

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4222
Summary Calendar

THOMAS E. SIMMONS,

Petitioner-Appellant,

versus

JAMES A. COLLINS, TEXAS
PAROLE COMMISSION,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(9:92 CV 37)

(September 24, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

I

Thomas Ellis Simmons was indicted in the 88th District Court of Tyler County, Texas, for the unlawful use of a criminal instrument as a habitual felony offender having two prior convictions. A jury found Simmons guilty of the offense and

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

assessed punishment at 50 years in the Texas Department of Corrections. Simmons directly appealed his conviction to the Court of Criminal Appeals, which affirmed the judgment. See Simmons v. State, 690 S.W.2d 26 (Tex. Crim. App. 1985). Subsequently, Simmons filed two state applications for habeas corpus. The first petition, No. 15,691-01, was denied without written order or hearing, and the second was denied without order as well.

Simmons filed a petition seeking habeas corpus relief in federal district court. Without conducting an evidentiary hearing, a magistrate judge issued an extensive report and recommendation that the petition be denied and that the claims in the petition be dismissed with prejudice. Over Simmons's objections and after conducting a de novo review, the district court adopted the magistrate judge's report and recommendation in full and dismissed the petition with prejudice. The district court issued a certificate of probable cause and granted him IFP status, enabling Simmons to appeal.

II

Simmons asserts that he should have been granted an evidentiary hearing by the district court on various issues raised in his § 2254 petition: 1) whether his court-appointed counsel had a conflict of interest in representing him; 2) whether he was entitled to be present at the hearing on his attorney's request to be excused; 3) whether he received ineffective assistance of counsel; and 4) whether perjured testimony was used to qualify a

deputy sheriff as an expert on tubular lockpicks and whether that testimony was improperly used by the state to convict him.

A

Simmons argues that the magistrate judge erroneously concluded without conducting an evidentiary hearing, that his attorney did not have a conflict of interest in representing Simmons. Simmons alleges that, during the hearing in state court, Kinney requested to be excused from representing Simmons based on his concern over the amount of compensation he would receive and the possibility that he could not represent Simmons adequately with that compensation. Simmons argues that because the testimonial evidence indicated that attorneys such as Kinney distinguish their services for paying and non-paying clients, that a conflict of interest existed and that he was prejudiced by Kinney's representation. Simmons's argument that his defense counsel had a conflict of interest is factually unfounded.

In order to prevail on this issue, Simmons must show that his defense counsel had an actual conflict of interest that adversely affected [his] lawyer's performance. "A conflict exists when defense counsel places himself in a position conducive to divided loyalties." U.S. v. Vaquero, ___ F.2d ___, (5th Cir. Jul. 26, 1993, Nos. 91-3781, 91-3805) slip pp. 5763, 5776 (internal quotations and citations omitted). A theoretical or merely speculative conflict of interest will not invoke the protections of the Sixth Amendment. The defendant must prove that his defense

attorney was torn between two interests, either his own or the interests of his client.

The state trial court decided that Simmons's attorney should not be excused based on the inadequate compensation that court-appointed attorneys receive. The trial court stated:

THE COURT: Mr. Kinney, I can say the matter you've presented to the court is certainly informative and helpful, however, under our present system, I'm persuaded that I can do nothing at this time but prevail upon you to continue your services in behalf of Mr. Simmons and overrule your motion to be excused as court appointed attorney.

The magistrate judge's report and recommendation concluded that Kinney's request to be excused based on the compensation was merely an opportunity to express his dissatisfaction with the present system for compensating court-appointed attorneys. The magistrate judge determined:

Contrary to Petitioner's claim, nowhere in the motion and hearing transcript does Mr. Kinney assert that his loyalties are divided between paying and non-paying clients. Petitioner alleges in his Traverse that "[the transcript of proceedings] reflects that Kinney's ongoing expenses necessitated that Kinney had to devote his time and effort [sic] to his paying clients in order to maintain his legal practice based on economic needs." Yet Mr. Kinney did not testify at the hearing.

Having read both the motion and hearing transcript, I find that Mr. Kinney's motion was meant to serve as a statement against the rate of compensation for court-appointed attorneys in Tyler County, Texas and not, as Petitioner claims, to serve as notice to the court that Mr. Kinney would not or could not represent Petitioner in an effective manner. A review of the trial transcript reveals that Mr. Kinney made timely, specific objections during the trial, and diligently urged motions throughout. Based on this evidence I cannot conclude that a conflict of interest existed or, in this context,

that Petitioner was not provided effective assistance of counsel.

This conclusion is supported by the record and evidenced by Kinney's defense of Simmons.

B

Simmons argues that the state court erred in denying his presence at the hearing on his counsel's request to be excused. He contends that the district court erred by not granting him an evidentiary hearing on whether he should have been present during the hearing in state court on his attorney's motion to be excused. Simmons distinguishes his attorney's first motion to be excused from the second and argues that he was not allowed to be present during the first motion hearing and that he was unaware that such motion had been filed in violation of his due process and equal protection rights.

The record indicates that the first motion to be excused was filed by Simmons's attorney on February 29, 1984, and denied on May 31, after a hearing on April 18, 1984. The second motion to be excused, which addresses Simmons's failure to cooperate with his attorney, was filed by Kinney on May 2, 1984. There is no indication that Simmons was not informed of the first motion despite the court's failure to order his presence during the evidentiary stage of the hearing. After he was brought into the courtroom, the judge explained to him what was taking place and made an oral ruling on the matter at that time. The court stated:

THE COURT: Mr. Simmons, the court has had under consideration the motion by Mr. Kinney to be excused as your attorney. I'm going to overrule that motion and Mr. Kinney will continue as your attorney.

In response, Simmons replied, "Yes, sir," without making any additional remarks or inquiring into the purpose of the hearing.

Relevant case law on the issue of a defendant's presence at a hearing is limited. The Supreme Court has ruled that a prisoner's presence is required in a hearing held in a § 2255 proceeding that addressed whether the convicted defendant's attorney had a conflict of interest because he had represented in a related case, a key witness against him. U.S. v. Hayman, 342 U.S. 205, 219-20, 72 S.Ct. 263, 96 L.Ed. 232 (1952). The Supreme Court based its ruling on the fact that the district court made findings on controverted factual issues without notice to Hayman and without his presence at the hearing. Id. at 220. "Whether the prisoner should be produced depends upon the issues raised by the particular case. Where, as here, there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing." Id. at 223. Unlike Hayman, the trial court in this instance was conducting a hearing on the attorney's motion to dismiss and factual matters pertaining to his compensation. The issue regarding adequate compensation and whether the attorney could adequately represent Simmons was not determined based on the record and files in the trial court or any factual disputes between Simmons and Kinney but on Kinney's

experience with compensation from other indigent clients. Thus, Simmons's presence and testimony was not necessary because it would not have assisted the court in protecting his Sixth Amendment rights. The magistrate judge did not err in failing to conduct an evidentiary hearing on this matter, as her report and recommendation indicates that she based her ruling on the complete record which included a copy of the motion and a transcript of the state-court hearing and the ruling and of the trial. Hayman, 342 U.S. at 219-20.

C

Simmons argues that Kinney provided him with ineffective assistance of counsel by not investigating the scene of the crime, by not inspecting the money boxes on the laundry machines, or interviewing any of the state's witnesses. Specifically, Simmons takes issue with 1) the expert's testimony regarding the use of rubber bands to adapt an instrument and his attorney's failure to rebut this testimony; 2) the attorney's failure to investigate the background and experience of the state's expert witness, Vardeman; 3) the attorney's failure to object to the indictment as duplicitous by charging both a misdemeanor and a felony; and 4) the state's use of false and perjured testimony to enhance Vardeman's qualifications. He contends that the state court record is inadequate to dispose of the ineffective assistance of counsel claim and that a hearing should have been conducted by the magistrate judge.

To prevail on his claim of ineffective assistance, Simmons must show 1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness; and 2) that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687-94, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Hill v. Lockhart, 474 U.S. 52, 56-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In order to show prejudice, Simmons must demonstrate that counsel's errors were so serious as to "render[] the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993). A failure to establish either deficient performance or prejudice defeats the claim. Strickland, 466 U.S. at 697. Such a claim can be rejected because of an insufficient showing of prejudice without the need to inquire into the adequacy of counsel's performance. Id.

The Court held further: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. The Court stated that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696. Moreover, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all

significant decisions in the exercise of reasonable professional judgment." Id. at 690.

Simmons contends that his attorney's failure to investigate the background of Vardeman, the state's expert witness, and to interview the eyewitnesses and owner of the laundry facility, and to inspect the lock prejudiced his defense by allowing the testimony of the state's expert witness to contribute to a guilty verdict. These allegations have no merit. Simmons has not indicated what possible defenses further investigation would have revealed other than rebutting the testimony regarding the rubber-band theory in his motion for a directed verdict. See U.S. v. Green, 882 F.2d 999, 1003 (5th Cir. 1989) (allegations that counsel failed to investigate a defense must show with specificity what the investigation would have revealed). Simmons argues that counsel could have found out that the state's witness was not as experienced as he claimed and could have been impeached on this basis. Simmons notes that Vardeman stated that he had experience with cases involving the types of locks that were picked by Simmons at the laundry. However, the testimony at trial was that Vardeman had worked on "a half dozen or so" cases of this nature and that he had called the lock manufacturer to find out more about the design of the locks." Simmons does not present a specific defense that could have been proved by discrediting Vardeman's expertise or by Kinney's interviewing the eyewitnesses. He merely contradicts that Vardeman had ever handled a tubular lockpick case in Tyler County,

Texas. Simmons also argues that Kinney could have investigated Vardeman's qualifications and objected to his testifying as an expert at trial. Simmons asserts that Vardeman's testimony comprised the state's entire case and that he could have been found not guilty if Kinney had further investigated Vardeman. This theory is simply incorrect.

There was substantial evidence against Simmons in support of the jury's verdict. There was eyewitness testimony from Michelle Marie Cotter who identified Simmons as the party removing coins from the laundry machines on January 17, 1984. Carolyn Renee Loper testified that she also witnessed Simmons opening the coin boxes with a key and rubber bands. She confirmed that Cotter and a Michael Myers were present and that all of them had discussed what was occurring in the laundry. Michael Stephen Myers testified that Simmons was in the laundry and that he saw him place a key into a lock and open it. He stated that he went to the police station to report that an apparent robbery was occurring. Although each witness's testimony was not lengthy and detailed, it was cogent and consistent and supported a verdict that Simmons along with another man were guilty of using a key and rubber bands to adapt the laundry machines.

D

Simmons argues that he was entitled to an evidentiary hearing on whether the state knowingly and intentionally used perjured testimony for his conviction. He objects to the magistrate judge's

finding that Vardeman was not an expert but that Vardeman was testifying merely about the information he had received about the locks. Simmons compares Vardeman's testimony to the statement of a William A. Brewer, a 14-year expert locksmith, who based an opinion on the operation of the lock and the method for adoption on a picture of the lock and the witnesses' testimony at trial. In his affidavit, Brewer contradicted that someone could successfully manipulate several locks in less than 30 seconds and the usefulness of rubber bands in adapting a lock such as the kind he examined. Vardeman limited his knowledge of the locks to the information he had received from the manufacturer.

To prove a due process violation from the use of perjured testimony, Simmons has the burden of establishing that "(1) [Vardeman] gave false testimony; (2) the falsity was material in that it would have affected the jury's verdict; and (3) the prosecution used the testimony knowing it was false." May v. Collins, 955 F.2d 299, 315 (5th Cir. 1992), cert. denied, 112 S.Ct. 1925. It is evident that Vardeman's testimony was material and affected the jury's finding of guilt. Simmons, however, fails to prove either that Vardeman's testimony was false or that prosecutors knew that it was false and that it affected the jury's verdict. As noted earlier, several witnesses testified that Simmons and a companion were removing coins from the laundry machines by using a key and rubber bands. An evidentiary hearing on this issue is not needed because the magistrate judge was able

to review the transcript of the proceedings. The magistrate judge stated in her report and recommendation that Vardeman was not offered as an expert in locks and lock picks, but on criminal instruments. Simmons has failed to allege facts that were unresolved in the state proceeding and if proved would entitle him to the writ. Therefore, an evidentiary hearing was not required. See O'Bryan v. Estelle, 714 F.2d 365, 403 (5th Cir. 1983), cert. denied, 465 U.S. 1013 (1984).

III

For the reasons stated herein, the judgment of the district court denying habeas relief is

A F F I R M E D.