UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-3607
Summary Calendar

JERRY TONEY,

Petitioner-Appellant,

VERSUS

BURL CAIN, Warden 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 93 1373 F)

(May 20, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

Jerry Toney was convicted of two counts of being a convicted felon in possession of a firearm in violation of La. Rev. Stat.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Ann. 14.95.1 (West Supp. 1994) and was sentenced to seven years' and five years' imprisonment to run consecutively. After exhausting state remedies, he filed this petition for a writ of habeas corpus raising two grounds of error: that the evidence was insufficient to prove every essential element of the offense and that the trial court gave an unconstitutional jury instruction regarding the reasonable doubt standard. He also asked the district court to review the trial record for errors patent on the face of the proceedings. The district court denied habeas relief but granted a certificate of probable cause. The facts of Toney's offense can be found in the opinion of the Louisiana Fourth Circuit Court of Appeal affirming his conviction. State v. Toney, 599 So.2d 1106 (La. App. 4th Cir. 1992).

OPINION

ISSUE 1: Errors patent on the face of the record

Toney asked the district court to review the trial record for errors patent on the face of the record, and he makes this request again on appeal.

The Louisiana Code of Criminal Procedure provides for which issues will be considered on appeal. Louisiana appellate courts will review errors designated in the assignment of errors and errors that are "discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La. Code Crim. Proc. Ann. art. 920 (West 1984). Referred to as "error patent", this type of review includes review of the caption, the time and place of holding court, the indictment or information and

its endorsement, the arraignment, the plea of the accused, the bill of particulars, the mentioning of the impaneling of the jury, the minute entry reflecting sequestration in a capital case, the verdict, and the judgment or sentence. State v. Brooks, 496 So.2d 1208, 1210 (La.Ct.App. 1986).

"A state prisoner is entitled to relief under 28 U.S.C. § 2254 only if he is held `in custody in violation of the Constitution or laws or treaties of the United States.'" Engle v. Isaac, 456 U.S. 107, 119, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). The federal courts do not act as courts of appeal to review state court records in their entirety for errors in state court convictions. Dillard v. Blackburn, 780 F.2d 509, 513 (5th Cir. 1986). Review for error patent under art. 920 is an appellate procedure applied by Louisiana appellate courts, not by federal courts reviewing state convictions under § 2254. Toney did not allege any particular violation of the Constitution or laws of the United States, and so this issue does not afford Toney habeas relief.

ISSUE 2: Sufficiency of the evidence

Toney argues that the evidence is insufficient because the state did not prove that his previous felony convictions were valid. He argues that those convictions were based on guilty pleas and that the State did not prove that the pleas were taken in compliance with Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), or that the pleas were knowing and voluntary.

Toney did not make this argument in the district court. His sufficiency argument in the district court was based on lack of evidence that he possessed the firearms. This Court will not review issues raised in a habeas corpus proceeding for the first time on appeal. Fransaw v. Lynaugh, 810 F.2d 518, 522-23 (5th Cir.), cert. denied, 483 U.S. 1008 (1987). Likewise, although Toney raised the issue of sufficiency of the evidence of his possession of the firearms in the district court, because he has not raised this issue on appeal, this Court will not consider it.

ISSUE 3: Jury instruction regarding reasonable doubt - state procedural default

Toney argues that the trial court gave an unconstitutional jury instruction regarding the reasonable doubt standard. He contends that the trial court gave the instruction found to be unconstitutional in Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).[1] Although he admits that he did not object to this instruction at trial, he argues that the issue should not be procedurally defaulted. His argument is based on State v. Berniard, 625 So.2d 217, 219-20 (La.Ct.App. 1993), in which the Louisiana Fourth Circuit Court of Appeal held that after Sullivan v. Louisiana, ___ U.S. ___, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), which held that harmless error could not apply to a Cage

[1]The substance of the charge given was not transcribed by the court reporter because there was no objection. Toney moves that the transcript of the instruction be made available for the record on appeal. Because Toney has procedurally defaulted this issue, for purposes of this appeal, the actual content of the charge is irrelevant and the transcript is not needed.

instruction, failure to object to a Cage reasonable doubt instruction would not bar review on appeal.

The district court held that because the state appellate court refused to review this claim because Toney failed to object at trial, the issue was procedurally defaulted.

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, ___ U.S. ___, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991). A "fundamental miscarriage of justice" occurs where the alleged constitutional violation has probably caused an innocent person to be convicted. Murray v. Carrier, 477 U.S. 478, 495-96, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). This Court has applied state procedural default to a claim for an unconstitutional Cage reasonable doubt instruction. See Skelton v. Whitley, 950 F.2d 1037, 1041-42, 1046 (5th Cir. 1992).

Louisiana appellate courts have refused to consider arguments about jury charges, and in particular, arguments regarding unconstitutional Cage jury instructions on reasonable doubt, where no contemporaneous objection was made pursuant to Louisiana Code of Criminal Procedure articles 801 and 841. State v. Dobson, 578 So.2d 533, 534-35 (La.Ct.App.), writ denied, 588 So.2d 1110 (La. 1991). In Toney's case, the state appellate court refused to review this claim for failure to make a contemporaneous objection.

Toney does not argue that he had cause for failure to object or that he is actually innocent. He argues that Dobson is no longer good authority that Louisiana appellate courts will apply the contemporaneous objection rule to failure to object to an unconstitutional Cage jury instruction after Berniard. Toney is correct that the Louisiana Fourth Circuit initially overruled Dobson in Berniard. However, on rehearing, by a 6 to 6 vote en banc, the Fourth Circuit decided not to overrule Dobson, and so Dobson is still good law. State v. Wolfe, 630 So.2d 872, 882-83 (La.Ct.App. 1993). Review of Toney's claim regarding the jury instruction is barred by state procedural default.

AFFIRMED.