IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5340
(Summary Calendar)

WILLIE LEE McCOWIN,

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
(6:92-CV-764)

(May 26, 1994)

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

PER CURIAM:*

Petitioner-Appellant Willie Lee McCowin (McCowin), a prisoner of the State of Texas, appeals the dismissal of his federal habeas

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

corpus petition filed pursuant to 28 U.S.C. § 2254. His petition was grounded in claims of insufficient evidence to support his conviction, ineffective assistance of counsel, and failure of the district court to grant an evidentiary hearing. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

McCowin was convicted by a Texas state jury of burglary of a habitation. After exhausting state remedies, McCowin filed a 28 U.S.C. § 2254 petition in district court, after which Scott filed a motion for summary judgment. McCowin then filed a motion for an evidentiary hearing and an objection to Scott's motion for summary judgment. The magistrate judge denied McCowin's motion for an evidentiary hearing, and recommended that his petition be dismissed with prejudice.

Overruling McCowin's objections, the district court adopted the magistrate judge's report and recommendation, granted Scott's motion for summary judgment, and dismissed McCowin's petition with prejudice. McCowin filed a notice of appeal in timely fashion, and the district court granted his request for a certificate of probable cause and his motion to proceed in forma pauperis on appeal.

II

ANALYSIS

A. Sufficiency of the Evidence

When reviewing a federal habeas petition challenging a state

conviction for sufficiency of evidence, the inquiry is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The Jackson standard is the same for circumstantial or direct evidence and requires "explicit reference to the substantive elements of the criminal offense as defined by state law." Foy v. Donnelly, 959 F.2d 1307, 1313-14 & n.9 (5th Cir. 1992) (citation omitted).

The applicable Texas Penal Code provision, § 30.02, defines the elements of burglary, in pertinent part, as follows:

> (a) A person commits [burglary] if, without the effective consent of the owner, he:
>
> (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft; or
>
> . . .
>
> (3) enters a building or habitation and commits or attempts to commit a felony or theft.
>
> . . .
>
> (d) An offense under this section is a felony of the first degree if:
>
> (1) the premises are a habitation . . . .

See Tex. Penal Code Ann. § 30.02 (West 1989).

McCowin argues that the evidence was constitutionally insufficient to convict him of burglary because proof was lacking that he entered or exited the habitation, a material element of the offense. The evidence adduced at trial contradicts that argument. The record reflects that McCowin was observed by Darrell Kennon near his property, hiding behind a tree to avoid being seen by

passing vehicles. When McCowin saw Kennon, he ran away and hid behind some other trees. Kennon then hid too and watched McCowin, who moved, hid behind a pickup truck near a trailer owned by Kennon's neighbor, Mr. Gilbert, and walked around the front of the trailer when cars were not passing.

Suspecting that McCowin was attempting to burglarize Gilbert's trailer, Kennon sent his wife to get a gun. After she returned with the gun, Kennon circled around the trailer, losing sight of McCowin for several minutes because of the surrounding dense woods. The trailer's foundation was unsteady and would move when someone walked inside. When Kennon heard the trailer move, he knocked on the corner of the trailer two times without getting a response. At the third knock, someone inside--later determined by Kennon to be McCowin--asked Kennon what he wanted, to which he replied that he wanted to talk to that person (who turned out to be McCowin).

Kennon then saw the back trailer window shake and assumed that McCowin was moving down the hall toward the back of the trailer. Kennon then went to the rear corner of the trailer, near the back door, and hid behind a tree. McCowin came out of the back door, facing Kennon. McCowin held a screwdriver in one hand, and was pulling a glove off his other hand. When he stopped momentarily, Kennon asked if the owner, Mr. Gilbert, knew that he (McCowin) was there. McCowin replied, "Oh, man," and backed down the side of the trailer with his hands in the air. Kennon drew his gun from his trousers, and McCowin said, "Aw, man, don't shoot me," then fled.

Mrs. Gilbert testified that she had locked the trailer earlier

before leaving, and had not given anyone permission to enter. She stated that the window and back door were unlocked when she examined the trailer after the burglary.

Applying the standard in Jackson, we conclude that any rational trier of fact could have found that McCowin entered the trailer without the owner's permission. See Foy, 959 F.2d at 1313.

McCowin nevertheless argues that the rain, shifting earth, or the overhanging trees could have caused the window to shake. Under Jackson, however, trial evidence need not be "inconsistent with every reasonable hypothesis of innocence." See Foy, 959 F.2d at 1313-14 & n.9. It is sufficient that any reasonable juror could have found that McCowin was guilty beyond a reasonable doubt. Id.

McCowin continues by arguing that a reasonable juror could not have believed logically that a burglar would have answered Kennon's knock on the trailer. But this argument amounts to an attack on Kennon's credibility. Alone, McCowin's challenge of the jury's credibility choice fails to satisfy the Jackson standard for habeas relief. Further, in light of all of the evidence, McCowin's decision to respond to Kennon's inquiries is not antithetical to a finding of guilt.

Although McCowin argues further that there is no corroborating evidence to support the inferences derived from trial testimony, Kennon's testimony provided direct evidence that McCowin had committed the burglary. Viewed in a light most favorable to the prosecution, such evidence was sufficient to support McCowin's conviction.

McCowin next argues that the failure of the prosecutor to call certain witnesses, including law enforcement personnel, casts doubt on the sufficiency of evidence, as the court may infer that the witnesses were not called because their testimony would be unfavorable to the state. We find this argument to be wholly speculative and therefore unavailing.

McCowin relies in part on more lenient state law standards of review, but his reliance is misplaced. Such standards are superseded by Jackson, the federal habeas standard. See Foy, 959 F.2d at 1314 n.9. We cannot, as McCowin suggests, abrogate the Jackson standard and apply his preferred standard of review. See id. McCowin also relies on United States v. Parr, 516 F.2d 458 (5th Cir. 1975), a direct appeal case. In Parr, we merely noted that the failure of a party "to produce a favorable witness peculiarly within a party's power creates an inference that his testimony would be unfavorable." See id. at 471. McCowin's position is not bolstered by Parr.

B. Ineffective Assistance of Counsel:

1. Prosecutor's Comments

McCowin argues that counsel was ineffective for failing to objectSQand move for a mistrialSQbecause the prosecutor misrepresented McCowin's prior criminal history in the final argument to the jury during the punishment phase of the trial.[1]

[1] Although raised and considered in district court, McCowin's claims that counsel was ineffective for failure to investigate, call witnesses, and present an adequate misidentification defense were not briefed on appeal and are thus abandoned. Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S.

McCowin argues that, as he never served time in the penitentiary, any mention before the jury that he had served time there was unduly prejudicial. McCowin argues that the harsh sentence imposed by the jury was evidence of prejudice.

In his objections to the magistrate judge's report, McCowin indicated, inter alia, that, in June 1988, his probation was revoked following his convictions for four burglaries and that he was incarcerated in the county jail for about a year before he was released on parole in May 1989.

Scott argues that this "factual allegation of ineffectiveness" was raised for the first time in McCowin's objections to the magistrate judge's report and is thus not properly before us for appellate review. This, however, misstates the record. Although McCowin discussed the issue in greater particularity in his objections to the magistrate judge's report, he did raise the issue in his original petition.

A claim that counsel has been ineffective will prevail only if the defendant proves that counsel was not just objectively deficient, but also that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Although "specific errors and omissions may be the focus of a claim of ineffective assistance," United States v. Cronic, 466 U.S. 648, 657 n.20, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), there is no constitutional entitlement to error-free representation. Washington v. Watkins, 655 F.2d 1346, 1367

838 (1985).

(5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). Effectiveness of counsel is presumed, and even counsel's unprofessional conduct will not constitute ineffective representation unless actual prejudice results. Strickland, 466 U.S. at 691; see Lockhart v. McCotter, 782 F.2d 1275, 1279 (5th Cir. 1986), cert. denied, 479 U.S. 1030 (1987).

A state court's findings of fact are entitled to a presumption of correctness by federal courts. 28 U.S.C. § 2254(d); Sumner v. Mata, 449 U.S. 539, 544-47, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). The district court may abandon the presumption of correctness afforded to factual determinations by state courts in certain enumerated circumstances. Sumner, 449 U.S. at 544-45. One of these circumstances is that the state court's findings are not "fairly supported in the record." 28 U.S.C. § 2254(d)(8).

If the state court holds a hearing, federal courts must presume the correctness of the state court's factual findings that are supported by the record. 28 U.S.C. § 2254(d); Sumner, 449 U.S. at 546-47. Section 2254(d) does not require state courts to hold live evidentiary hearings for this presumption to attach. See id. Those courts may resolve factual disputes on the basis of competing, written affidavits. See Lincecum v. Collins, 958 F.2d 1271, 1279 (5th Cir.), cert. denied, 113 S.Ct. 417 (1992). The facts underlying an ineffectiveness claim are subject to this presumption of correctness. Id.

McCowin raised this same issue in his state habeas petition in conjunction with his ineffectiveness argument. The matter was

remanded to the state trial court for an affidavit hearing. Based on counsel's affidavit, the state trial court rejected McCowin's ineffectiveness claim. The state court ruling, however, did not contain a specific finding whether the prosecutor misrepresented McCowin's criminal history; neither did counsel's affidavit respond directly to McCowin's allegation. Although application of the presumption of correctness is questionable in these circumstances, see Lincecum, 958 F.2d at 1279-80, the magistrate judge did not rely on the state court's ruling but stated that no misrepresentation had occurred and that McCowin had misread the record.

In his argument, the prosecutor stated that McCowin received a seven-year penitentiary sentence in June 1988, after revocation of probation, for committing four burglaries. This comports with evidence elicited by the prosecutor during direct examination about the pen packets. Contrary to McCowin's argument, the prosecutor's comments during his closing argument do not necessarily suggest, as noted by the magistrate judge, that McCowin served time in the penitentiary on four separate occasions. The tenor of the prosecutor's argument was that, regardless whether McCowin received probation or time in the penitentiary, nothing seemed to keep him from committing more burglaries upon his release and that the only way to deter his propensity to burglarize was to keep him locked up for life.

McCowin admitted in district court that he actually served time in county jail until he "received his parole papers." There

is no evidence that the prosecutor or trial counsel knew at the time of trial that McCowin went to jail, but not to the penitentiary. More important, whether McCowin went to county jail or was moved to the penitentiary was of little consequence because the judgments reflect that McCowin was sentenced to the penitentiary and actually served some time in jail. McCowin does not show that he was prejudiced by counsel's failure to object.

Further, the presumption that counsel's performance was objectively reasonable extends to actions taken pursuant to trial strategy. See Strickland, 466 U.S. at 689. Counsel's closing argument was that a sentence at the lower range was warranted because McCowin had paid his debt to society for his previous crimes. An objection to a suggestion by the prosecutorsQhowever equivocalsQthat McCowin had served time in the penitentiary would be inconsistent with a trial strategy that McCowin had paid his debt to society.

2. Plea Bargain Offer

McCowin argues that counsel was also ineffective for failing to consult with McCowin regarding the prosecutor's alleged plea bargain offer before trial. McCowin raised this issue in his state habeas petition, attaching an affidavit by his father, Lamar McCowin (Lamar), and another by his mother, Lurline McCowin (Lurline). Lamar swore that counsel stated that a plea bargain was offered prior to the trial date. Lurline swore that she was "fully aware" that "no plea bargain was told to Mr. Willie Lee McCowin." The matter was remanded to the state trial court for an affidavit

hearing. Trial counsel's affidavit states that he did not recall any plea bargain offer having been made by the prosecutor and that, as McCowin "was adamant in asserting his innocence from the outset and never wavered from this position," he (counsel) never sought a plea bargain from the prosecutor.

The state trial court made a factual finding that, "[n]o plea bargain was requested by the defendant nor made in this cause as the defendant maintained his innocence and plea of not guilty." The magistrate judge concluded that the trial judge's factual findings were entitled to a presumption of correctness. That conclusion was not error.

The trial judge implicitly made credibility choices and rejected averments in the affidavits submitted by McCowin's father and mother in favor of the declarations in defense counsel's affidavit. See, e.g., May v. Collins, 955 F.2d 299, 313 (5th Cir.), cert. denied, 112 S.Ct. 1925 (1992). McCowin fails to carry his burden of proving that the factual findings by the state court were not fairly supported by the record. See Edmond v. Collins, 8 F.3d 290, 292-93 (5th Cir. 1993). It follows that McCowin's ineffectiveness challenge grounded on this factual allegation is meritless.

C. Evidentiary Hearing

McCowin argues that the district court erred when it failed to hold an evidentiary hearing. "A federal habeas court must hold an evidentiary hearing if there are disputed facts and the petitioner did not receive a full and fair hearing in a state court, either at

trial or in a collateral proceeding." Wiley v. Puckett, 969 F.2d 86, 98 (5th Cir. 1992). McCowin fails to demonstrate that he was not afforded a fair hearing in state court. The record was adequate for the district court to conclude that counsel rendered constitutionally effective representation and that the evidence was sufficient to convict McCowin. An evidentiary hearing was therefore not mandated. See id.; Joseph v. Butler, 838 F.2d 786, 788 (5th Cir. 1988).

AFFIRMED.