

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-3683
Summary Calendar

YUL SMITH,

Petitioner-Appellant,

VERSUS

RICHARD STALDER 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 1526 E)

(June 16, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Yul Smith, a Louisiana state prisoner, was convicted by a jury of first-degree murder and sentenced to life imprisonment. After

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

exhausting state remedies, he filed the instant federal habeas petition. The defendants answered, and the district court denied Smith's habeas petition. Judgment was entered accordingly. Smith filed a timely notice of appeal, and the district court granted a CPC.

OPINION

ISSUE 1:

Relying upon Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), Smith argues that (i) he is entitled to habeas relief because the trial court improperly charged the jury with an instruction on reasonable doubt that was unconstitutional, and (ii) such error was not harmless. Smith's conviction and sentence, however, became final in late 1980. This Court has decided that Cage is not retroactively applied to decisions which became final before Cage was decided. Skelton v. Whitley, 950 F.2d 1037, 1041-46 (5th Cir.), cert. denied, 113 S.Ct. 102 (1992).¹ Smith's argument is unavailing.

¹In a federal habeas case, the Fourth Circuit cited Skelton to support its determination that, although a state court's reasonable doubt instruction violated due process as analyzed under Cage, Cage would not be applied retroactively. Adams v. Aiken, 965 F.2d 1306, 1311-12 (4th Cir. 1992), vacated and remanded, 114 S.Ct. 1365 (1994). On a petition for rehearing, the Supreme Court granted the petition for a writ of certiorari, vacated the judgment, and remanded the case to the Fourth Circuit Court of Appeals for further consideration in light of Sullivan v. Louisiana, ___ U.S. ___, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Adams v. Aiken, 114 S.Ct. 1365 (1994). Sullivan was a direct appeal, in which the Supreme Court determined that a constitutionally deficient reasonable-doubt instruction could not be harmless error. Id. at 2080-83. Sullivan did not discuss the retroactive application of Cage because the question was not an issue in the case.

ISSUE 2:

Smith argues that the trial court's instructions on the specific intent element of first-degree murder was constitutionally infirm. Smith objected to the jury instruction on specific intent at trial. Smith complained of the constitutionality of the specific intent instructions in his direct appeal and when seeking post-conviction relief. His conviction was affirmed on appeal without a written opinion. His application for post-conviction relief was denied by the trial court, but the court's opinion did not address the specific intent issue. In upholding the lower court's decision, the Supreme Court of Louisiana subsequently denied Smith's request for a supervisory writ and/or remedial writ without explanation. Because the last reasoned state court opinion, the trial court's, did not mention or rely on procedural default, the federal district court was correct in addressing the merits of Smith's claim. Ylst v. Nunnemaker, 501 U.S. 797, ___, 111 S. Ct. 2590, 2594, 115 L. Ed. 2d 706 (1991).

The question is whether "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle v. McGuire, ___ U.S. ___, 112 S. Ct. 475, 482, 116 L. Ed. 2d 385 (1991) (internal quotations and citation omitted). The instruction "`may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." Id. (quoting Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973)). In addition, a reviewing court must inquire "`whether

there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." Id. (quoting Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)).

Due process prohibits the state from using evidentiary presumptions in a jury charge if their effect is to relieve the state of its burden of persuasion on an essential element of the offense. Coleman v. Butler, 816 F.2d 1046, 1048 (5th Cir. 1987). A mandatory presumption instructs a jury that it must infer the presumed fact if the state proves the predicate facts. Such a presumption is unconstitutional. Id. "A permissive inference suggests to the jury that it may, but need not, draw an inference if the state proves the predicate facts." Id. This inference is unconstitutional only if reason and common sense do not justify the suggested conclusion. Id.

In this case, Smith was charged with first-degree murder, which applicable Louisiana state law defines as "the killing of a human being when the offender has specific intent to kill or to inflict great bodily harm.'" Bates v. Blackburn, 805 F.2d 569, 572 (5th Cir. 1986), cert. denied, 482 U.S. 916 (1987) (quoting LA. REV. STAT. ANN. § 14.30 (West 1976), amended and reprinted in, La. Rev. Stat. Ann. § 14:30 (West 1986)). To be convicted of such a crime, an individual must have the requisite mental state: the specific intent to kill. Flowers v. Blackburn, 779 F.2d 1115, 1121 (5th Cir.), cert. denied, 475 U.S. 1132 (1986). According to Smith, the court's instruction on specific intent relieved the State from

proving beyond a reasonable doubt that Smith had the specific intent to commit the charged offense and shifted the burden of proof to Smith to prove that he was innocent of the charge.

Smith bases his argument on Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), in which the Supreme Court reversed a murder conviction because the jury charge contained an instruction that shifted the burden of proof on the issue of the defendant's intent. The instruction in Sandstrom stated that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." Id. at 513. In the present case, the trial court instructed the jury, in pertinent part, that:

[w]hen the word "intent" is qualified by the prefix "specific," it means that the intent was directed toward the accomplishment of a particular or specific act . . .

With reference to the crime of murder, it is immaterial whether the specific intent, or the premeditation, existed for a brief time, or existed for a great length of time before the killing. . . . Specific intent or premeditation may be implied from certain acts; for example, when it is established that the accused laid in wait for his alleged victim, or when the accused made previous threats against the deceased, or when there existed between the defendant and the deceased former grudges, or when the accused arms himself beforehand, or from any other facts observable by the senses which show a previously planned scheme to commit a crime. Specific intent or premeditation may also be implied when there are no external signs of it beyond the mere fact of the killing itself.

After overruling defense counsel's objection, the court concluded:

[f]or example, when there has been no lawful reason for it, when the killing is without provocation, or so slight a provocation as to not justify the killing.

Id. at 345. Consequently, Smith argues that once the state proved that a killing had occurred, the jury could find that Smith had the

requisite mental state without any further proof presented by the state of his intent. Research has indicated no published case determining whether the above-challenged instruction violated due process. See Bates v. Blackburn, 805 F.2d at 576 (declined to consider whether another portion of a similar intent instruction contained a Sandstrom error due to application of procedural bar).

Looking at the language in the instruction, especially the use of the word "may," the instruction does not give rise to a mandatory presumption or an unconstitutional permissive inference. See Coleman, 816 F.2d at 1048-49. Additionally, the jury was instructed in the beginning of the charge regarding the relevant burden of proof of the elements of the crime and the fact that it was the state's responsibility to uphold it. Additionally, the trial court informed the jury of the lesser-included offenses below first-degree murder, which would give the jury the opportunity to determine that Smith might still have been guilty of some crime, if the state had not proved beyond a reasonable doubt that Smith had the specific intent to kill.

Assuming, arguendo, that the instruction is erroneous, habeas-corpus relief is not warranted if the error is harmless. See Brecht v. Abrahamson, ___ U.S. ___, 113 S. Ct. 1710, 1721-22, 123 L. Ed. 2d 353 (1993). In a habeas proceeding, a constitutional error is not harmless if it "had substantial and injurious effect or influence in determining the jury's verdict." Id. (internal quotations and citation omitted). The harmless-error standard applies to errors in jury instructions. See O'Neal v. Morris, 3

F.3d 143, 145 (6th Cir. 1993), cert. granted in part, 114 S.Ct. 1396 (1994) (applying Brecht harmless error analysis to jury instructions); see also Rose v. Clark, 478 U.S. 570, 576-80, 106 S.Ct. 3101, 92 L. Ed. 2d 460 (1986) (applying pre-Brecht harmless error analysis to jury instructions).

At the beginning of the trial, the defense and the State stipulated that Shirley Phillips died on April 2, 1979, as a result of a gunshot wound to the chest that she received on that date.

Detective Raymond J. Miller, an off-duty police officer, testified that he was working a paid detail in the Carrollton Shopping Center in uniform, when he heard what sounded like a gunshot coming from the direction of the Winn-Dixie. Miller then saw a black male trotting along the sidewalk. When the man saw Miller, he took off running. Miller chased him, but could not apprehend him. Miller subsequently radioed in a description of the suspect as a black male, between the ages of sixteen and twenty years, between five-six and five-ten, wearing a brown bebop cap, a white T-shirt, and dark colored cut-off pants. Miller also noticed that the youth had something in his hand, but Miller could not tell what it was.

When Miller arrived back at the scene, he observed a Charity Hospital emergency unit placing a female into the rear of the unit. Several days later, Miller was shown a photographic line-up comprised of six color photographs and six black and white photographs and identified Smith, in the line-up and at trial, as the man he saw running away from the Carrollton Shopping Center.

Gail Fleming, a clinical nurse specialist at Touro Infirmary Emergency Room, treated Shirley Phillips for gunshot wounds. Id. Although Phillips was in critical condition, she was conscious and speaking lucidly. Phillips informed Fleming that she felt she was going to die. She then told Fleming that she had gone shopping at the Winn-Dixie and was coming out to her car when a young black man stopped her and asked for her car keys. The next thing she knew she had been shot. She expressed shock as to why she had been shot when she had done as the man requested. Phillips died later that night.

In light of the above evidence, there was sufficient evidence of specific intent to kill such that any improper presumption regarding the burden of proof in the jury instruction did not have a substantial and injurious effect or influence in determining the jury's verdict. Additionally, Smith's defense at trial was that he was innocent of the crime, had an alibi, and was mistakenly identified as the perpetrator. Smith did not bring a defense that he pulled the trigger but did not intend to kill Phillips. Therefore, any error arising from the jury instruction regarding specific intent was harmless.

ISSUE 3:

Smith argues that he was misidentified as the shooter in the photographic line-up shown to Dr. Anna C. Davis. Smith contends that the photographic line-up conducted by law enforcement officials was impermissibly suggestive, as the officer conducting the photographic line-up showed Davis a photo of him which showed

him bandaged while the other people in the photos were not. He further contends that Davis saw him as he was recuperating in the hospital.

Following a hearing, the trial court denied Smith's pre-trial motion to suppress the photographic identification of Smith by Davis. "Whether identification testimony is constitutionally admissible is a mixed question of fact and law and is not entitled to a presumption of correctness under 28 U.S.C. § 2254(d). However, the factual findings underlying the determination of the admissibility of identification testimony are entitled to that presumption." Peters v. Whitley, 942 F.2d 937, 939 (5th Cir. 1991), cert. denied, 112 S.Ct. 1220 (1992) (citation omitted). "[T]he appropriate inquiry is whether the pretrial identification was so unnecessarily suggestive and conducive to irreparably mistaken identification that the [petitioner] was denied due process of law." Lavernia v. Lynaugh, 845 F.2d 493, 499 (5th Cir. 1988). This Court first considers "whether the identification procedure was impermissibly suggestive, and if so, whether there was a substantial likelihood of misidentification. If the photographic line-up was not impermissibly suggestive, the inquiry ends." Peters, 942 F.2d at 939 (5th Cir. 1991).

Approximately an hour after the shooting of Phillips, Dr. Davis was in the Canal-Villere grocery store parking lot by her house at Carrollton and Claiborne when a medium-framed, black male wearing a white t-shirt, blue-jean cut-offs, and tennis shoes approached her with a gun. The lighting in the parking lot was

good and Davis could see the man and the gun clearly. Davis identified the gun shown to her at trial as similar to the one she saw in the parking lot. Two days later, Davis was shown a photographic line-up and identified Smith, in the line-up and at trial, as the man with the gun. Dr. Davis testified that the distance between Carrollton Shopping Center and Canal-Villere was about five to seven minutes away by car and that a public bus runs up and down Carrollton Avenue.

Officer Herbert Zingerling participated in a photographic line-up shown to Davis two days after she was robbed. He showed her six or seven color photographs. He did not say that one of the photographs was that of Smith. Nor did he force, threaten, intimidate, or promise her anything for choosing a photo in the line-up. Zingerling did not indicate to Davis that Smith had been shot. Davis went to see Smith at Charity Hospital only after she identified him. Consequently, the photographic line-up does not appear to have been impermissibly suggestive.

However, even if the photographic line-up was impermissibly suggestive, Davis's identification could still have been reliable. In determining the reliability of the identification, a reviewing court should consider the totality of the circumstances, paying particular attention to the following factors:

1. the opportunity of the witness to view the criminal at the time of the crime,
2. the witness's degree of attention,
3. the accuracy of the witness's prior description of the criminal,

4. the level of certainty demonstrated by the witness at the time of confrontation, and
5. the length of time between the crime and confrontation.

Lavernia, 845 F.2d at 500.

As stated earlier, the lighting in the parking lot where she was confronted by Smith was good, and she could see him and the gun clearly. The photographic identification took place only two days later, when the details of the event and Smith's appearance would still be distinct in Davis's mind. Additionally, nothing in Davis's testimony or the record indicates that Davis was anything less than positive in her identification of Smith in the photographic line-up as the person who confronted her in the parking lot. Consequently, there does not appear to have been a substantial likelihood of misidentification by Davis.

AFFIRMED.