

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3446
(Summary Calendar)

EARL ROBINSON,

Petitioner-Appellant,

versus

ED C. DAY, Warden,
Washington Correctional Inst., 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-92-3788-G-1)

(December 2, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

In this habeas corpus appeal Petitioner-Appellant Earl Robinson contends that the district court erred in denying his

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

petition filed pursuant to 28 U.S.C. § 2254. Specifically, Robinson complains of vindictive sentencing, of a violation of the rule in Brady,¹ and of permitting testimony arising from an alleged uncounseled line-up in violation of Robinson's Sixth Amendment rights. For the reasons set forth below, we reject Robinson's contentions on appeal and affirm the ruling of the district court.

I

FACTS AND PROCEEDINGS

A state court in Louisiana convicted Robinson of armed robbery and sentenced him to 25 years imprisonment without benefit of parole, probation, or suspension of sentence. He filed a petition for writ of habeas corpus in federal district court alleging (1) that the 25-year sentence was imposed vindictively after he refused to accept the state trial judge's plea offer of ten years and insisted instead on going to trial; (2) that he was denied effective assistance of counsel during sentencing; (3) that the prosecution withheld Brady information; and (4) that the trial judge improperly admitted evidence of an uncounseled line-up in violation of the Sixth Amendment.

The district court granted habeas relief on the ineffective-assistance-of-counsel claim, suspended on the condition that Robinson be resentenced within 90 days of the date of the final judgment; and denied relief on the remaining claims. The district court also denied Robinson's request for a certificate of probable

¹Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d (1963).

cause (CPC). We granted Robinson's motion for CPC and ordered the respondents to explain whether Robinson's appeal (or any part of it) was moot, and to provide Robinson with a copy of any resentencing hearing transcript. The respondents informed us that, within the specified 90 days of the district court's order, Robinson had been resentenced to ten years imprisonment, with at least five years to be without benefit of probation, parole, or suspension of sentence. Robinson has appealed his new sentence; and that appeal was pending as of March 3, 1994. The parties have not informed us of the outcome of that appeal, but we do know that Robinson was released from prison on July 13, 1993. As he was resentenced within the 90 days specified, however, we determined that his appeal was not moot.

II

ANALYSIS

A. Vindictive Sentence

Robinson argues that the district court impermissibly sentenced him to 25 years imprisonment to punish him for going to trial rather than pleading guilty and accepting the court's offer of a ten-year sentence. As noted, Robinson was subsequently resentenced to ten years imprisonment. Therefore, this issue is moot.²

²The record does not indicate the disposition of Robinson's appeal of the ten-year sentence. If the new sentence is vacated and Robinson is resentenced to a new term of imprisonment, he may bring a new habeas petition.

B. Brady Claim

Robinson also argues that the prosecution withheld exculpatory evidence in violation of Brady. Specifically, he alleges that the prosecution withheld information that the victim was unsure of her identification of Robinson as the gunman involved in the robbery, and that this information could have been used to impeach her testimony or suppress her identification of Robinson. To establish a Brady violation Robinson must show that "(1) the prosecution suppressed evidence; (2) the evidence was favorable; and (3) the evidence was `material either to guilt or punishment.'" Blackmon v. Scott, 22 F.3d 560, 564 (5th Cir.), petition for cert. filed, (U.S. Aug. 24, 1994) (No. 94-5773).

At Robinson's trial, the victim testified that on the night of the robbery she gave the police a description of the two men involved in the robbery and picked both of them out of a photographic line-up. She then stated:

The other guy [Robinson] I don't really remember. I don't remember him that well. He didn't come up to the counter either time they came in. But I know he took the curl out of his hair.

The prosecutor then asked her:

Q. [D]o you realize that if your identification is in error that it seriously jeopardizes these men's future[s]?"

A. "Yes, sir. But I'm not in error."

On cross-examination she testified:

Q. Now . . ., wasn't it your testimony just a minute [ago] that you were not sure about this guy [Robinson]?"

A. No.

Q. Didn't you just say that you were certain about him [Watts] but you're not sure of him [Robinson]?

A. No, sir.

Robinson has failed to demonstrate that this isolated statement made during the victim's testimony establishes that she was unsure of her identification of Robinson, or that the prosecution was aware of any indecision about her identification of Robinson. He has not demonstrated that the prosecution suppressed any evidence.

C. Uncounseled Line-up

Finally, Robinson argues that the trial court improperly admitted evidence of an uncounseled line-up in violation of his Sixth Amendment rights. On the date that Robinson's trial was originally scheduled to begin, the victim and another witness viewed Robinson in the courtroom. Apparently Robinson and his attorney were not aware that the witnesses were viewing Robinson; therefore, argues Robinson, this viewing constituted an uncounseled line-up.

A defendant has the right to the presence of counsel during a line-up conducted after adversarial judicial proceedings have been initiated. Frisco v. Blackburn, 782 F.2d 1353, 1355 (5th Cir. 1986). If we assume that the courtroom viewing of Robinson constituted a "line-up" within the meaning of Frisco, admission of testimony regarding that identification was error. Robinson is not entitled to habeas relief, however, if the error was harmless. An error is harmless unless there is a reasonable probability that the

error "might have contributed to the conviction." Id. (internal quotations and citation omitted).

The record reveals that on the night of the robbery both witnesses gave descriptions of the robbers to the police and identified Robinson from a photographic line-up. Robinson's attorney had ample opportunity to cross-examine both witnesses about their descriptions of the robber and their ability to identify Robinson. The victim testified that she was able to identify Robinson because he was the one who robbed her, not because she had been shown his photograph. Under the circumstances, any error in admitting the testimony regarding the courtroom viewing was harmless error. See Lavernia v. Lynaugh, 845 F.2d 493, 500 (5th Cir. 1988) (an identification is reliable if it is based upon observations of the individual independent from suspect pretrial identification procedures).

III

CONCLUSION

Finding no reversible error in the district court's denial of Robinson's habeas petition, the ruling of that court is
AFFIRMED.