

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 93-4254

Summary Calendar

---

SAM HOUSTON SIMMONS,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,  
Texas Department of Criminal  
Justice, Institutional Division,

Respondent-Appellee.

---

Appeal from the United States District Court  
for the Eastern District of Texas  
(9:92-CV126)

---

(March 23, 1994)

Before KING, DUHÉ and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Sam Houston Simmons, a Texas state prisoner, brought a petition for habeas relief in federal district court complaining that he had received ineffective assistance of counsel. The district court denied relief and granted a certificate of probable cause to appeal to this court.

---

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

## I. BACKGROUND

In 1983, Sam Houston Simmons pleaded guilty in Texas state court to the offense of aggravated robbery. He was sentenced to confinement in the Texas Department of Corrections (TDC) for a term of twenty-five years.

While Simmons was serving his sentence, a Texas grand jury returned an indictment charging him with the felony offense of aggravated assault on a TDC guard by striking him with a pen on May 28, 1987. Simmons entered a plea of guilty to this charge on June 9, 1988. The trial court sentenced Simmons to confinement for five years, to be served consecutively to his sentence for aggravated robbery. Simmons did not directly appeal this conviction.

Simmons applied for habeas relief in Texas state court. His application was denied by the Texas Court of Criminal Appeals without written order on April 29, 1992. Having exhausted state remedies, he sought habeas relief in federal district court, alleging that he had received ineffective assistance of counsel and that his guilty plea to the offense of aggravated assault on a correctional officer was thus involuntary. The state of Texas moved for summary judgment. The case was referred to a magistrate judge, who recommended denial of the writ. The district court overruled Simmons's objections to the magistrate judge's recommendation, adopted the magistrate judge's report, and entered judgment denying Simmons all relief. The court also

granted Simmons a certificate of probable cause to appeal to this court.

## II. STANDARD OF REVIEW

The Supreme Court has developed a two-pronged test governing the evaluation of claims of ineffective assistance of counsel. The claimant must show (1) that his counsel's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that the result of the proceeding would have been different absent counsel's unprofessional errors. Strickland v. Washington, 466 U.S. 668, 690, 694 (1984). This test also applies to challenges to guilty pleas based on ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 58 (1985). In order to satisfy the second prong of the Strickland test, the party claiming ineffective assistance "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59; Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993).

Petitioner is proceeding pro se and is therefore entitled to liberal construction of his pleadings and briefs. Securities and Exch. Comm'n v. AMX, Int'l, Inc., 7 F.3d 71, 75 (5th Cir. 1993).

## III. ANALYSIS

Simmons contends first that his parole eligibility has been limited because he pleaded guilty to the charge of aggravated

assault on a correctional officer. Simmons contends that his counsel, in advising him to plead guilty, told him that his parole eligibility would remain unaffected, and that this erroneous advice induced him to plead guilty. The state of Texas responds that Simmons is wrong to believe that his eligibility for parole has been automatically limited by his guilty plea to aggravated assault on a correctional officer.

The 1988 judgment of conviction and sentence against Simmons does not identify the Texas penal statute at issue, but rather describes the offense as "aggravated assault on [a correctional] officer." This crime was, as the district court observed and Simmons agrees, a form of aggravated assault under the version of the Texas Penal Code then in effect. The relevant section provided:

(a) A person commits an offense if the person commits an assault as defined in Section 22.01 of this code and the person:

(2) threatens with a deadly weapon or causes bodily injury to a peace officer or a jailer or guard employed . . . by the Texas Department of Corrections . . . when the person knows or has been informed the person assaulted is a peace officer, jailer, or guard . . . .

TEX. PENAL CODE ANN. § 22.02(a)(2) (West 1989). This offense was a third-degree felony unless a deadly weapon was used, in which case the offense was a second-degree felony. TEX. PENAL CODE ANN. § 22.02(c) (West 1989). The judgment lists a finding that Simmons did not use a deadly weapon in his assault on the TDC guard, and includes the notation "n/a" in the blank reserved for "findings on enhancement."

Simmons contends that his conviction under section 22.02(a)(2) means that he will be required to serve one-third of his sentence without any consideration of credits for good time. The court below concluded, and we agree, that under Texas law Simmons's parole eligibility has not been affected by his section 22.02(a)(2) conviction, and thus that his counsel committed no unprofessional error in so informing Simmons prior to Simmons's guilty plea.

The general rule under Texas law currently is that a prisoner becomes eligible for parole when his time served plus good conduct time equals the lesser of one-fourth of the maximum sentence imposed or fifteen years. TEX. CODE CRIM. PROC. ANN. art. 42.19, § 8(b)(5) (West Supp. 1994). Prisoners convicted of offenses committed prior to September 1, 1987, however, are not governed by the current rule; such prisoners are not ordinarily eligible for parole until they have accrued credit (including good time) equal to one-third of their sentences. Ex parte Choice, 828 S.W.2d 5, 8 & n.21 (Tex. Crim. App. 1992).

A prisoner's eligibility for parole will be delayed, and his good time credits are eliminated, if his conviction is for a crime specified in TEX. CODE CRIM. PROC. ANN. art 42.12, § 3g(a)(1) (West Supp. 1994) or if the judgment against the prisoner contains an affirmative finding that the prisoner used or exhibited a deadly weapon during a felony offense. TEX. CODE CRIM. PROC. ANN. art. 42.18, § 8(b)(3) (West Supp. 1994). The crime of aggravated assault against a corrections officer is not one of

those listed in article 42.12, section 3g(a)(1), and the judgment against Simmons contains a finding that no deadly weapon was used in his assault on the TDC guard. Thus, Simmons has not shown that his guilty plea to the aggravated assault charge has occasioned any negative impact on his parole eligibility under Texas law. Assuming the truth of Simmons's factual allegations, we agree with the court below that Simmons's counsel committed no unprofessional error in his legal advice to Simmons.

Simmons also complains that his counsel incorrectly advised him that he would receive credit for the time lapsing between his indictment and his conviction for the aggravated assault charge, almost thirteen months. The record reveals, and the district court found, however, that the state of Texas conceded that Simmons was entitled to this credit for pretrial confinement, and that Simmons was in fact credited with this time. Thus, Simmons was not misled by his counsel's advice regarding credit for pretrial confinement.

Simmons also complains, apparently for the first time on appeal, that a detainer was lodged against him in connection with the aggravated assault charge on March 17, 1988, and that he is entitled to additional credit for the period from March 17, 1988, to the present. We have stated repeatedly that we will not review issues raised for the first time on appeal unless they involve purely legal questions and failure to consider them would result in manifest injustice. United States v. Sherbak, 950 F.2d 1095, 1101 (5th Cir. 1992). This standard is not met in the

instant case. The authorities cited by Simmons do not support his position that he is entitled to additional credit for time served after his sentencing for aggravated assault; more fundamentally, he does not contend that he was ever told by his counsel that he would receive such credit.

In sum, Simmons has not shown that his counsel rendered erroneous legal advice to him in connection with his conviction for aggravated assault. His claims that he received ineffective assistance of counsel and that his guilty plea was involuntary for that reason must therefore fail.

#### IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.