

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5342
Summary Calendar

CHARLES WELDON WILLIS,

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
(1:93-CV-52)

(August 19, 1994)

Before SMITH, WIENER and PARKER, Circuit Judges.

Per curiam¹:

Charles Weldon Willis is an inmate confined to the Texas Department of Criminal Justice - Institutional Division (TDCJ). Willis pleaded guilty to aggravated robbery in return for a forty-five year sentence. The trial court rejected the plea agreement, and Willis and a codefendant proceeded to trial. Willis re-entered his guilty plea and requested that the jury assess punishment. The

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

trial court accepted the guilty plea and instructed the jury to find Willis guilty and to assess punishment. The jury returned a verdict finding that an enhancement paragraph contained in the indictment was untrue and assessed punishment at 99 years in TDCJ and a \$10,000 fine.

Willis brought a petition for federal habeas relief, pursuant to 28 U.S.C. § 2254 in the court below. Willis asserted that he was never found guilty of the crime for which he was sentenced because the jury never completed a verdict form finding him guilty. He also alleged that his appellate counsel was ineffective for not asserting this claim on direct appeal.

The magistrate judge found that Willis properly exhausted these two claims in a prior state writ, then concluded that no authority supported Willis's allegation that there could be no finding of guilt without a verdict once a trial judge has instructed a jury to find the defendant guilty. The magistrate judge noted that a guilty plea entered into knowingly, intelligently and voluntarily waives all non-jurisdictional defects, citing *United States v. Broce*, 488 U.S. 563, 569, 109 S.Ct. 757, 762, 102 L.Ed.2d 927 (1989). Last, the magistrate judge determined that, because Willis's substantive allegation was without merit, his appellate counsel was not ineffective for failing to advance a meritless claim. Accordingly, the magistrate judge recommended dismissing the petition. Over Willis's objections to the recommendation, the court adopted the report and recommendation of the magistrate judge and denied Willis's petition. The district court granted Willis a

certificate of probable cause to appeal.

DUE PROCESS CLAIM

Willis argues that his due process rights were violated when the jury sentenced him without making a written finding of guilt. Willis contends that the magistrate judge erred in relying on *Broce* because the trial court was without jurisdiction to sentence him absent an adjudication of guilt.

The Supreme court has held that a guilty plea is a conviction, with nothing remaining but for the court to determine punishment and render judgment. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). The Texas Court of Criminal Appeals, citing *Boykin*, recognized that a failure to comply with the Texas statute requiring proof of guilt after a guilty plea "does not constitute a federal constitutional violation." *Bender v. State*, 758 S.W.2d 280, 281 (Tex. Crim. App. 1988).

Moreover, even under Texas law, Willis' contention that he was not convicted is incorrect. If the intention of the jury can be discerned by a fair interpretation of its written findings, then such interpretation should be given effect. *Stewart v. State*, 422 S.W.2d 928, 929 (Tex. Crim. App. 1968). The trial court's charge can be examined to help determine the intention of the jury, *Ainsworth v. State*, 517 S.W.2d 274, 277 (Tex. Crim. App. 1975), and the jurors are presumed to have followed the court's instructions. *Parker v. Randolph*, 442 U.S. 62, 73, 99 S.Ct. 2132, 2139, 60 L.Ed.2d 713 (1979); *United States v. Hopkins*, 916 F.2d

207, 218 (5th Cir. 1990).

In *Blackshear v. State*, 744 S.W.2d 704 (Tex. App. - Fort Worth - 1988, no pet.) a Texas court of appeals was faced with the following situation:

[T]he verdict form submitted by the court [after a plea of guilty] only required the jury to assess punishment for the offense of aggravated robbery. It did not include the magic phrase "guilty as charged in the indictment," nor was there a place provided in the verdict form for the jury to find [the defendant] guilty...

Id. at 706. The verdict the jury returned stated that the jury had been instructed to find the defendant guilty, but it did not make a finding of guilt. *Id.* at 707. Instead, it merely assessed punishment. *Id.* The Texas court of appeals nevertheless held that "[a]lthough the jury never entered a finding of 'guilty,' we hold that the verdict implies this finding." *Id.*

In this case, the court's charge to the jury on punishment reads, in part, as follows:

The defendant Charles Weldon Willis, stands charged with the offense of Aggravated Robbery, alleged to have been committed in Jefferson County, Texas, on or about March 31, 1986.

To this charge the defendant has entered a plea of guilty. The defendant has persisted in entering this plea even though the court, as required by law, has admonished him of the consequences.

Furthermore, it plainly appears to the Court that the defendant is mentally competent and the plea is freely and voluntarily entered. Therefore, you are now instructed to find the defendant guilty of the offense charged, and to assess punishment within the range provided by law.

The jury returned the following verdict:

WE, THE JURY, find that the additional allegations in

the indictment are untrue, and assess punishment at confinement in the Texas Department of Corrections for a term of 99 years.

In addition, we assess a fine of \$10,000.

We find that the verdict form returned by the jury, when read in light of the instructions of the court, implies that the jury followed the court's instructions, found Willis guilty and assessed his punishment.

Willis' argument that Texas has not adopted the common law doctrine of conviction by plea, citing *Thornton v. State*, 601 S.W.2d 340 (Tex. Crim. App. 1980), is unavailing. Willis was not convicted by his plea, but rather by the jury, whose intent can be clearly inferred from its written verdict.

INEFFECTIVE ASSISTANCE OF COUNSEL

Willis' counsel was not ineffective for failing to raise this meritless claim on direct appeal.

CONCLUSION

The trial court's order denying Willis's petition for habeas corpus is AFFIRMED.