FIFTH CIRCUIT
UNITED STATES COURT OF APPEALS

No. 93-7441

(Summary Calendar)

MELVIN SMITH, JR.,

Petitioner-Appellant,

V.

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
(G 88 CV 67)

(November 25, 1994)

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

PER CURIAM:[*]

Melvin Smith, Jr., convicted of felony aggravated robbery with a deadly weapon, challenges the dismissal of his petition for writ of habeas corpus. Smith contends that he is entitled to relief on the grounds that 1) his plea was not voluntary because the State of Texas recommended a higher sentence than that which, during plea-bargain negotiations, they agreed to recommend; 2) he received

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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 assistance of counsel; and 3) the state district judge improperly failed to recuse himself.[1] Smith further contends that an evidentiary hearing is necessary to consider the voluntariness of his plea in light of the plea negotiations. The district court dismissed Smith's petition for writ of habeas corpus. Smith now appeals, and we AFFIRM.

I

After Smith's arrest, his court-appointed counsel negotiated a tentative agreement with the prosecution under which Smith would receive a forty-year sentence in exchange for pleading guilty. Smith declined the plea bargain and plead not guilty when the case was called for trial. After a jury was impaneled, Smith changed his plea to *nolo contendere*,[2] waived a jury trial, and opted to have his punishment set by the court. The complaining witness testified; the court found Smith guilty, and proceeded to hear evidence relating to punishment.

In the punishment phase, the State proved that Smith had six

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[1] Smith also asserts that his arrest violated Fourth Amendment protections against unreasonable search and seizure. Illegal searches and seizures are non-jurisdictional defects that Smith lost the right to challenge once he entered a knowing and voluntary guilty plea. *Norman v. McCotter*, 765 F.2d 504, 511 (5th Cir. 1985).

[2] Before Smith entered his plea, the trial judge asked Smith whether he understood the allegations in the indictment and explained to Smith that a plea of *nolo contendere* has the same legal effect as pleading guilty. *See* Tex. Code Crim. Proc. Ann. art. 27.02(5) (Vernon 1989) ("A plea of nolo contendere, the legal effect of which shall be the same as that of a plea of guilty, except that such plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based . . . ."). Smith assured the judge that he understood the indictment and was aware of the effect of a *nolo contendere* plea.

prior felony convictions. Smith testified that he had committed the robbery under the influence of drugs and urged the trial court to sentence him to a drug rehabilitation center rather than to prison. The trial court sentenced Smith to fifty years' incarceration.

Smith has filed six state applications for writ of habeas corpus. With the exception of one that Smith withdrew, all six were denied without written order by the Texas Court of Criminal Appeals. Subsequently, Smith filed the present petition for writ of habeas corpus and now appeals the district court's dismissal of that petition.

II

A

Smith complains that his guilty plea was not voluntary because the state failed to recommend a forty-year sentence as negotiated. Smith contends that an evidentiary hearing is necessary to examine the voluntariness of his plea of *nolo contendere* in light of these negotiations. While "a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked," a plea agreement that was induced by unkept promises is involuntary and cannot stand. *See Mabry v. Johnson*, 467 U.S. 504, 508, 104 S. Ct. 2543, 2546-47, 81 L. Ed. 2d 437 (1984). In order for the federal district court to conduct an evidentiary hearing on the matter, "the burden is on the habeas corpus petitioner to allege facts which, if proved, would entitle him to relief." *Ellis v. Lynaugh*, 873 F.2d 830, 840

(5th Cir.), *cert. denied*, 493 U.S. 970, 110 S. Ct. 419, 107 L. Ed. 2d 384 (1989). No hearing is required when the record is complete or the only issues raised are those which can be resolved without adducing additional evidence. *Lavernia v. Lynaugh*, 845 F.2d 493, 501 (5th Cir. 1988).

The State does not dispute that it offered to recommend a forty-year sentence. However, Smith rejected that offer when he plead not guilty and forced the case to trial. His later change of heart and plea of *nolo contendere* did not reactivate the original bargain. Further, the record affirmatively shows that, prior to being sentenced to fifty years' imprisonment, Smith assured the judge that he understood the effect of his *nolo contendere* plea to be the same as a guilty plea; that he was not promised "any reward or any lesser punishment" in exchange for his plea; that he understood the judge could sentence him to a maximum of life in prison; and that he was aware that no sentencing recommendation had been made by the State of Texas at the point he plead *nolo contendere*. Smith's introduction at sentencing of evidence of his drug use further demonstrates that he was aware that the court would determine his sentence. An evidentiary hearing is unnecessary because the trial record is sufficiently detailed to resolve this issue. We find that no plea bargain was ever consummated between Smith and the State. Therefore, we hold that Smith's *nolo contendere* plea was voluntary and knowing.

B

Smith also asserts that he received ineffective assistance of

counsel because his attorney misled Smith to believe that the forty-year offer from the state remained open after he had rejected the offer, plead not guilty, and forced the case to trial. To prevail on an ineffective assistance of counsel claim, the 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, the petitioner must show that, but for counsel's substandard performance, the petitioner would have found it more reasonable to go to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed 2d 203 (1985).

Smith offered no credible evidence to demonstrate that counsel misled him to believe that the State's offer remained open after his initial rejection. Smith's statements that he relied on the offer of a forty-year recommendation from the State in deciding to plead *nolo contendere* show his personal state of mind, but do not address counsel's conduct in any way, and, therefore, are not relevant to whether counsel misled him. Further, under direct questioning, Smith assured the court that no one had offered him "hope of any reward or any lesser punishment" in exchange for his plea. The court also informed Smith that no sentence recommendation had been made and, even if there was one made later, the court was not obligated to follow it. Again, Smith assured the judge that he fully understood. Smith presented nothing of

probative weight to prove that counsel's conduct was deficient nor was there anything, save Smith's after-the-fact statements to suggest that it was more likely that he would go to trial, but for counsel's alleged misconduct.[3]

In addition, Smith argues that his counsel was ineffective because counsel failed at sentencing to object to the State's recommendation of fifty years' incarceration and apprise the judge of the State's abrogation of the alleged plea agreement. Smith also alleges that, during the guilt-innocence phase of the trial, counsel failed to cross-examine the complaining witness and never called the arresting police officer to testify.

As previously stated, Smith's not-guilty plea terminated the State's offer to recommend a forty-year sentence. Consequently, counsel's failure to raise that issue with the trial court cannot be deemed to be deficient conduct because no plea agreement

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[3] Smith contends that he was misled by "erroneous advice" from counsel. It is unclear from Smith's brief exactly what the erroneous advice was, however, giving Smith's brief a generous reading it appears that he is alleging that 1) counsel "erroneously advised" him to accept the forty-year offer when the State was not empowered to guarantee that particular sentence, and 2) counsel did not advise him, after his plea of not guilty, that the State was no longer bound to recommend a forty-year sentence.

Smith cites as support for his claim the holding in *United States v. Rumery*, 698 F.2d 764 (5th Cir. 1983), in which defense counsel prejudicially advised his client in plea negotiations due to counsel's own mistaken understanding of the applicable sentencing law. The advice Smith received, however, was neither prejudicial to Smith nor based on a mistaken understanding of the law. Furthermore, Smith presents no credible evidence that he was ever advised that the State's forty-year offer remained on the table after Smith plead not guilty.

As with the other allegations of ineffective assistance of counsel, Smith presents nothing but unsubstantiated statements in support of his complaint that counsel provided erroneous advice. Importantly, Smith assured the trial court, before his guilty plea was accepted, that he understood that he had not been promised a reduced sentence in exchange for the plea, that the judge was not obligated to abide by the state's sentencing recommendation if any were made, and that the maximum term of incarceration for the offense was life in prison.

survived Smith's plea of not guilty. Also, having knowingly and voluntarily entered a plea of *nolo contendere*, Smith has waived the right to an adversarial confrontation with his accusers, *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L. Ed. 274 (1969), therefore, counsel's failure to question them does not amount to substandard conduct.

Smith further complains that his counsel was ineffective in failing to raise the issue of the legality of Smith's arrest in the trial court. Smith did not raise this issue in the proceedings below. We will not review issues that the petitioner raises for the first time on appeal unless they involve purely legal questions and failure to address them would result in manifest injustice. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). Whether counsel's conduct is so deficient as to fall below the *Strickland* standard is a mixed question of fact and law. *See Strickland*, 466 U.S. at 698, 104 S. Ct. at 2070.

C

Finally, Smith contends that the state district court judge who considered at least one of his applications for writ of habeas corpus should have recused himself on the grounds that he was the prosecuting attorney at Smith's original trial. "Errors or defects in the state post-conviction proceeding do not, *ipso facto*, render a prisoner's detention unlawful or raise constitutional questions cognizable in habeas corpus proceedings." *Williams v. Missouri*, 640 F.2d 140, 143-44 (8th Cir.), *cert. denied*, 451 U.S. 990, 101 S. Ct. 2328, 68 L. Ed. 2d 849 (1981); *see Duff-Smith v. Collins*, 973

F.2d 1175, 1182 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1958, 123 L. Ed. 2d 661 (1993). Because Smith attacks a proceeding collateral to his detention and not the detention itself, he is not entitled to federal habeas relief.

III

For the foregoing reasons, **WE AFFIRM.**