UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7260
Summary Calendar

JUAN MONTEZ,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
Texas Department of Criminal
Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(C-92-130)

(September 14, 1994)

Before POLITZ, Chief Judge, KING and STEWART, Circuit Judges.

POLITZ, Chief Judge:*

Juan Montez, a Texas state prisoner, appeals the denial of his motion for habeas relief under 28 U.S.C. § 2254. Finding no reversible error, 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Acting on a tip from a confidential informant Officer Martin DeLeon of the Aransas County Sheriff's Department obtained a search warrant for a recreational vehicle occupied by Montez. Upon executing the warrant DeLeon found Montez and two other men seated at a table covered with packages of cocaine and heroin. A struggle ensued. Montez placed a chokehold on DeLeon; one of the others hit the officer in the face. The three suspects eventually were subdued and arrested.

Montez was convicted by a jury of possession of cocaine and he was sentenced by the judge to 60 years imprisonment. The conviction and sentence were affirmed on appeal and collateral relief was denied. The instant petition for federal habeas relief followed. On the magistrate judge's recommendation, the district court denied the petition, entering summary judgment for the state. Montez timely appealed and we granted a certificate of probable cause.

Analysis

Montez's principal contention on appeal is that he was denied effective assistance of counsel. His prime criticism is counsel's failure to file a timely election for assessment of punishment by the jury. Counsel advised Montez to opt for sentencing by the jury and he prepared the required document but inadvertently failed to file it before *voir dire*, as required by Texas law.[1] His belated motion for sentencing by the jury was denied.

[1] Tex. Code Crim. Proc. art. 37.07, § 2(b).

In **Ex Parte Walker**,[2] the Texas Court of Criminal Appeals held that the failure to file a timely motion to have the jury assess punishment constituted deficient performance. Eschewing the inquiry into the prejudicial effect of the error, as mandated under federal law by **Strickland v. Washington**,[3] a divided court found ineffective assistance of counsel. Montez contends that we should apply **Walker** rather than **Strickland**. We disagree.

A federal habeas court may grant relief only for errors of federal constitutional dimension.[4] The test for a violation of the right to counsel granted by the sixth amendment is detailed in **Strickland**. In **Spriggs v. Collins**,[5] we particularized the **Strickland** test to errors by counsel during sentencing in a non-capital case. Montez must show not only deficient performance but also "a reasonable probability that but for trial counsel's errors . . . [his] sentence would have been significantly less harsh."[6] This he cannot do.

Applying the **Spriggs** test, we examine:

> the actual amount of the sentence imposed on the defendant by the sentencing judge or jury; the minimum and maximum sentences possible under the relevant statute or sentencing guidelines, the relative placement of the sentence actually imposed within that range, and the

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[2]794 S.W.2d 36 (Tex.Crim.App. 1990).

[3]466 U.S. 668 (1984).

[4]**Lavernia v. Lynaugh**, 845 F.2d 493 (5th Cir. 1988).

[5]993 F.2d 85 (5th Cir. 1993).

[6]**Spriggs**, 993 F.2d at 88 (emphasis in original).

various relevant mitigating and aggravating factors that were properly considered by the sentencer.[7]

With a prior felony conviction for possession of a controlled substance, Montez was subject to a sentencing range of 5 to 99 years or life imprisonment.[8] The 60-year sentence imposed -- that recommended by the state -- was in the middle third of the range. Aggravating Montez's offense was his contemporaneous possession of heroin and his assault on Officer DeLeon. On these facts it is not likely that a Texas jury would have imposed a significantly lesser sentence. The state trial judge doubted such in denying Montez's motion raising the issue of sentencing by the jury.

In addition, Montez complains that the state court panel which decided his appeal misapplied Texas law for following **Strickland** rather than **Walker**. That is not a matter cognizable on federal habeas review. Montez attempts to evade this bedrock principle by casting his complaint as a violation of equal protection. We previously have rejected this maneuver[9] and do so again today. Montez has presented no evidence that the state appellate court intended to discriminate against him, an essential element of an equal protection claim.

Montez's remaining claims need not detain us long. He faults his trial counsel for failing to "subject Officer DeLeon's testimony to adversarial testing" on trial of the motion to

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[7]**Spriggs**, 993 F.2d at 88-89.

[8]Tex. Health & Safety Code § 481.115(b); Tex. Penal Code §§ 12.32(a), 12.42(b).

[9]**Lavernia**.

suppress. The record reflects that his counsel vigorously cross-examined DeLeon, argued to the court that DeLeon was not a credible witness, and, in reurging the motion to suppress at the close of evidence, highlighted the conflict between DeLeon's assertion that he had verified Montez's residency in the RV before obtaining the search warrant and the testimony of the owner of the trailer park that the police did not contact him prior to the arrest.

Montez also complains that his lawyer did not obtain the confidential informant's identity or call him as a witness. He has not specified, however, the grounds on which defense counsel could have compelled disclosure[10] or the exculpatory testimony that the informant would have given. Montez further criticizes his attorney for not investigating ownership of the trailer and the source of payment of the rent at the trailer park. Ownership of the trailer was irrelevant to the validity of the search warrant. If Montez disputed Officer DeLeon's testimony that he had paid the rent, he could have offered that testimony at the suppression hearing. Further, Montez asserts that his lawyer should have asked the court to instruct the jury that DeLeon's testimony was admissible for impeachment purposes only. Montez has not identified specific parts of DeLeon's testimony warranting such an instruction. As applied to DeLeon's testimony as a whole, such an instruction would have been error.

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[10] See **United States v. Sanchez**, 988 F.2d 1384 (5th Cir.), cert. denied, 114 S.Ct. 217 (1993).

Finally Montez attacks the sufficiency of the evidence. This argument is frivolous, ignoring the fact that Montez was caught red-handed with the contraband.

AFFIRMED.