

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3761
Summary Calendar

KENNETH COTTON,

Petitioner-Appellant,

versus

C.M. LENSING, Warden,
Hunt Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-93-1922-J)

(August 2, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Kenneth Cotton, a Louisiana state prisoner, was found guilty by a jury of attempted distribution of cocaine and received a 7½-year term of incarceration. Seeking federal habeas corpus relief, he alleged that the trial court denied him a fair trial by refusing a continuance motion, that his court-appointed counsel was ineffective, and that there was insufficient evidence to convict.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Finding no error in the district court's denial of relief, we affirm.

Cotton alleges that the state trial court erroneously denied his motion for a continuance, effectively forcing him to proceed to trial with his court-appointed attorney as opposed to his retained counsel. His argument is unavailing.

"While it cannot be disputed that the Sixth Amendment to the Constitution grants an accused in a criminal prosecution an absolute unqualified right to have the assistance of counsel for his defense, it does not necessarily follow that his right to a particular counsel is absolute and unqualified." United States v. Sexton, 473 F.2d 512, 514 (5th Cir. 1973) (emphasis in original).

"To warrant federal habeas relief, the denial of the continuance must have been not only an abuse of discretion but also 'so arbitrary and fundamentally unfair' that it denied [the petitioner] due process. . . ." McFadden v. Cabana, 851 F.2d 784, 788 (5th Cir. 1988) (footnote omitted), cert. denied, 489 U.S. 1083 (1989). "The petitioner making this claim must show prejudice from the denial of the continuance." Id.

Cotton has not made the requisite showing. In the district court, Cotton failed to allege how he was prejudiced by the state trial court's refusal of his motion for a continuance, or by the fact that he was represented by appointed counsel rather than retained counsel. To the extent that Cotton alleges as prejudice on appeal that his appointed counsel was ineffective, that claim is raised for the first time on appeal and is therefore

not properly before this Court. Self v. Blackburn, 751 F.2d 789, 793 (5th Cir. 1985).

Additionally, the state appellate court, whose findings of fact are entitled to a presumption of correctness in federal habeas proceedings, see 28 U.S.C. § 2254(d); King v. Collins, 945 F.2d 867, 868 (5th Cir. 1991), found that the state trial judge believed that Cotton was attempting to abuse the judicial process to avoid trial. The record does not indicate that reliance upon that presumption would be misplaced. Cotton has not shown a denial of due process.

Cotton alleged in the district court that his court-appointed attorney rendered ineffective assistance. For the first time on appeal, he asserts that she failed to properly cross-examine a state witness regarding testing done on the substance Cotton sold to an undercover police officer. Because this argument is raised for the first time on appeal, it is not properly before the Court. Self, 751 F.2d at 793. In any event, she did elicit the testimony concerning a negative test of the cocaine.

Cotton also claims that the evidence is insufficient to support his conviction. The standard for determining sufficiency for the evidence in a habeas proceeding is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). It is "the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic

facts to ultimate facts." Id. The state appellate court considered this argument and determined that a rational trier of fact could have concluded that Cotton attempted to distribute cocaine. That determination is entitled to "great weight" on federal habeas review. Porretto v. Stalder, 834 F.2d 461, 467 (5th Cir. 1987).

The crux of Cotton's argument is that the evidence is insufficient because there was a conflict in the evidence regarding whether the substance he delivered was actually cocaine and because there was no proof of chain of custody. At trial, Sergeant Terry Legendre testified that he received a brown bag containing two baggies of white powder from Cotton. An initial field test was conducted, which "came back negative." However, Legendre also testified that after the initial field test, the substance was placed in a heat-sealed evidence bag, labeled, turned over to Lt. Bergeron, and placed into the evidence vault. From there it was submitted to the State Police Crime Laboratory.

Bergeron testified that the substance that he received from Legendre was kept in a locked evidence vault from the time he received it until the time it was sent to the State lab, and from the time it was received back from the State lab until trial. The State lab analysis report was introduced into evidence and viewed by the jury. The State lab report indicates that the substances were cocaine. The jury was entitled to make a credibility determination regarding the differing test results, and the record

indicates that a rational trier of fact could have found that Cotton was guilty of attempted distribution of cocaine.

AFFIRMED.