulted with him about the case. When the court asked Masinter why he had not consulted with Hernandez in the six weeks he had been representing him, Masinter replied that he had been out of town for two weeks and that "things developed [and] I didn't come back where I thought I

would. I would have had a week to prepare." Masinter also gave the court no reason why he did not consult with Hernandez during the two days before trial when Masinter was back in town. Further, he told the court that he had talked to previous counsel in the case but that they had just "filled [him in with] a skeleton of the case." He did not give any reasons why he had not inquired more of previous counsel.

The court, after noting that Hernandez's case was more than a year old and that no defense witnesses had been subpoenaed to appear at trial, denied the motion for continuance and ordered the trial to proceed. However, the court did allow Masinter enough time to make a telephone call to apply for a supervisory writ from the Louisiana Supreme Court regarding the denial of the motion for continuance. The Louisiana Supreme Court denied the writ.

The trial proceeded, and after the State rested, Masinter again asked for a continuance, stating that he had not had an opportunity to discuss the case with Hernandez and that he understood that Hernandez wanted to take the stand but did not have any idea what Hernandez wanted to say. The court then granted a fifteen-minute recess so that Masinter could consult with Hernandez. After the recess, the trial court asked Masinter who Hernandez's witnesses were, and Masinter replied that Hernandez wished to call neighbors, but that Hernandez did not know what their names were, if they would testify, or what they

would say. The trial court the recessed the case until the next morning.

The following day, Masinter reported to the court that he had attempted to locate one of the witnesses Hernandez wanted to call but that the witness had moved and was not able to be located either at his new place of residence or where he worked. The defense then rested without Hernandez testifying and without calling witnesses.

Hernandez's conviction and sentence were affirmed on direct appeal. Hernandez then filed numerous post-conviction writs in state court, all of which were denied. After exhausting his state court remedies, Hernandez filed a petition for habeas corpus relief in the United States District Court for the Eastern District of Louisiana, pursuant to 28 U.S.C. § 2254. He argued (1) that the state trial court abused its discretion in denying his motion for continuance, (2) that he was denied effective assistance of counsel, (3) that the evidence used to convict him was illegally seized, and (4) that his sentences and fines constituted cruel and unusual punishment. A magistrate judge concluded that Hernandez's claims were without merit and recommended that Hernandez's petition be denied. After reviewing and overruling Hernandez's objections to this recommendation, the district court adopted the magistrate's recommendation in its entirety and dismissed Hernandez's petition with prejudice on February 28, 1991. On March 6, 1991, Hernandez filed a notice of

appeal and a request for a certificate of probable cause to appeal, which the district court granted on March 19, 1993.

II. DISCUSSION

On appeal, Hernandez intertwines his ineffective-assistance-of-counsel-claim with his claims regarding the denial of his motion for continuance and illegally seized evidence.[2] We address each of Hernandez's arguments in turn.

A. Motion for Continuance/Ineffective Assistance

The major thrust of Hernandez's habeas petition is that the state trial court abused its discretion by denying his motion for continuance, thereby violating his due process rights. He also asserts that this denial effectively rendered his counsel's assistance ineffective. He argues that his counsel was unable to investigate the case properly and that he was thus constructively denied his right to counsel as guaranteed by the Sixth Amendment.

1. Motion for continuance

In addressing Hernandez's claim that the trial court abused its discretion by denying his motion for continuance, we note that to warrant federal habeas relief, Hernandez must show that the trial court's denial of a continuance was "not only an abuse of discretion but also so arbitrary and fundamentally unfair"

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[2] We note that in his appellate brief, Hernandez lists as an issue, but does not argue, the fact that his sentences and fines constitute cruel and unusual punishment. We do not address this issue because a pro se habeas petitioner abandons a claim by failing to argue it in the body of his brief. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993).

that it denied Hernandez due processSQi.e., it rendered Hernandez's trial fundamentally unfair. McFadden v. Cabana, 851 F.2d 784, 788 (5th Cir. 1988), cert. denied, 489 U.S. 1083 (1989); see Hicks v. Wainwright, 633 F.2d 1146, 1148 (5th Cir. 1981). Hence, he has to establish "'a reasonable probability that the granting of a continuance would have permitted him to adduce evidence that would have altered the verdict.'" McFadden, 851 F.2d at 788 (quoting Kirkpatrick v. Blackburn, 777 F.2d 272, 280 (5th Cir. 1985), cert. denied, 476 U.S. 1178 (1986)).

Hernandez has failed to demonstrate that he is entitled to any relief on his claim regarding the denial of his motion for continuance. The record supports the district court's determination that although Hernandez contended that his attorney was denied an opportunity to find witnesses for his defense, he could not inform the trial court what the names of these witnesses were, what specific facts they would testify to, or how specifically their absence at trial prejudiced his presentation of the case. The only assertions Hernandez made at trial, as he did in the district court below and in his appellate brief, were that (1) these potential witnesses were his neighbors who may have been at home at the time of his arrest, (2) if they had been at home, they may have had knowledge of the circumstances of his arrest, (3) if they had knowledge of the circumstances of his arrest, they may have testified for the defense, and (4) if they had testified, their testimony might have impeached the police officers' testimony concerning the circumstances of his arrest.

Even if this court were to determine that the trial court abused its discretion in denying Hernandez's motion for continuance, Hernandez's speculation concerning possible unidentified witnesses fails to demonstrate a reasonable probability that the granting of the continuance would have permitted him to adduce evidence that would have altered the verdict. Therefore, his claim that the trial court erred in denying his motion for a continuance does not entitle him to habeas relief.

2. Ineffective Assistance

Hernandez also asserts that the district court erred in denying him habeas relief on his ineffective-assistance-of-counsel claim, as that claim relates to the denial of a continuance in the state trial court. He challenges the district court's finding that he suffered no prejudice as a result of the denial of a continuance, arguing that no showing of prejudice on his part was necessary because the trial court's failure to grant a continuance constructively denied him his right to effective assistance of counsel.

In Strickland v. Washington, 466 U.S. 668, 687-95 (1984), the Supreme Court decided that to be entitled to relief on the ground that his counsel rendered ineffective assistance, a habeas petitioner must show (1) that counsel's performance in representing the petitioner fell below "an objective standard of reasonableness" and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." A petitioner has to satisfy both the "performance" and the "prejudice" prongs of Strickland to successfully demonstrate an ineffective-assistance-of-counsel claim. Id. at 687. In United States v. Cronic, 466 U.S. 648, 658 (1984), which was decided on the same day as Strickland, the Court carved out a narrow exception to the general rule enunciated in Strickland, stating that a showing of prejudice was not necessary if circumstances existed which were "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Such circumstances would exist "if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," the adversarial process becomes presumptively unreliable. Id. at 659 (emphasis added). Thus, an "[a]ctual or constructive denial of counsel altogether is legally presumed to result in prejudice." Strickland, 466 U.S. at 692 (emphasis added).

We have read Strickland and Cronic together to conclude that a constructive denial of counsel occurs "'only in a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant is in effect denied any meaningful assistance at all.'" Craker v. McCotter, 805 F.2d 538, 542 (5th Cir. 1986) (quoting Martin v. McCotter, 796 F.2d 813, 820 (5th Cir. 1986)); see Chadwick v. Green, 740 F.2d 897, 901 (11th Cir. 1984), cert. denied, 479 U.S. 1057 (1987). The instant case does not fall within that narrow

spectrum of cases described in Cronic. The record indicates that counsel conducted voir dire, cross-examined the State's witnesses, and objected during the witnesses' testimony. We therefore cannot conclude that trial counsel's active representation of Hernandez during the trial was so deficient as to fail to subject the State's case to meaningful adversarial testing and thus to amount constructively to "no representation at all." See Fink v. Lockhart, 823 F.2d 204, 206 (8th Cir. 1987) (determining that counsel's failure inter alia to interview witnesses prior to trial, to conduct voir dire, or to make an opening statement was not presumptively prejudicial under Cronic because counsel cross-examined the State's witnesses and made a closing argument); cf. Martin v. Rose, 774 F.2d 1245, 1250-51 (6th Cir. 1984) (presuming prejudice under Cronic when counsel failed to participate in any aspect of the petitioner's trial). Hence, trial counsel's performance does not justify a presumption of prejudice, and any failure of counsel to investigate witnesses and avenues of defense is best characterized as a failure to perform his investigatory duties, which must be analyzed under the two-pronged test enunciated in Strickland. See Woodard v. Collins, 898 F.2d 1027, 1029 (5th Cir. 1990) (an attorney's failure to conduct investigations into a case or into various aspects of the case is governed by Strickland); Mann v. Adams, 855 F.2d 639, 636-37 (9th Cir.), cert. denied, 488 U.S. 898 (1988) (same); United States ex rel. Smith v. Lane, 794 F.2d 287, 289 (7th Cir. 1986) (same).

When analyzed under Strickland, Hernandez's ineffective-assistance-of-counsel claim must fail, for he has not satisfied Strickland's prejudice prongSQi.e., he has not demonstrated a reasonable probability that the trial's result would have been different. See Motley v. Collins, 18 F.3d 1223, 1226 (explaining that if this court can "'dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed'" (quoting Strickland, 466 U.S. at 697)), petition for cert. filed, (U.S. April 22, 1994) (No. 93-8843). Hernandez has made only conjectures concerning possible witnesses whom his trial counsel failed to produce at trialSQwitnesses who he essentially concedes might not have been able to provide any testimony that would have helped his defense. Hernandez has therefore not shown that the absence of these witnesses prejudiced the outcome of his trial.

B. FOURTH AMENDMENT/INEFFECTIVE ASSISTANCE

Hernandez also asserts that the evidence used against him at trial was illegally seized.[3] He further contends that he "was denied a fundamentally fair hearing at suppression because of counsel's admitted unpreparedness" and that even though he was permitted the opportunity for a hearing, "it was by no means full, [f]air[, or] adequate under the circumstances." Construing Hernandez's brief most liberally, we read his argument regarding

[3] This evidence includes quantities of cocaine and marijuana, $3700 in cash, beam scales, two .38 caliber pistols, and a .22 caliber revolver found in his house at the time of his arrest.

the seizure of evidence used against him at trial to be two-fold: (1) that no probable cause existed to secure the search warrant which resulted in the seizure of the evidence in question and (2) that his counsel's ineffective assistance at the suppression hearing was critically damaging to his defense.

A federal court is precluded from considering a habeas petitioner's Fourth Amendment search-and-seizure claim unless the State has failed to provide an opportunity for a full and fair hearing on that claim. Stone v. Powell, 428 U.S. 465, 494-95 (1976); Davis v. Blackburn, 803 F.2d 807, 808 (5th Cir. 1986); Avery v. Procunier, 750 F.2d 444, 448 (5th Cir. 1985). A "full and fair" hearing requires consideration of the issue by the fact-finding court and at least the availability of meaningful appellate review by a higher state court. Davis, 803 F.2d at 808.

As the district court noted, the record indicates that a hearing on the motion to suppress was conducted on May 25, 1984, in the Orleans Parish Criminal District Court. At that hearing, Ronnie Austin, the officer with the New Orleans Police Department who executed the warrant, testified, and the search warrant itself was admitted into evidence. After cross-examination and argument by counsel, the court denied the motion. The matter was then submitted to the Louisiana Fourth Circuit Court of Appeal, which declined to exercise its supervisory jurisdiction. The Louisiana Supreme Court likewise denied the writ. Because Hernandez has thus been afforded a "full and fair" hearing on his

motion to suppress, Hernandez is not entitled to have a federal court consider on habeas review the merits of his Fourth Amendment claim.

Hernandez's ineffective-assistance-of-counsel claim concerning his representation at the suppression hearing also fails. The record indicates that Ary, Hernandez's attorney at the time, was present at the suppression hearing and that he cross-examined Officer Austin, the officer who executed the warrant. Hernandez makes no assertion of any specific error on Ary's part or that his representation at this hearing was in any way deficient. Because he thus fails to satisfy Strickland's "performance" prong, he is not entitled to habeas relief on this claim.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.