

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4908
Summary Calendar

ROBERT C. WELLS,

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
(92-CV-81)

(April 8, 1994)

Before POLITZ, Chief Judge, JONES and EMILIO M. GARZA, Circuit
Judges.

PER CURIAM:*

We review the appeal by Robert C. Wells of the denial of his
28 U.S.C. § 2254 petition for habeas relief. Finding no error we
affirm.

Wells was convicted by a Texas state jury of aggravated

*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should not be published.

robbery and sentenced to 40 years imprisonment. Brandishing a six-inch hunting knife he robbed a pizza delivery driver. The instant federal habeas action followed his direct appeal and four unsuccessful state habeas petitions. In the present action he claims ineffective assistance of appellate counsel and improper pretrial identification procedures.

The magistrate judge's recommendation that the relief sought be denied was adopted by the district court. Wells, represented by counsel in the trial court but now proceeding *pro se*, urges the same issues on appeal.

The challenge to appellate counsel's performance is based on counsel's failure to argue on direct appeal that the prosecutor did not adduce sufficient evidence that the knife was a "deadly weapon" under Texas law. To succeed with the ineffective assistance of counsel claim Wells must demonstrate that his counsel's performance fell below an objective standard of reasonable competence occasioning prejudice to Wells.¹ We evaluate counsel's competence deferentially, presuming counsel acted within a wide range of reasonable conduct.² To find prejudice we must be convinced that, but for counsel's deficiencies, the result of Wells' direct appeal would have been different.³

Although a knife is not a deadly weapon *per se*, the leading

¹**Lockhart v. Fretwell**, 113 S.Ct. 838 (1993).

²**Strickland v. Washington**, 466 U.S. 668 (1984).

³**Ellis v. Lynaugh**, 873 F.2d 830 (5th Cir.), cert. denied, 493 U.S. 970 (1989).

case from Texas' highest criminal court found sufficient evidence of intent to use a knife as a "deadly weapon" where the defendant approached to within striking distance of his victim "displaying the knife open in his hand."⁴ The case at bar is almost factually identical to that controlling case. We cannot say counsel was deficient constitutionally for failing to raise what appears to be a markedly tenuous point nor do we perceive any likelihood that the result of Wells' direct appeal would have been different had the issue been raised.

Wells' other contention is that the pretrial identification procedures used were impermissibly suggestive. If suggestive procedures cause a substantial likelihood of misidentification, they violate a defendant's right to due process.⁵ The delivery driver testified that he was shown a series of photos but he could not identify any as the robber. At a live lineup shortly thereafter he immediately identified Wells. The asserted

⁴**Tisdale v. State**, 686 S.W.2d 110, 115 (Tex.Crim.App. 1984). Wells' citation to **Davidson v. State**, 602 S.W.2d 272 (Tex.Crim.App. 1980), is unavailing. **Davidson** involved a defendant who drew a knife while running away and never came closer than five feet to his alleged victim. In **Tisdale** and the instant case, the knife was held within arm's reach of the victim.

Denying any intent to use the knife in a dangerous manner, Wells claims that he told his victim "I am not gonna hurt you." We view evidence in the light most favorable to the conviction, **Jackson v. Virginia**, 443 U.S. 307 (1979); contrary direct or circumstantial evidence defeats Wells' challenge. As the government effectively points out, the delivery driver testified that Wells brandished the knife in such a manner that he feared for his life and safety and Wells did not disavow the intent to harm until after the robbery was completed.

⁵**United States v. Buckhalter**, 986 F.2d 875 (5th Cir.), cert. denied, 114 S.Ct. 203, 114 S.Ct. 210 (1993).

impermissible procedure arises from the driver's testimony that he was shown Wells' picture during the photo lineup.⁶ Assuming *arguendo* that this procedure was impermissibly suggestive, Wells does not establish the requisite substantial likelihood of misidentification. During the robbery the driver saw Wells at arm's length and under good lighting; he accurately described Wells to the police; and he immediately pointed Wells out in the lineup three days later. These indicia of reliability suffice to preclude a finding that the driver misidentified Wells in the instant case.⁷

Finding no error in the denial of habeas relief, we AFFIRM.

⁶The driver testified that Wells' appearance was different in the photo than it had been during the robbery and at the live lineup. The police detective who showed the driver the photo lineup testified that Wells' picture was not included.

⁷See **Lavernia v. Lynaugh**, 845 F.2d 493 (5th Cir. 1988) (listing important factors for determining reliability of identification).