UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5334
Summary Calendar

JAMES R. WILCOX,

Petitioner-Appellant,

versus

WAYNE SCOTT, 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-98)

(October 25, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

GARWOOD, Circuit Judge:

In this habeas corpus proceeding, petitioner-appellant James Robert Wilcox (Wilcox) challenges his Texas conviction of aggravated rape for which he is currently serving a life sentence in the Texas Department of Criminal Justice. Texas courts upheld his conviction on direct appeal and denied his state habeas petitions, and Wilcox then sought habeas corpus relief from the federal courts. He now appeals the district court's denial of that relief, raising a variety of complaints concerning his

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

state conviction. We affirm.

Facts and Proceedings Below

Wilcox was convicted of aggravated rape primarily upon the testimony of his victim, Delma Welch (Welch). In 1978, Wilcox leased space from the Colvin Cadillac dealership in Texarkana, Texas, where he had a business cleaning and detailing cars. On January 31, 1978, Welch brought her car to the dealership for service. She spoke with Wilcox at the dealership and agreed that he would clean and detail her car for $50. Welch arranged with Wilcox that he would deliver the car to her at her place of employment when he had finished the work on it; Wilcox informed her that he would finish work on the car in three or four hours. When her car had not been delivered after seven hours, Welch called to check on it. At ten minutes to four that afternoon, Wilcox called Welch to tell her that he would not be able to deliver the car early but would pick her up when she got off work at 5:30 p.m., if she would take him back to the dealership.[1] Welch agreed.

Shortly after 5:30 p.m., Wilcox picked Welch up from work in her car. When he made no effort to move from the driver's seat, Welch got in on the passenger side of the car. When they arrived at the dealership, the lights were off. Wilcox asked Welch to take him to his house, which he claimed was not too far away. Before she could reply, Wilcox drove out of the parking lot. The evening was becoming darker, and snow was beginning to fall.

While Wilcox drove, Welch gave him a check for $50 for the work he had done on her car. She noticed a small camera on the seat beside Wilcox; it was not her camera and had not been in the car that morning when she left her car at the dealership. Wilcox continued to drive for a long time and eventually turned down a street where Welch knew there were no houses. Welch became frightened and confronted him, asking him to acknowledge that he did not live on that street. Wilcox did not reply. He stopped the car near a church, turned off the lights, and took a gun from his pants pocket, pointing it at her. Welch later described the gun as a small, black pistol with a long barrel and

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[1] The original arrangement was for Wilcox and another man to drive in tandem to drop off Welch's car; the other man would then be available to take Wilcox back to the dealership. Wilcox informed Welch when he called that the other man was not available to help him drop off her car and that he would need a ride back to the dealership.

white handles.

Wilcox forced Welch to undress, picked up the camera, and took several nude photographs of her. Welch noticed that during three of the photographs taken by Wilcox, the camera's flash went off; when Wilcox took a fourth photograph, the flash did not function. Wilcox threatened to show the pictures at Welch's place of employment if she reported him. He forced her to perform oral sex on him and hit her when she gagged. Wilcox threatened her again, telling her that he had done the same things before and that Welch did not want to know what happened to the woman who reported him. He took several more picture of her without the flash attachment on the camera and then raped her.

When he had finished, Wilcox drove to a house with green shutters. Before getting out of her car, he once more threatened Welch, this time promising to kill her if she spoke to anyone about the rape.

Welch drove to a friend's house and called an attorney, who arranged to meet her at the police station to report the rape. Wilcox was arrested the following day. After a magistrate judge read him his *Miranda* rights, Wilcox consented in writing to a search of his home. In Wilcox's bedroom, the police found a pistol and camera similar to those described by Welch. A flash attachment found beside the camera had three burned flashes and one unburned flash.

Wilcox pleaded not guilty to an indictment charging him with aggravated rape, a first-degree felony under Texas state law. A jury found him guilty as charged and sentenced him to life imprisonment. The Texas Court of Criminal Appeals affirmed his conviction in an unpublished opinion issued on January 12, 1983. *Wilcox v. State*, No. 63,760 (Tex. Crim. App. 1983) (*per curiam*).

Wilcox filed two state applications for writ of habeas corpus; in the first, the trial court entered findings of fact on his claim of ineffective assistance of counsel. The Texas Court of Criminal Appeals denied both applications without written order. *Ex parte Wilcox*, Applications Nos. 12,737 (Dec. 12, 1984) and 12,737-02 (Nov. 13, 1991).

Wilcox filed the current habeas proceeding in the United States District Court for the Eastern

District of Texas. Upon the report and recommendation of the magistrate judge to whom the case had been referred, the district court entered final judgment dismissing Wilcox's application for habeas relief with prejudice.

Wilcox filed a timely notice of appeal.

Discussion

Wilcox raises a variety of challenges to his state court rape conviction. He claims that he received ineffective assistance of counsel, that the trial court erroneously instructed the jury on the elements of rape and aggravated rape, that the prosecution improperly withheld exculpatory evidence, that the evidence was insufficient to support his conviction, and, finally, that the trial court records were altered to reflect testimony which was not given at his trial. We consider each argument in turn.

I. Ineffective Assistance of Trial Counsel

The Supreme Court established a two-part test to evaluate claims of ineffective assistance of counsel in *Strickland v. Washington*, 104 S.Ct. 2052, 2064 (1984). In order to prevail on such a claim, Wilcox must meet both prongs of the test. First, he must show that his trial counsel's performance was deficient. To do this, Wilcox must show that his counsel made errors so serious that the lawyer was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id*. Representation by counsel is deficient only if it falls below an objective standard of reasonableness, measured under prevailing professional norms. *Id*. at 2064, 2065. In assessing counsel's decisions, we must afford counsel's performance a high degree of deference. *Id*. at 2065. Second, Wilcox must show that his defense was prejudiced by the deficient performance. The alleged errors must have been so serious as to deprive him of a fair trial, a trial whose result is reliable. *Id*. at 2064. In order to establish prejudice, Wilcox must show that there is a reasonable probability that a different result would have occurred but for the deficient representation. *Id*. at 2068.

Wilcox bases his contention that he received ineffective assistance of counsel on allegations that his attorney failed to call witnesses to testify in Wilcox's favor, to conduct an adequate pre-trial investigation, and to seek suppression of evidence obtained during the search of Wilcox's house.

A. Witnesses for the Defense

Wilcox asserts that his attorney should have located and/or called as witnesses (1) persons to testify that the Cadillac dealership did not close until 6:30 p.m., to refute Welch's testimony that the dealership was closed when she and Wilcox returned, and (2) the two people who saw Welch immediately following the rape.[2] He also contends that his attorney should have either called the physician who examined Welch or secured the physician's medical reports. In order to establish that his counsel provided ineffective assistance for failing to call these witnesses, Wilcox must show that the witnesses would have testified in his favor. *McCoy v. Cabana*, 794 F.2d 177, 183-84 (5th Cir. 1986).

Although testimony that the dealership was in fact not closed when Welch and Wilcox arrived might have raised some question as to that aspect of Welch's testimony, Wilcox does not identify any person who would have testified concerning the hours of the Cadillac dealership. He also does not identify the two persons who saw Welch after the rape (although Welch mentioned both persons by name in her trial testimony), nor does he describe the contents of the physician's medical report. Wilcox assumes that the State did not call either of the persons who saw Welch or produce the physician or his medical reports because this evidence was not favorable to the State and would not corroborate Welch's claims that she had been raped. He provides no basis for this assumption, nor does he establish that this testimony would instead have been favorable to his defense.

In the absence of a showing that the evidence would have been favorable to the defense, Wilcox's claim that his attorney should have called these witnesses must fail.

B. Pre-Trial Investigation

Wilcox alleges that his counsel failed to conduct an adequate pre-trial investigation into the facts and circumstances of the alleged rape. He claims that witnesses for the defense at trial testified that they had not talked extensively with defense counsel prior to trial.

Although an attorney generally has a duty to conduct reasonable investigations or to make

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[2] After Wilcox got out of the car, Welch drove to a friend's house, where she called her attorney, who arranged to meet her at the police station.

a reasonable decision that a particular investigation is unnecessary, unsupported general and conclusory allegations in this respect do not implicate *Strickland*'s protections. *Nelson v. Hargett*, 989 F.2d 847, 850 (5th Cir. 1993) (quoting *Strickland*, 104 S.Ct. at 2066). A petitioner who raises allegations of inadequate pre-trial investigations must specify what a proper investigation would have revealed and how such an investigation likely would have changed the result of the trial. *Id*.

Wilcox fails to carry this burden. His argument consists of conclusory statements that his attorney did not acquaint himself with the facts or law of the case and did not spend adequate preparation time with witnesses for the defense. Wilcox does not identify what a fuller investigation would have revealed or what the defense witnesses knew and failed to tell defense counsel in the interviews which did occur; nor does he allege how more information likely would have changed the result of his trial. His allegations are inadequate to support his failure-to-investigate claim.

C. Failure to Seek Suppression of Evidence

Wilcox contends that his counsel should have moved to suppress the gun, camera, and flash attachment found at his house. Wilcox argues that his consent to the search was invalid because the items seized by the police differed from the items described when the police asked his permission to search his house. Wilcox claims that the police told him they were looking for a pistol with a long barrel and a 35mm camera. Because he believed that no objects matching those descriptions were at his house, he consented to the search.

The police based their request to search upon the description of the gun and camera provided by Welch. Welch told the police, and testified at trial, that Wilcox had pointed a small black or blue pistol with white handles at her and had taken pictures of her with a small black camera with a grayish top and front. Welch also testified that the camera's flash attachment had three used flashes and one flash that had not gone off.[3] The items found at Wilcox's house matched these descriptions.

An attorney is not required to file futile motions. *McCoy v. Lynaugh*, 874 F.2d 954, 963 (5th

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[3] These descriptions are consistent with those provided in the testimony of Police Detective Jerry Morgan, who stated at trial that the police were looking for a black or blue pistol with white handles and a small camera with a flash attachment. The State introduced the consent-to-search form at trial, but the form was not included in the record.

Cir. 1989). The asserted deviation in the descriptions of the gun and camera is not of such consequence that Wilcox's attorney need have objected to the search on the ground that Wilcox's consent was invalid: an objectively reasonable person could perceive that the seizure of a dark pistol with white handles and a small camera would not exceed the scope of a search for a pistol with a long barrel and a 35mm camera. *Gonzalez v. State*, 869 S.W.2d 588, 590-91 (Tex. App.—Corpus Christi 1993). Wilcox has not shown that, had his attorney made a motion to suppress the items seized, the motion would have been granted.

The district court correctly dismissed Wilcox's claims that he was denied the effective assistance of counsel.

II. Sufficiency of Jury Charge

Wilcox challenges the trial court's charge to the jury, claiming that the instructions failed to define the elements of rape and aggravated rape, as provided by 1975 amendments to the Texas Penal Code. He contends that the charge did not encompass the two sets of aggravating circumstances, of which one must be found to support a conviction for aggravated rape.

A habeas petitioner is entitled to relief as a result of an erroneous jury instruction only if the challenged instruction, by itself, tainted the entire trial and resulted in the violation of due process. *Henderson v. Kibbe*, 97 S.Ct. 1730, 1736-37 (1977). In reviewing such a claim, we look to the jury charge as a whole. *United States v. Welch*, 810 F.2d 485, 488 (5th Cir.), *cert. denied*, 108 S.Ct. 350 (1987).

Under the relevant Texas law at the time of the offense, a person committed rape if he had sexual intercourse with a female, who was not his wife, without the female's consent. *Little v. State*, 573 S.W.2d 775, 777 (Tex. Crim. App. [Panel Op.] 1978). The intercourse was without consent if, *inter alia*, the perpetrator compelled the female to submit by force or threats which would have prevented such resistance as might reasonably be expected under the circumstances. *Id*. A person was guilty of aggravated rape if he committed rape, as defined above, and (1) caused serious bodily injury or death, or (2) compelled submission to the rape by threat of death, serious bodily injury, or kidnapping. *Id*.

Wilcox cites only a portion of the jury charge in support of his argument that the trial court omitted crucial portions of the rape statutes in the jury charge. Examining the charge as a whole, as we must, the trial judge's instructions tracked the language of the then-current statutes and encompassed each required element of the relevant offenses, including the two sets of aggravating circumstances of aggravated rape.[4] Wilcox's argument is without merit.

III. Exculpatory Evidence

Next, Wilcox argues that the State withheld Welch's medical report and the names of the two witnesses who saw Welch after the rape, in violation of *Brady v. Maryland*, 83 S.Ct. 1194 (1963). He surmises that this evidence did not support Welch's claim that she had been raped and that the State therefore suppressed it to prevent its use by the defense. To establish a *Brady* violation, Wilcox must show that evidence was suppressed which was favorable to his defense, and that the evidence was material to guilt or punishment. *Barnes v. Lynaugh*, 817 F.2d 336, 338-39 (5th Cir. 1987), *overruled on other grounds by Taylor v. Whitley*, 933 F.2d 325, 327 n.1 (1991), *cert. denied*, 112 S.Ct. 1678 (1992).

Wilcox has not met his strong burden of showing that he is entitled to habeas relief on this basis. Nothing indicates that the State made any effort to conceal the existence of these witnesses. Indeed, the examining physician was listed as a possible witness for the State, and Welch named both

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[4] The charge to the jury states as follows:

> "A) A person commits rape if he has sexual intercourse with a female not his wife, without the female[']s consent.
> "B) The intercourse is without the female's consent if he compels her to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or, if he compels her to submit or participate by any threat that would prevent resistance by a woman o[f] ordinary resolution.
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> "Rape, as set forth in A and B above[,] becomes Aggravated Rape if in connection with the above the person commiting [sic] rape either:
> "1) Causes serious bodily injury or attempts to cause death to the victim or another in the course of the same criminal episode; or,
> "2) Compels submission to the rape by threat of death or serious bodily injury to be immediately inflicted on anyone."

men in her testimony at trial when she stated that she had gone to a friend's house to call her attorney after the rape. Aside from Wilcox's unsupported speculations that the evidence was not favorable to the State, there is no evidence that the State deliberately concealed the contents of the medical report or the testimony of Welch's friends; nor has Wilcox shown that this evidence would have been in any way favorable to his defense.

Wilcox's speculations are insufficient to support habeas relief based on a *Brady* violation.

IV. Sufficiency of the Evidence

Wilcox asserts that the evidence was insufficient to support his conviction because the State did not provide any evidence to corroborate Welch's claim that she was raped. He claims that his conviction cannot rest on Welch's testimony alone. Wilcox also contends that Welch's description of the gun at trial did not match the description of the gun recovered from his house.

A habeas petitioner claiming that his conviction rests upon insufficient evidence must show that no rational trier of fact, viewing the evidence in a light most favorable to the prosecution, could have found the essential elements of the offense proven beyond a reasonable doubt. *Duff-Smith v. Collins*, 973 F.2d 1175, 1184 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1958 (1993).

Welch's testimony at trial that Wilcox penetrated her is sufficient evidence of the penetration element of the rape offense. Wilcox's claim that Welch's testimony alone is insufficient is essentially a challenge to her credibility. Credibility determinations are solely within the province of the finder of fact, here, the jury. *Schrader v. Whitley*, 904 F.2d 282, 287 (5th Cir.), *cert. denied*, 111 S.Ct. 265 (1990).

Moreover, contrary to Wilcox's contention, Welch's testimony was not uncorroborated. The State introduced the gun and camera with flash attachment which matched those Welch described both to the police following the rape and later at trial. When asked how Welch was able to describe these items to the police without ever having been to Wilcox's home, Wilcox's only explanation was that someone must have broken into his home. Although Wilcox argues that the gun had a short rather than a long barrel, a rational trier of fact could have found that the gun described by Welch was the gun recovered from Wilcox's house.

A rational trier of fact could have found beyond a reasonable doubt that Wilcox had committed the aggravated rape.

V. Alteration of Trial Records

Finally, Wilcox maintains that the state trial records were altered to reflect that Jesse Estes, an officer with the Texarkana Police Department, testified as a rebuttal witness for the State. Officer Estes's testimony linked the gun and camera found at Wilcox's house with those described by Welch following the rape.

Wilcox claims that Estes did not in fact testify at his trial. In support of this contention, Wilcox introduced a letter he wrote to Estes asking Estes why he had not testified at trial and Estes's letter in response in which Estes stated that the District Attorney selected the witnesses to testify at trial. Wilcox interprets this response as an admission that Estes did not testify at the trial. Wilcox also argues that Estes testified under oath in a previous federal lawsuit that he had received a letter from Wilcox and had had his secretary answer it.

In response, the State asserts that Estes confirmed that he did testify at Wilcox's trial and agreed to provide an affidavit in support. No such affidavit appears in the record, however.

Wilcox also argues that a tape of the trial testimony provided by the court reporter did not reflect Officer Estes's testimony. The tape in question contained Welch's testimony during the State's evidence-in-chief. The typed trial record reflects that Officer Estes did not testify until after the defense rested, in rebuttal for the State. One may infer that Estes's testimony, occurring later during the trial, would not have been on the same tape as that of Welch. There was evidence that the court reporter had erased and taped over at least one tape from Wilcox's trial.

Official records are entitled to a presumption of regularity in habeas corpus proceedings. *Hobbs v. Blackburn*, 752 F.2d 1079, 1081-82 (5th Cir.), *cert. denied*, 106 S.Ct. 117 (1985). Wilcox's bare assertions that Officer Estes did not testify are supported only by the uncertified letter, purportedly from Officer Estes, and his claims that the trial tape did not reveal the challenged testimony. In his letter to Wilcox, Officer Estes does not state that he did not testify at the trial.

Thus, the letter does not support Wilcox's assertion that the records were altered.[5] Both Wilcox's defense counsel and the prosecutor reviewed the transcript of the state trial and agreed that it was accurate.

Wilcox's unsupported claim that Estes did not testify does not overcome the presumption that the state record is accurate.

Conclusion

For the reasons discussed above, the district court's order dismissing Wilcox's petition for habeas corpus relief with prejudice is

AFFIRMED.

[5] Furthermore, the magistrate judge examined the records and evidentiary hearing from the previous federal lawsuit that Wilcox alluded to in his pleadings below. These documents are not included in the record on appeal. Apparently, Officer Estes testified in the previous federal case that he did, in fact, testify at Wilcox's state trial and that, to the extent that Wilcox asserts that Estes's reply letter established that Estes did not testify, Wilcox must have misunderstood the letter.