UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-5539

(Summary Calendar)

EDWARD B. LYON, JR.,

Petitioner-Appellant,

versus

WAYNE SCOTT,

Respondent-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas
(5:91-CV-92)

(January 31, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Edward B. Lyon, Jr., an inmate of the Texas Department of Criminal Justice's Institutional Division, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1988). The district court adopted a magistrate judge's recommendation and denied the petition. Lyon appeals the district court's decision, alleging that (1) the state trial judge should have recused himself, (2) his guilty plea was involuntary, (3) his counsel was

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

ineffective, (4) the evidence presented by the prosecution was insufficient to support his guilty plea, and (5) the state appellate proceedings were inadequate. We affirm the district court's dismissal of Lyon's habeas petition.

I

Petitioner Edward Lyon plead guilty in Texas state court to the murder of William Long, and was sentenced to life imprisonment. He appealed his conviction to the Texas Sixth Circuit Court of Appeals, which affirmed the trial court's judgment. While his second direct appeal was pending in the Texas Court of Criminal Appeals, Lyon filed a petition for a writ of habeas corpus in federal court pursuant to 28 U.S.C. § 2254. Lyon moved to be excused from the requirement that he exhaust state-law remedies before pursuing federal habeas relief, arguing that he had been waiting over twenty months for the Court of Criminal Appeals to decide his case. The district court denied Lyon's motion, but this Court reversed the lower court's ruling and granted Lyon a certificate of probable cause. We reasoned that the delay of the Court of Criminal Appeals' ruling, which was then approaching three years, was inordinate. The Court of Criminal Appeals eventually affirmed the state Court of Appeals' judgment, but not until after the district court had already dismissed Lyon's habeas petition. Lyon appeals the district court's dismissal.

II

"We are limited in habeas proceedings to assuring that the accused has been afforded the constitutional rights due to him."

Ellis v. Collins, 956 F.2d 76, 78 (5th Cir. 1992). "When reviewing the habeas proceedings of petitioners in state custody, we must accord a presumption of correctness to state court findings of facts." *DeVille v. Whitley*, 21 F.3d 654, 656 (5th Cir.) (citing § 2254), *cert. denied*, ___ U.S. ___, 115 S. Ct. 436, 130 L. Ed. 2d 348 (1994). We review the district court's findings of fact in a § 2254 case for clear error, but decide any issues of law de novo. *Id.*

A

Initially, Lyon contends that the state trial-court judge's failure to recuse himself from presiding over his case deprived Lyon of his right to due process. Lyon alleges that the judge, Judge Leon F. Pesek, Sr., should have recused himself because he was related to William Long, the man Lyon was charged with having murdered.[1] The State argues that Lyon waived his right to make such a challenge when he plead guilty.

By pleading guilty to an offense, a criminal defendant waives all nonjurisdictional defects in the proceedings preceding his plea. *United States v. Owens*, 996 F.2d 59, 60 (5th Cir. 1993). Whether an alleged defect in a state criminal proceeding is

[1] Lyon alleges that Judge Pesek's daughter was married to Long's twin brother. Lyon also alleges that Judge Pesek's son, Leon Pesek, Jr., "assisted in the investigation and prosecution" of Lyon's case. The only evidence that Lyon offers in support of the latter assertion is the report filed by the police officer investigating Long's murder. The officer stated that, upon arriving at the murder scene, he "made contact with Leon Pesek, Jr., who had already arrived at the scene. Mr. Pesek advised th[e] officer that he was a relative of the victim and would assist in any way necessary." Lyon provides no evidence that Pesek actually assisted the State in any way; thus, Lyon's claim that Judge Pesek's son assisted in the investigation and prosecution of the case is groundless.

jurisdictional is a question of state law, and the Texas Court of Criminal Appeals held that Lyon's contention that Judge Pesek should have recused himself was a jurisdictional issue. *See Lyon v. State*, 872 S.W.2d 732, 736 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2684, 129 L. Ed. 2d 816 (1994).[2] Thus, Lyon did not waive his right to challenge Judge Pesek's qualification.

Lyon claims that Judge Pesek's failure to recuse himself deprived Lyon of his right to due process. However, the Supreme Court has recognized that: "All questions of judicial qualification may not involve constitutional validity. Thus, matters of kinship, personal bias, state policy, [and] remoteness of interest would seem generally to be matters merely of legislative discretion." *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S. Ct. 437, 441, 71 L. Ed. 749 (1927); *accord Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820, 106 S. Ct. 1580, 1584, 89 L. Ed. 2d 823 (1986) (citing *Tumey*); *United States v. York*, 888 F.2d 1050, 1056 n.9 (5th Cir. 1989) (citing *Tumey* and *Aetna* as finding matters of kinship and personal bias "not to implicate constitutional concerns"). The Texas Court of Criminal Appeals held that Judge Pesek was not disqualified from presiding over Lyon's trial by the Texas Constitution or any state statute. *Lyon*, 872 S.W.2d at 736-37. Thus, the district court correctly held that Judge Pesek's failure to recuse himself did not violate Lyon's right to due process.

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[2] The Court of Criminal Appeals held that: "This issue is jurisdictional, and the Court of Appeals was correct in addressing it on its merits." *Lyon*, 872 S.W.2d at 736. The State is thus mistaken in asserting that: "The state's highest court has found that this claim was not jurisdictional." (Appellee's Br. at 7) (citing *Lyon*).

B

Lyon also contends that the police and the prosecuting attorneys coerced him into pleading guilty, depriving Lyon of his right to due process. "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." *United States v. Borders*, 992 F.2d 563, 567 (5th Cir. 1993). At the plea colloquy, Judge Pesek asked Lyon whether he plead guilty "freely and voluntarily, uninfluenced by fear, persaution [sic], delusive hope of pardon, parole, or anything else that might prompt [Lyon] to enter such a plea, except for the fact that [he was] guilty." Lyon answered affirmatively. Lyon was later asked, under oath, if he was freely admitting his guilt. Again, Lyon answered that he was. Although this is not an absolute bar to raising a claim of coercion, Lyon "face[s] a heavy burden in proving that [he is] entitled to relief because such testimony in open court carries a strong presumption of verity." *DeVille v. Whitley*, 21 F.3d 654, 659 (5th Cir.) (citing *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629, 52 L. Ed. 2d 136 (1977)), *cert. denied*, ___ U.S. ___, 115 S. Ct. 436, 130 L. Ed. 2d 348 (1994). Lyon must support his claim with "independent indicia of the likely merit of [his] contentions, and mere contradiction of his statements at the guilty plea hearing will not carry his burden." *United States v. Raetzsch*, 781 F.2d 1149, 1151 (5th Cir. 1986).

Lyon contends that Lieutenant Ronnie Sharp of the Texarkana Police Department and Ranger Max Womack of the Texas Ranger Service

"both threatened [him] with death in some form or the other" if he did not confess to the murder of William Long.[3] Lyon also contends that District Attorney John Miller told him that Texas' Sixth Circuit Court of Appeals promised Miller that Lyon's conviction would be upheld regardless of what issues Lyon raised on appeal.[4] Lyon is unable to provide any independent evidence to support his claims, however. Therefore, he cannot meet the burden of proof necessary to refute his open-court statements as to the free and voluntary nature of his plea.

C

Lyon further claims that his trial counsel provided him ineffective assistance. To prevail on an ineffective assistance of counsel claim, a habeas petitioner must show that counsel's representation fell below an objective standard of reasonableness and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064-65, 80 L. Ed. 2d 674 (1984). To successfully challenge a guilty plea on the grounds of ineffective assistance of counsel, Lyon must show that, but for his counsel's substandard performance,

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[3] Lyon claims that Ranger Womack told him that if he did not confess, that "it would not surprise Womack to hear that [Lyon] had been killed in some form or fashion because of the powerful people that were willing to do whatever it would take to get him if he would not confess." Lyon further claims that Lieutenant Sharp told him that "he would see to it that [Lyon] would receive the death penalty if he refused to give a confession."

[4] Lyon mentions, too, that he was "taken" to an "office" before the plea hearing. The office belonged to Judge Pesek, who has since stated that he "vacated his own chambers so that [Lyon's attorney] and his client couls [sic] consult privately." Lyon claims that pictures of Judge Pesek with William Long, the murder victim, were prominently displayed in the office. Lyon never states who arranged the meeting in Judge Pesek's office, however, nor does he offer any independent evidence to this effect.

there is a reasonable probability that he would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed 2d 203 (1985).

Lyon claims that he plead guilty because his attorney, Russel Hunt, told him that "evidence would be manufactured against him to ensure a capital murder conviction." This claim is undercut by Lyon's statement to the trial court that he plead guilty "freely and voluntarily, [and] uninfluenced by fear." We agree with the district court that "Lyon's pleadings and the record as a whole are devoid of any indication that but for the alleged statements by Hunt, Lyon would have pleaded not guilty and insisted on going to trial."[5] *See Hill*, 474 U.S. at 59, 106 S. Ct. at 370.

Lyon also suggests that he received ineffective assistance of counsel because Hunt represented both Lyon and his co-defendant, failed to investigate Lyon's case, and relied on a scripted statement at Lyon's guilty plea hearing. At the hearing, the trial court asked Lyon if he was "completely and fully satisfied" with Hunt, and if Hunt "in every respect represented [Lyon] in the

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[5] Lyon's reliance on affidavits from his mother and his friend, Thomas Knowles, is misplaced. His mother's affidavit contains no mention of manufactured evidence. Knowles states no more than that he met Hunt while visiting Lyon at Lyon's home, and that "Mr. Hunt went on to tell me that one of his greatest fears was that evidence would be manufactured by the authorities in Texarkana, Texas that would allow them to convict Edward of capitol [sic] murder, and that in that event, Edward would unjustly receive the death penalty." Even if we were to assume that Lyon overheard Hunt's alleged statement to Knowles, the statement did not even amount to a prediction of what might happen if Lyon did not plead guilty. Lyon's overhearing such a comment is not sufficient evidence to surmount the formidable barrier presented by his open-court statement that he plead guilty uninfluenced by fear. *See Harmason v. Smith*, 888 F.2d 1527, 1532 (5th Cir. 1989) (holding evidence of defense counsel's "prediction, prognosis, or statement of probabilities" that formed basis of ineffective assistance of counsel claim not sufficient to overcome "formidable barrier" created by defendant's open-court assertion that guilty plea was voluntary).

manner that [Lyon] desired." Lyon answered "yes" to both questions. When the court asked if Lyon had any complaints to make about Hunt's representation, Lyon answered that he did not. The Court also asked Lyon if he had any objection to make about Hunt's "dual representation" of Lyon and Adcox. Lyon answered that he did not. Lyon has presented no evidence sufficient to contradict his statements to the trial court, and therefore cannot show that but for Hunt's alleged deficiencies in representation, there is a reasonable probability that he would have insisted on going to trial. *See id.*

D

Alleging that the prosecution manufactured much of the evidence presented in support of the plea, Lyon contends that insufficient evidence supported his guilty plea. "State courts are under no constitutional duty to establish a factual basis for the guilty plea prior to its acceptance, unless the judge has specific notice that such an inquiry is needed." *Smith v. McCotter*, 786 F.2d 697, 702 (5th Cir. 1986). Lyon claims that portions of the police report were fabricated,[6] and that Lieutenant Sharp directed a witness to make false statements against him.[7] At Lyon's plea hearing, however, the court asked Lyon if he objected to the

[6] Specifically, Lyon claims that the police record includes the false statements that Lyon had been arrested for impersonating a police officer, that a trespass complaint had been filed against Lyon, and that a psychological profile of Lyon had been prepared for the police.

[7] According to the magistrate judge, the witness stated that Lyon "asked him if he, [the witness], had ever seen a human heart, and said that he, Lyon, had because he had held one in his hand."

introduction of either the report or the witness' statement. Lyon answered that he did not. The court had no constitutional duty to inquire further into the factual basis for Lyon's guilty plea because Lyon did not give the court specific notice that such an inquiry was needed. *See id.*; *Hobbs v. Blackburn*, 752 F.2d 1079, 1082 (5th Cir.) (holding that court had no constitutional duty to inquire into factual basis for guilty plea where "nothing in [petitioner's] conduct or in anything he said or did in open court which would have alerted the trial judge that the need existed for a factual basis inquiry"), *cert. denied*, 474 U.S. 838, 106 S. Ct. 117, 88 L. Ed. 2d 95 (1985). Therefore, Lyon's insufficiency of the evidence claim is not proper for federal habeas review.

E

Lastly, Lyon argues that the state-court appellate review of his case was inadequate, violating his right to due process. Lyon claims that the prosecution told him that Texas' Sixth Circuit Court of Appeals had promised the District Attorney that it would affirm Lyon's conviction regardless of what issues Lyon might present for review. He further claims that the state Court of Appeals never conducted a hearing to determine whether Lyon was competent to represent himself before that court, and failed to rule on several issues of law despite having granted a motion to hear all of Lyon's contentions.[8]

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[8] Because the Texas Court of Criminal Appeals decided Lyon's final state appeal in January, 1994, *see Lyon v. State*, 872 S.W.2d 732 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2684, 129 L. Ed. 2d 816 (1994), Lyon's additional claim that the Court of Criminal Appeals never heard his case is meritless.

Lyon's claim that the state Court of Appeals promised the District Attorney that it would affirm Lyon's conviction is not supported by the record. Both the District Attorney and Lyon's own attorney have denied that any such promise was ever made or communicated to Lyon.[9] "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his pro se petition (in state and federal court), unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983) (per curiam).

Lyon claims that he never waived his right to counsel in his first state appeal, and that the state Court of Appeals failed to conduct a hearing to determine whether Lyon was competent to represent himself before that court. Indigents have a constitutional right to counsel in their first appeal as a matter of right. *Myers v. Collins*, 8 F.3d 249, 251-52 (5th Cir. 1993). Lyon has stated that he "never request[ed] appointment of counsel by the trial court to represent [him] on appeal because [he] was convinced that . . . Judge Pesek would be inclined to appoint a somewhat less than competent attorney." The Texas Court of

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[9] The District Attorney, John Miller, stated that: "At no time was this case discussed with *any* member of the court of appeals or their staff." Lyon's attorney, Russel Hunt, stated that Miller "did not say his convictions were appeal-proof but indicated that he believed th[at] the case would withstand the scrutiny of an appellate court."

Lyon argues that we should not consider Miller's affidavit because he was never served with a copy, and because the affidavit was not signed before a notary. Miller swore his affidavit in January of 1993, and Lyon referred to the affidavit in a pleading dated February 3, 1993, indicating that Lyon had read the affidavit within one month of its writing. Attached to the affidavit is a signed document stating that the affidavit was "sworn and subscribed to" before a notary public.

Criminal Appeals noted that Lyon "filed an affidavit of indigence and moved the trial court to furnish him with the transcript and statement of facts so he could pursue a pro se appeal. The trial court found appellant was indigent and granted that motion." *Lyon v. State*, 872 S.W.2d 732, 733 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2684, 129 L. Ed. 2d 816 (1994). We defer to the Court of Criminal Appeals' finding, *see DeVille v. Whitley*, 21 F.3d 654, 656 (5th Cir.), and hold that Lyon knowingly and intelligently waived his right to counsel in his first state appeal.

Lyon suggests that under the Supreme Court's ruling in *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), that "the Court of Appeals was to ORDER a hearing to determine the ability of the pro se litigant to represent himself." The Court in *Faretta* created no such requirement, emphasizing that "although [the pro se litigant] may conduct his own defense ultimately to his own detriment, his choice must be honored . . . ." *Faretta*, 422 U.S. at 834, 95 S. Ct. at 2541; *see Godinez v. Moran*, ___ U.S. ___, ___, 113 S. Ct. 2680, 2686-87, 125 L. Ed. 2d 321 (1993) (citing *Faretta* as emphasizing court's obligation to honor choice of self-representation).[10]

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[10] Were we to liberally construe Lyon's claim as being that the state Court of Appeals should have held a hearing to determine his competency to *waive his right to counsel* rather than to represent himself on appeal, *see Godinez*, ___ U.S. at ___, 113 S. Ct. at 2687 (distinguishing between competency to waive right to counsel and competency to proceed pro se), Lyon's claim would still fail. We have held that there is no constitutional requirement for such a hearing or dialogue." *Neal v. Texas*, 870 F.2d 312, 315 n.3 (5th Cir. 1989). Instead, "the proper inquiry is to evaluate the circumstances of each case as well as the background of the defendant." *Wiggins v. Procunier*, 753 F.2d 1318, 1320 (5th Cir. 1985). "The waiver inquiry is dependent `upon the particular facts and

Lyon further contends that the state Court of Appeals failed to rule on several issues he presented on appeal despite having granted a motion to hear all of Lyon's contentions. The Court of Appeals did, however, rule that Lyon's right to bring all but one of the issues he raised on appeal had been eliminated by his guilty plea. *Lyon v. State*, 764 S.W.2d 1, 1 (Tex. App.))Texarkana 1988), *aff'd*, 872 S.W.2d 732 (Tex. Crim. App.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2684, 129 L. Ed. 2d 816 (1994). The Texas Court of Criminal Appeals similarly determined that the issues not addressed by the Court of Appeals were issues that the Court of Appeals did not have jurisdiction to consider. *Lyon v. State*, 872 S.W.2d at 736.

III

For the foregoing reasons, we AFFIRM the district court's dismissal of Lyon's habeas petition.

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circumstances surrounding [the] case, including the background, experience, and conduct of the accused.'" *Self v. Collins*, 973 F.2d 1198, 1206 (5th Cir. 1992) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938)), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1613, 123 L. Ed. 2d 173 (1993). Lyon's efforts to have his appeal considered by the state Court of Appeals indicate that he was competent to waive his right to counsel. Lyon filed a timely notice of appeal with the state Court of Appeals, accompanied by a pauper's oath, and filed a motion for trial records and transcripts with the trial court. Lyon also wrote letters to attorneys and state law schools "begging" for legal assistance and representation. Lyon's evidenced understanding of legal procedure and the dangers of self-representation indicate that he was competent to waive his right to counsel.