IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7021

Summary Calendar

WILLIAM E. BURNEY,

Petitioner-Appellant,

versus

EDWARD HARGETT,
Superintendent,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
(91-CV-153)

(April 25, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

William Burney, the recipient of a life sentence for attempted armed robbery to be followed by a twenty year sentence for attempted burglary of a dwelling, challenges his state court conviction. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

On the night of October 11, 1982, Burney appeared at the home of Herman and Lillian White posing as an insurance salesman. After Mr. White refused to purchase an insurance policy, Burney forced his way into the house, pulled a gun, and demanded three thousand dollars. Mrs. White ran for help. The police arrested Burney on the premises.

II.

Burney challenges remarks made by the prosecutor in his closing statement as improper and unconstitutional. The Mississippi Supreme Court refused to consider this issue because Burney had not objected to the remarks at trial. Burney v. State, 515 So.2d 1154, 1157 (Miss. 1987) (quoting Johnson v. State, 477 So.2d 196, 208-09 (Miss. 1985), cert. denied, 476 U.S. 1109 (1986)). We will not review a state court's holding on a federal law claim if the holding rests on independent and adequate state grounds. Sawyers v. Collins, 986 F.2d 1493, 1499 (5th Cir.) (citing Harris v. Reed, 489 U.S. 255, 260-63 (1989)), cert. denied, 113 S.Ct. 2405 (1993). The Mississippi Supreme Court proffered independent and adequate state grounds for refusing to consider this claim. We will not reopen this issue.

III.

Next, Burney claims that his indictment was defective because the grand jury foreman might not have presented a statutorily required affidavit to the court. See Miss. Code Ann. § 99-7-9 (1972 & Supp. 1993). Even if Burney made this argument in state

court, we will not grant habeas relief unless, under state law, the indictment was so defective that it deprived the state court of jurisdiction over the offense. Alexander v. McCotter, 775 F.2d 595, 598 (5th Cir. 1985). Mississippi law states that failure to attach the statutorily required affidavit to an indictment is not a fatal defect. Atkinson v. State, 392 So.2d 205, 206 (Miss. 1980). We will not consider this claim.

IV.

A number of claims that Burney has placed before us first appeared in an application for post conviction relief after his direct appeal. The Mississippi Supreme Court refused to hear the claims on custodial interrogation and the racial composition of the venire, grand jury, and petit jury as procedurally barred under state statute. See Miss. Code Ann. § 99-39-21(1) and (3) (1972 & Supp. 1990). Where a petitioner has defaulted on federal claims in state court pursuant to an independent and adequate state procedural bar, we will not consider habeas relief without evidence of cause for the default and actual prejudice or a miscarriage of justice. Coleman v. Thompson, 111 S.Ct. 2546, 2554 (1991). The Mississippi Supreme Court found an independent and adequate state procedural bar to hearing these claims. Burney has not made the requisite showing of cause, prejudice, or a miscarriage of justice. We affirm the denial of relief on these claims.

V.

The independent and adequate state grounds doctrine causes even more problems for Burney because he challenges a denial of a

change in venue, a claim that the Mississippi Supreme Court dispatched under Johnson v. State, 476 So.2d 1195 (Miss. 1985), with the observation that the trial judge did not abuse his discretion in denying the motion. Burney, 515 So.2d at 1160-61. Even aside from any procedural bar, the motion for a change of venue required an assessment of prevailing local opinion about the trial. The factual nature of this inquiry means that we assign a presumption of correctness to any decision on this front. 28 U.S.C. § 2254(d) (1993). We find no infirmity in the decision not to change venue.

VI.

As a final matter, Burney challenges the effectiveness of his trial and appellate counsel. We test such claims against the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984), which hold that a petitioner must establish (1) that counsel's performance was so deficient that it fell below an objective standard of reasonable professional service; and (2) that this deficient performance prejudiced the defense such that there is a reasonable probability that it changed the outcome of the trial. Id. at 687-88. Like the district court, we find the evidence of guilt in this case so overwhelming that any errors made by trial or appellate counsel did not cause prejudice.

AFFIRMED.