IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3617
Summary Calendar

MICHAEL TODD,

Petitioner-Appellant,

VERSUS

RICHARD WALL, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-92-4037-G-3)

(June 30, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Michael Todd appeals the denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. Finding no error, we affirm.

I.

Todd, a state prisoner, pleaded guilty to charges of second

[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

degree kidnapping, armed robbery, and attempted first-degree murder. Under the terms of a plea agreement, the state agreed not to charge him as a multiple offender, and Todd was sentenced to concurrent terms of thirty years without possibility of probation, parole, or suspension of sentence.

After exhausting state remedies, Todd filed a § 2254 petition in district court, alleging ineffective assistance of counsel, denial of his right to speedy trial, and procedural errors by the state court considering his writ of habeas corpus. Following a hearing, the magistrate judge recommended that the petition be dismissed. The district court, overruling Todd's objections, issued a memorandum order and judgment dismissing the complaint.

II.

Todd argues that counsel provided constitutionally ineffective representation. Todd argues that Pawlus did not adequately prepare his defense, neither meeting with him before trial nor obtaining defense witnesses. Todd argues that, because of poor preparation, counsel erroneously advised Todd that he could plead guilty then withdraw his plea before sentencing, which would allow him to obtain a continuance to prepare his defense. Todd argues further that Pawlus's intentions were evident from the record because he requested a copy of the presentence report (PSR) at sentencing.

A claim that counsel has been ineffective will prevail only if the petitioner proves that such counsel was not only objectively deficient, but also that the petitioner was prejudiced by counsel's

errors. Strickland v. Washington, 466 U.S. 668, 687 (1984). A valid guilty plea waives all nonjurisdictional defects, including an ineffective-assistance-of-counsel claim, unless the ineffective-assistance claim, as in Todd's case, goes to the voluntariness of the plea. Smith v. Estelle, 711 F.2d 677, 682 (5th Cir. 1983), cert. denied, 466 U.S. 906 (1984). The district court's factual findings will not be disturbed unless clearly erroneous. FED. R. CIV. P. 52(a); Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985).

A.

The district court noted that, contrary to Todd's factual allegations, Pawlus testified that he habitually met with all defendants before trial and that he "no doubt" had met with Todd. Additionally, the district court found that public defender Charles Reid and an investigator from the public defender's office met with Todd on several occasions prior to trial. The court further found that attorneys from the public defender's office tried to identify available defense witnesses before trial. These findings are not clearly erroneous. The district court ruled that actions taken by counsel to prepare for trial and obtain witnesses were objectively reasonable. That ruling, supported by the record, was not error.

B.

In cases alleging counsel's ineffectiveness in advising a petitioner to plead guilty, Washington's two-pronged test requires

the petitioner to demonstrate that counsel's performance was objectively deficient and that there is a reasonable probability that, but for counsel's deficiency, rather than plead guilty, he would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 56-58 (1985); see Theriot v. Whitley, 18 F.3d 311, 313-14 (5th Cir. 1994). The magistrate judge found that Todd's testimony that he pleaded guilty on counsel's advice that he could then retract his plea was not credible. Although the district court considered that finding "noteworthy," the court ruled that, "even assuming petitioner's claim to be credible, it must still be determined whether any evidence allegedly undiscovered by counsel might have allowed petitioner to succeed or gain significant relief at trial." See Hill, id.

As noted by the magistrate judge, Todd fails to demonstrate how witnesses he presented at the hearing "would have been favorable or . . . available for trial." See United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983) (28 U.S.C. § 2255 case; speculative claims of uncalled witnesses not sufficient to raise a constitutional claim), cert. denied, 467 U.S. 1251 (1984). Further, Todd's witnesses, convicted felons, gave feeble testimony, at the hearing, that Todd purportedly bought the car rather than stole it. The district court found that the witnesses' testimony was "vague and inconsistent on details such as the model and make of the car." That finding is not clearly erroneous and harmonizes, in part, with the magistrate judge's finding that Todd's witnesses were not credible.

The record further demonstrates that, in light of other objective factors, Todd's decision to plead guilty was an objectively reasonable one. As noted by the district court, Todd knew that the prosecutor was prepared to present ample evidence pointing to his guilt. Furthermore, Todd testified at the hearing that, by pleading guilty, he avoided a possible ninety-nine-year sentence without benefit of probation, parole, or suspension of sentence if convicted of armed robbery, up to fifty years if convicted of attempted murder, and a possible life sentence if convicted of aggravated kidnapping. See LA. REV. STAT. ANN. 14:64(B) (armed robbery) (West 1986); LA. REV. STAT. ANN. 14:27(D), 14:30(C) (West 1986) (attempted first-degree murder); LA. REV. STAT. ANN. 14:44 (West 1986) (aggravated kidnapping). Todd testified further that he believed that, by pleading guilty to second-degree kidnapping, he was exposed)) absent the plea agreement)) to a possible fifty-year sentence. See LA. REV. STAT. ANN. 14:44.1(C) (West Supp. 1992) (actually a forty-year maximum). Todd testified that he knew, and the record indicates, that the prosecutor would file a habitual offender petition or a "multiple bill" if he did not accept the plea bargain. See LA. REV. STAT. ANN. 15:529.1 (habitual offender statute).

The district court did not clearly err when it found that it was "highly unlikely" that Todd would have proceeded to trial. On the foregoing undisputed facts, even assuming arguendo that counsel's representation was deficient, Todd fails to demonstrate that, but for counsel's deficiency, he reasonably would have gone

to trial, thereby allowing the jury to view the prosecutor's evidence and expose himself to possible life imprisonment rather than the plea-bargain's concurrent thirty-year terms. See Hill, 474 U.S. at 56-60.

C.

Todd argues that, because Well's constitutional ineffectiveness was challenged in state habeas proceedings, a conflict of interest arose; he was thus unable to rely upon Wells's advice or advocacy. Todd contends further that, consequently, Pawlus gave him faulty advice that caused him to plead guilty rather than go to trial.

On the day scheduled for trial, Wells appeared and announced that he was "filling in" for Pawlus. Wells noted, "I don't know if I can represent [Todd] in a hearing to have myself recused." The trial court permitted Todd to argue various pro se motions unassisted by Wells, including a motion to dismiss the public defender's office on the ground of ineffective representation.

Wells responded to Todd's complaints. The state court denied Todd's various motions and dismissed his writ of habeas corpus. The following day, Pawlus represented Todd and, after Todd's motion for continuance was denied, Todd accepted the plea bargain. Todd testified that he was satisfied with Pawlus's performance but not with that of the public defender's office.

To demonstrate ineffective assistance of counsel based upon a conflict of interest, a petitioner must demonstrate "an actual

conflict of interest that adversely affected [his] lawyer's performance." Russell v. Lynaugh, 892 F.2d 1205, 1213 (5th Cir. 1989) (internal quotations and citation omitted), cert. denied, 111 S.Ct. 2909 (1991). The district court rejected Todd's claim that he was adversely affected by Wells's advocacy, finding that Wells was a "neutral witness" during the state proceeding.

That finding was not necessary to dispose of Todd's claim. As noted by the magistrate judge, assuming arguendo that a conflict of interest existed during the course of Well's representation, no "adverse impact" or "prejudice" resulted. See id. Todd substantially benefited from accepting the plea agreement rather than proceeding to trial. He fails to show a Sixth Amendment violation.

AFFIRMED.