

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3276

Summary Calendar

TROY MILLER,

Plaintiff-Appellant,

versus

RICHARD P. IEYOUB and JOHN P. WHITLEY,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 93 366 M)

(December 1, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

I.

Troy Miller, an inmate at the Louisiana State Penitentiary, was convicted in Louisiana state court of first degree murder and sentenced to life imprisonment. The murder victim, Wayne Breland, was a taxi driver who allegedly saw Miller and his accomplice, Edward Williams, steal a purse from Marna Cass. According to

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

testimony at trial, after Breland tried to stop Miller and Williams from fleeing the robbery scene, Miller shot him in the head.

Louisiana courts affirmed Miller's sentence on direct appeal, and he now seeks federal habeas relief on the basis that the police unconstitutionally withheld an exculpatory report on the crime. The district court held no evidentiary hearing and dismissed Miller's habeas petition with prejudice. The court found that the report had no exculpatory or material value in light of the overwhelming evidence of Miller's guilt. We affirm.

II.

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). To demonstrate a Brady violation, Miller must show that (1) the prosecution suppressed evidence requested by him; (2) the evidence was favorable to him; and (3) the evidence was material. Moore v. Illinois, 408 U.S. 786, 794-95 (1972); United States v. Stephens, 964 F.2d 424, 435 (5th Cir. 1992). "The evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Stephens, 964 F.2d at 435-36.

III.

Miller first argues that the police report contained an account of Breland's dying declaration that he had been "mugged,"

a statement that Miller alleges refers to an assault or robbery from behind. Miller does not show that the dying declaration would exculpate him, however, because prosecution witnesses testified that he had shot Breland from outside the cab to escape from the robbery scene. Given the strength of the prosecution's case, Breland's dying declaration was neither exculpatory nor material.

The police report noted that Breland had a passenger inside his cab during the murder. Miller seemingly alleges that the failure of the passenger to appear at trial violated his rights to confrontation and compulsory process. The former argument fails because the passenger did not testify against him. The latter argument fails because Miller did not prove that the government suppressed the passenger's testimony. At any rate, the passenger would not have provided inculpatory evidence, as he only could have contradicted prosecution witnesses on whether Miller shot Breland from the getaway car or from the street.

According to Miller, the police report suggested the involvement of a third suspect in the robbery and murder. Though the report does indicate that the police originally sought three suspects, prosecution witnesses mentioned only two suspects at trial, and two of these witnesses independently and unequivocally identified Miller as the murderer. Evidence of a third person probably would not have changed the outcome of the trial.

The police report would not have been helpful in impeaching Cass' identification of Miller as the murderer, though her testimony caused some discrepancy about the sleeve length of his

shirt at the crime scene. The jury could have evaluated any such discrepancy without the report, so Miller did not need it to point out conflicting evidence. Similarly, the report would not have assisted Miller in arguing that Cass identified him based on a published newspaper photograph.

Miller alleges that the police report included evidence that a pedestrian at the scene had stated that the murderer got into the rear of the getaway car, testimony which Miller alleges contradicted inculpatory testimony at trial. The evidence about the murderer getting into the getaway car, however, was relevant only for impeachment purposes, and was neither exculpatory nor material. Miller did not argue to the district court that the police report shed light on the respective locations of the getaway car and the cab, and we do not consider it on appeal.

IV.

The district court properly refused to conduct an evidentiary hearing on the police report. In his state habeas proceedings, Miller presented legal arguments, but not testimony or other evidence, about the missing report. The state court denied relief. Miller does not show cause for his failure to develop evidence about the report in state court, actual prejudice resulting from this failure, or the possibility of a fundamental miscarriage of justice, omissions that suggest no entitlement to a federal evidentiary hearing. Keeney v. Tamayo-Reyes, 112 S.Ct. 1715, 1721 (1992); Burnett v. Collins, 982 F.2d 922, 929 n.9 (5th Cir. 1993).

AFFIRMED.