

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-9523
Consolidated with 93-3491
Summary Calendar

WALTER BURNETTE,

Petitioner-Appellant,

VERSUS

JOHN F. WHITLEY, Warden, Louisiana State Penitentiary, 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-86-3368-A-6 & CA-86-3368-A)

(May 18, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

Per Curiam:*

A state jury convicted Walter Burnette (Burnette) of armed robbery with a vote of ten to two. He was sentenced to 99 years imprisonment, and the state Supreme Court affirmed. *State v.*

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Burnette, 337 So.2d 1097, 1101 (La. 1976). Burnette then filed a writ of habeas corpus in federal court. The district court dismissed for failure to exhaust state remedies. On appeal we ruled that Burnette had indeed exhausted all state claims. The district court denied the writ on remand, with prejudice, without holding an evidentiary hearing. Burnette appealed and this Court again reversed and remanded, instructing the district court to conduct an evidentiary hearing on the following issues: whether the state knowingly presented perjured testimony in Burnette's trial; and whether the pretrial identification of Burnette was unconstitutionally suggestive. *Burnette v. Whitley*, No. 89-3306 (5th Cir. -- November 9, 1990) (unpublished) We suggested that, on remand, the district court might wish to appoint counsel for Burnette.

Counsel was appointed, and after an evidentiary hearing, the magistrate judge concluded that the identification of Burnette was not constitutionally tainted and recommended that Burnette's petition be denied. The district court adopted the magistrate judge's report and denied the petition. Burnette then sought relief from judgment in two separate motions filed pursuant to FED. R. CIV. P. 60(b), which were also denied by the district court. Burnette now appeals these rulings. We affirm.

I. FACTS

In the early evening of May 26, 1974, Mrs. Cara O'Brien (Mrs. O'Brien) and her sixteen year old daughter, Miss Cara O'Brien (Miss O'Brien) saw two men in a car that was stopped outside their house in Covington, Louisiana. One of the men, later identified as

Burnette, got out of the car and spoke with Mrs. O'Brien about directions to a neighbor's house.

Later that night, the same two men entered the O'Brien home and demanded money. Mr. Pat O'Brien (O'Brien) struggled with the intruders, who beat and shot him, leaving him in the kitchen. Elsewhere in the house, the intruders discovered Mrs. O'Brien, and Miss O'Brien. One of the intruders forcibly took Miss O'Brien into another room and sexually molested her. The intruders then took Mrs. O'Brien and Miss O'Brien into the kitchen, where O'Brien, having reached a rifle, fired at the intruders. The intruders fled, taking guns belonging to O'Brien. During the intrusion, which lasted about 20 minutes, the O'Brien home was well lit and the intruders' faces were bare. In separate state trials, juries found that Burnette and Glenn Passman were the intruders. See *Passman v. Blackburn*, 652 F.2d 559, 563-64 (5th Cir. Unit A, Aug. 1981)(Passman I), *cert. denied*, 455 U.S. 1022 (1982); *State v. Burnette*, 337 So.2d 1096, 1097-98 (La. 1976).

II. STANDARD OF REVIEW

Burnette argues that the identification procedures used in the state court trial were impermissibly suggestive and led to a substantial likelihood of irreparable misidentification. The district court found that the identification was not unconstitutionally tainted. In considering a federal habeas corpus petition presented by a petitioner in state custody, this court must accord a presumption of correctness to any state court factual findings. We review the district court's findings of fact for

clear error, but decide any issues of law *de novo*. *Madden v. Collins*, 18 F.3d 304 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1114 (1995). If we find that constitutional error occurred, we must then determine, on *de novo* review of the entire trial record, whether the constitutional error had a substantial and injurious effect in determining the jury's verdict. *Lowery v. Collins*, 996 F.2d 770, 772 (5th Cir. 1993).

III. IN-COURT IDENTIFICATION OF BURNETTE

a. Analytical framework

In *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) the Supreme Court set forth a two-pronged test for the exclusion of identification based on impermissibly suggestive identification procedures. The first prong of the analysis is to determine whether the identification procedure was impermissibly suggestive. If it is not, the query ends. If it is, separate inquiry must be made as to whether, under the totality of the circumstances, the suggestiveness leads to a substantial likelihood of irreparable misidentification. Under this analysis, "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140 (1977). Thus, an identification found to be reliable will be admitted even though the confrontation procedure was suggestive.

The factors to be considered in evaluating the reliability of an identification were enumerated in *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375, 382, 34 L.Ed.2d 401 (1972):

[T]he opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Burnette does not dispute that the district court appropriately considered these factors in reaching the conclusion that the in-court identification of Burnette was not tainted.

b. Applying the *Neil* factors to Burnette's case

Burnette contends that an identification procedure conducted at his arraignment was improper, and therefore, it and all other identifications by the O'Briens of Burnette should have been omitted from his trial.

Miss O'Brien testified at Burnette's state trial that she was shown an album of photographs the night of the incident, and identified a "mug" shot of Burnette at that time. Burnette challenges the truth of this testimony by pointing to evidence that the photograph of Burnette that was in the album at the time of the state trial was not taken until four months after the incident. This discrepancy was revealed both to the jury at the state trial and was brought out in the federal evidentiary hearing. At the evidentiary hearing, the prosecutor testified that the original picture of Burnette in the mug shot book had been replaced with a more recent picture. Furthermore, testimony by various witnesses in Passman's trial contradicted the testimony that Miss O'Brien had identified Burnette from the mug shot album at or near the time of the incident. Finally, a statement allegedly taken from Miss

O'Brien shortly after the incident describes the intruder as having kinky hair, while Burnette has straight hair, although the description was otherwise accurate.

The focus of Burnette's complaint is that Miss O'Brien was unable to identify him as one of the intruders until she saw him at his arraignment, five months after the incident. O'Brien and Miss O'Brien were present when Burnette came into the courtroom for his arraignment, but left shortly after his arrival at the request of an officer. Burnette's attorney requested and was granted a post-arraignment line-up, where the O'Briens again identified Burnette as one of the intruders. All three of the O'Briens also identified Burnette at trial.

The magistrate judge, applying the *Neil* factors, concluded that the O'Briens' identification of Burnette was the product of their memories of the incident not unconstitutionally tainted by the subsequent investigation. He noted that the identification was clear and definite, their opportunity to observe the assailants in a well lit house was lengthy, and there was a similarity between Burnette and Miss O'Brien's pre-identification description. The district court adopted the magistrate's report, referring to the victims' contact with the perpetrators as "a memorable and horrifying experience, the duration of which was substantial in length."

The district court applied the correct legal standard, and reached factual conclusions which we cannot say were clearly erroneous.

IV. KNOWING USE OF PERJURED TESTIMONY

Burnette alleges that the victim/witnesses as well as Sgt. Mario Arthur (Arthur), one of the police officers who participated in the investigation, perjured themselves at Burnette's trial concerning information surrounding the procedures and events leading up to the identification of Burnette by the witnesses.

The giving of intentional falsehoods on a crucial fact by a state law enforcement officer, with or without the prosecutor's actual knowledge, satisfies the requirements for state action necessary to support Burnette's constitutional claim of violation of due process. *Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir. 1977).

The district court concluded that the testimony complained of did not influence the outcome of the case, because the witnesses' identification of Burnette stemmed from face-to-face contact with him, rather than from the alleged facts contained in the false testimony. The district court's analysis assumed, without finding, that the testimony was false, crucial, and attributable to the government, but because it did not have a substantial and injurious effect on the outcome, it could not form the basis for habeas relief. See *Lowery v. Collins*, 996 F.2d 770, 772 (5th Cir. 1993). We agree.

V. ALLEGED VIOLATION OF THE SEQUESTRATION ORDER

At the federal evidentiary hearing on March 15, 1991, Arthur was unable to testify. The magistrate judge continued the hearing and heard his testimony on May 9, 1991. Burnette brought a Rule

60(b)(6) motion, alleging that Arthur had access to a transcript of the prior testimony at the hearing before he was called to testify, in violation of the magistrate judge's sequestration order. FEDERAL RULE OF EVIDENCE 615, which provides for witness sequestration, is designed to avoid the testimony of one witness improperly influencing that of another. *United States v. Lamp*, 779 F.2d 1088, 1095 (5th Cir. 1986). Burnette argues that the alleged violation of the sequestration order prejudiced him to the point of warranting the reversal of the magistrate judge's findings and recommendations and the district court's orders.

The district court considered this claim and held that Burnette failed to establish that the violation of the sequestration order caused him any prejudice. First, the district court found that Arthur's testimony "had no bearing whatsoever" on the magistrate judge's conclusion that Burnette was not denied a fair trial. Second, Arthur's testimony at the evidentiary hearing was consistent with his testimony at Burnette's trial, and therefore was not influenced or altered by any information he may have gotten about the other witnesses' testimony at the evidentiary hearing. We affirm.

VI. CUMULATIVE ERROR

Burnette argues that the alleged errors made below amount to cumulative error severe enough to render the trial constitutionally unfair. Federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension

rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors so infected the entire trial that the resulting conviction violates due process. *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2928 (1993). Although this argument was never clearly made by Burnette in the district court, to the extent that any of his arguments may be interpreted as a cumulative error claim, it is totally without merit. Burnette challenges, in many different guises, the reliability of the witnesses' identification of him. The district court found that the identification of Burnette as the intruder in the O'Brien home was reliable. We agree.

VII. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of Burnette's petition for habeas corpus.