UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-4372
Summary Calendar

JAMES CLEMENS,

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
(6:91-CV-179)

(March 25, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

DAVIS, Circuit Judge:[1]

Clemons appeals the dismissal of his petition for habeas relief. We affirm.

I.

In 1987, James Clemens was indicted by a Texas grand jury for three separate offenses arising from the same criminal episode. He

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

was indicted for aggravated robbery in cause no. 10447, for aggravated kidnapping in cause no. 10446, and for what was entitled aggravated sexual assault in cause no. 10418. Clemens entered into a plea agreement whereby he pled nolo contendere to the aggravated sexual assault indictment in cause no. 10418. The state trial judge explained to Clemens the rights he was waiving before accepting his plea.

After a recess, the prosecution informed the court that Clemens had pled to a first-degree felony, aggravated sexual assault, but that the indictment had charged him only with a second-degree felony, sexual assault. Thus, the prosecution conceded that the plea agreement was impossible to carry out as it provided for a thirty year term of imprisonment, a term beyond the maximum allowable for a second-degree felony. Defense counsel confirmed to the court that Clemens had pled plead to a first-degree felony. Because the court had incorrectly admonished Clemens on the possible punishment, the court declared a mistrial.

After the mistrial was declared in cause no. 10418, Clemens entered a plea of nolo contendere to aggravated robbery in cause no. 10447. After questioning Clemens, the court accepted his nolo contendere plea and sentenced him to thirty years imprisonment. Defense counsel informed the court that the plea agreement called for the court to consider the two other offenses in assessing Clemens' sentence and called for the State to recommend dismissal of those indictments, which it did.

After exhausting his state post-conviction remedies, Clemens

petitioned the district court for federal habeas relief. Clemens alleged that counsel provided ineffective assistance, that his conviction for aggravated robbery was barred by double jeopardy, and that his nolo contendere plea was involuntary and unintelligent because he had not been informed of the double jeopardy problem and because he believed that he was pleading to a non-aggravated felony. Pursuant to the magistrate judge's order, the State submitted the affidavit of counsel who defended Clemens. The State also submitted Clemens' written stipulation and judicial confession for aggravated robbery, but did not submit similar documentation for cause no. 10418, the sexual assault offense.

The district court, after **de novo** review, adopted the findings and conclusions of the magistrate judge's report and dismissed Clemens's petition. The district court granted CPC.

I.

A.

Clemens argues first that his conviction for aggravated robbery in cause no. 10447 is barred by double jeopardy because of the proceedings leading to mistrial in cause no. 10418. "Under Texas law, . . . a plea of no contest, or **nolo contendere**, has the same legal effect in a criminal proceeding as a plea of guilty . . . ." **Cook v. Lynaugh**, 821 F.2d 1072, 1075 (5th Cir. 1987).

> In **United States v. Broce**, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989), the Supreme Court declared that a defendant who has entered a plea of guilty to a criminal charge may **not** assert a double jeopardy claim in a collateral attack upon the sentence. The Court recognized only two narrow exceptions to this rule. First, a defendant may question

> the voluntary and intelligent character of the guilty plea in a collateral attack. Second, a defendant may assert in a collateral attack that the face of the indictment or record against him establishes that his convictions violate the constitutional prohibitions against double jeopardy.

Taylor v. Whitley, 933 F.2d 325, 327 (5th Cir. 1991) (citations omitted), **cert. denied**, 112 S.Ct. 1678 (1992).

The indictment in cause no. 10447 for aggravated robbery, in conjunction with the indictment in cause no. 10418, entitled "aggravated sexual assault," do not establish a double jeopardy violation. The Double Jeopardy Clause prohibits "successive prosecutions for the same criminal offense." **United States v. Dixon**, ___ U.S. ___, 113 S.Ct. 2849, 2855, 125 L.Ed.2d 556 (1993). Even if jeopardy attached in cause no. 10418, this would not bar conviction in cause no. 10447 because the offenses listed in the two indictments do not contain identical elements and are not the same offense.[2] **Compare** TEX. PENAL CODE ANN. § 29.03 (West 1989) (amended 1989) (aggravated robbery) **with** TEX. PENAL CODE ANN. § 22.011 (West 1989) (sexual assault) **or** TEXAS PENAL CODE ANN. § 22.0021 (West 1989) (aggravated sexual assault).

Clemens' reliance on **Grady v. Corbin**, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), is misplaced. The Supreme Court has overruled **Grady**'s "same conduct" rule, a rule which prohibited subsequent prosecution if the government would have to prove conduct which constituted the offense covered by a prior

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[2] **See Blockburger v. United States,** 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

prosecution. **Dixon**, 113 S.Ct. at 2860. Moreover, a review of the state court record does not reveal a violation of double jeopardy.

Clemens also challenges the voluntariness and knowingness of his nolo contendere plea, thus seeking to invoke the other **Broce** exception. First, Clemens argues that the State failed to carry out its side of the bargain in the plea agreement for cause no. 10418, the sexual assault, and that this breach makes his plea in cause no. 10447, aggravated robbery, involuntary. This argument was not raised in the district court and we decline to address it for the first time on appeal. **See Yohey v. Collins**, 985 F.2d 222, 225 (5th Cir. 1993).

Clemens argues next that his plea was involuntary and unknowing because counsel failed to inform him of the double jeopardy problem due to a lack of time to investigate the facts and law at issue in the case. A double jeopardy problem was not apparent on the face of the indictments in this case and "[t]his Court has previously determined that the failure to inform the defendant of every conceivable consequence of a guilty plea does not render the plea involuntary and unintelligent." **Taylor**, 933 F.2d at 330. Moreover, a review of the record, including an affidavit detailing the plea negotiations, a transcript of the state trial court proceedings and the written stipulation and judicial confession signed by Clemens, belies Clemens' argument.

In the district court, Clemens also premised his involuntary plea argument on his misunderstanding that he was pleading to an aggravated felony and the resultant implications on his future

parole eligibility. Because this issue is not raised in Clemens' appellate brief, we consider it abandoned on appeal. **See Yohey**, 985 F.2d at 225.

Because Clemens does not meet either of the **Broce** exceptions, his double jeopardy claim is not amenable to habeas review. **See Taylor**, 933 F.2d at 327.

B.

Clemens argues that he received ineffective assistance of counsel. Under the two-prong test enunciated in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Clemens must show that counsel's assistance was deficient and that the deficiency prejudiced his defense. **See Hill v. Lockhart**, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (defining prejudice in the context of a guilty plea as, "but for counsel's errors, [petitioner] would not have pleaded guilty and would have insisted on going to trial").

Clemens argues that counsel's rushed assistance between the mistrial and the entry of Clemens' plea to aggravated robbery caused counsel to miss the double jeopardy issue. For reasons explained above, counsel's failure to advise Clemens about the ramifications of any double jeopardy problem, in the context of the facts of this case, did not amount to deficient performance. **See Taylor**, 933 F.2d at 331.

Clemens also argues that counsel violated professional ethics, as evidenced by counsel's affidavit, because he knew that the indictment for aggravated sexual assault actually charged only

sexual assault and because he failed to inform the state trial court of this problem before Clemens entered his plea in cause no. 10418. Although this specific claim was not presented in Clemens' original papers, he brought the issue to the district court's attention in his objections to the State's expansion to the record. Even if counsel violated professional ethics, Clemens has failed to show how this alleged deficiency prejudiced him. **See Hill**, 474 U.S. at 59.

Clemens also argues that the indictment for aggravated robbery failed to state the culpable mental state and that his counsel's failure to object to the defective indictment constituted ineffective assistance. Even if counsel should have moved for the dismissal of the indictment on this ground, the prosecution could have reindicted Clemens, or it could have continued prosecution for aggravated kidnapping in cause no. 10446, an indictment Clemens does not attack. Therefore, Clemens has not shown the requisite prejudice. **See Morlett v. Lynaugh**, 851 F.2d 1521, 1525 (5th Cir. 1988), **cert. denied**, 489 U.S. 1086 (1989).

Clemens appears to argue that counsel, by advising Clemens to plead nolo contendere, cost Clemens his right to appeal. Assuming this is a separate claim of ineffective assistance of counsel, this claim was not raised in the district court, and we decline to address it. **See Yohey**, 985 F.2d at 225.

Clemens argues that the district court erred in failing to conduct an evidentiary hearing on his claims. Relatedly, Clemens argues that the district court erred in relying on the affidavit of

defense counsel. "If the record is adequate to dispose of the claim[s], the federal court need not hold an evidentiary hearing." **Wiley v. Puckett**, 969 F.2d 86, 98 (5th Cir. 1992). The record, once enlarged on the order of the district court and the magistrate judge, was adequate to dispose of Clemens' claims.

AFFIRMED.