

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3739
Conference Calendar

THOMAS W. HURST,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary and
RICHARD P. IEYOUB, Attorney General,
State of Louisiana,

Respondents-Appellees.

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Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CA 93-1752 F
- - - - -

(May 19, 1994)

Before HIGGINBOTHAM, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Thomas Wayne Hurst stabbed a prison guard during an escape attempt on April 10, 1973. Hurst was charged with attempted murder and aggravated escape. Hurst's counsel negotiated a plea agreement which reduced the charges to attempted aggravated battery and attempted aggravated escape.

Hurst filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging that he was subjected to double

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

jeopardy by being convicted for attempted aggravated battery and attempted aggravated escape because both offenses arose out of the same course of conduct and because both required the same elements for conviction. Hurst also alleged that he received ineffective assistance of counsel because his counsel did not present a defense based on double jeopardy and because he advised him to plead guilty.

The test to determine if double jeopardy exists is whether each conviction required proof of a fact that the other did not. Blockburger v. United States., 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Consecutive sentences violate the double jeopardy clause if they impose multiple punishments for the same offense. United States v. York, 888 F.2d 1050, 1058 (5th Cir. 1989).

To convict Hurst of attempted aggravated battery the state had to prove that he intentionally used force or violence upon the person of another and that he did so with a dangerous weapon. See La. Rev. Stat. Ann. 14:33 and 14:34 (West 1986). To prove attempted aggravated escape, the state had to show that Hurst intentionally departed from his legal confinement and that he endangered human life in making that departure. See La. Rev. Stat. Ann. 14:109 (West 1951); La. Rev. Stat. Ann. § 14:110(C)(1) (West 1986). Each of these crimes requires proof of a fact that the other does not. See Blockburger, 284 U.S. at 304.

To prevail on his claim that his counsel was ineffective for failing to move to dismiss one of the charges on double jeopardy grounds and for advising him to enter a guilty plea to

both charges, Hurst must show that his counsel's performance fell below an objective standard of reasonable competence and that he was prejudiced by his counsel's performance. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show prejudice, Hurst must demonstrate that his counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993). As shown above, Hurst's double jeopardy argument has no merit; therefore, Hurst has not shown deficient performance on the part of his counsel nor has he shown any prejudice resulting therefrom.

AFFIRMED.