

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5558
Conference Calendar

CALVIN BATES,

Petitioner-Appellant,

versus

WAYNE SCOTT,

Respondent-Appellee.

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Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:93-CV-82

- - - - -
(September 22, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Calvin Bates, proceeding pro se, appeals the denial of his petition for writ of habeas corpus. Bates argues that his trial counsel was ineffective because he raised a defense of entrapment but failed to seek a jury charge on the issue.

To prevail on an ineffective-assistance-of-counsel claim, a defendant must establish 1) that counsel's performance was deficient in that it fell below an objective standard of reasonable competence and 2) that he was prejudiced by his counsel's deficient performance. Strickland v. Washington, 466

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A failure to establish either deficient performance or prejudice defeats the claim. Id. at 697. Judicial scrutiny of counsel's performance must be highly deferential, and courts must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689.

"It is a defense to prosecution that the actor engaged in the conduct charged because he was induced to do so by a law enforcement agent using persuasion or other means likely to cause persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment." Tex. Penal Code Ann. § 8.06(a) (West 1974). The issue is whether Bates "was induced to engage in the alleged penal conduct through persuasion or other means likely to cause persons to commit the offenses, or merely was afforded an opportunity to commit them." Sebesta v. State, 783 S.W.2d 811, 813 (Tex. Crim. App. 1990). "[P]rohibited police conduct usually includes but is not limited to, matters such as extreme pleas of desperate illness in drug cases, appeals based primarily on sympathy, pity, or close personal friendship, offers of inordinate sums of money, and other methods of persuasion which are likely to cause the otherwise unwilling person -- rather than the ready, willing and anxious person -- to commit an offense." Id. No such methods were employed in this case.

At trial, undercover police officer Debbie Rojo testified that on May 4, 1990, she went to Bates' residence. She testified that asked him "if he had a twenty, which meant a twenty [dollar] piece of cocaine rock." Bates went to the back of the house and returned with a small zip-lock baggie containing a rock-like substance. The packet contained 0.07 grams of cocaine. Rojo testified that she gave Bates \$20 in return for the packet. She testified that Bates said the rock was smaller than he normally gets and asked her if she wanted "a hit on it."

Bates testified that Rojo's boyfriend, Tommy Lee Jones, gave Bates a baggie that Bates believed contained soap to give to Rojo. He testified that when Rojo asked him if he had anything, he gave her the baggie. He denied receiving money from Rojo.

The evidence does not suggest that Bates was induced by prohibited police conduct to deliver a controlled substance. There is no indication that Bates was a friend of either Rojo or Jones. The police merely afforded him an opportunity to commit an offense; this does not constitute entrapment. See Tex. Penal Code Ann. § 8.06(a) (West 1974).

Bates' trial counsel did not err in not requesting a jury charge on entrapment. Bates has failed to show that counsel's performance was deficient.

The district court's denial of Bates' petition for habeas relief is AFFIRMED.