UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-7469
Summary Calendar

GEORGE KING,

Petitioner-Appellant,

VERSUS

EDWARD HARGETT, Superintendent,
Mississippi State Penitentiary, ET AL.,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi
(CA-1:92-179-D-D)

(May 30, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:[1]

King Appeals the district court's dismissal of his habeas petition. We affirm.

I.

George King, Jr., (King) was convicted of selling cocaine by a Mississippi state-court jury in 1989. He was sentenced under Mississippi's habitual-offender statute to a 30-year term of imprisonment and a $500,000 fine.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

In July 1988, Columbus, Mississippi police officer Joey Brackin met with Hozzie Hawthorne (Hawthorne), then in the city jail for contempt of court for failing to pay a traffic fine. Hawthorne told Brackin he wished to provide information about a drug pusher in that county. Hawthorne agreed to make a controlled buy of cocaine from King when he was released from jail.

Hawthorne contacted Brackin on August 2, 1988. He told Brackin that he already had discussed the purchase of an "eight-ball" of cocaine with King.[2] According to Brackin, the average price of an "eight-ball" was $300. Hawthorne told Brackin that King had told him that an "eight-ball" would cost $300. Brackin and narcotics officer Craig Taylor (Taylor) met with Hawthorne. The officers stripped Hawthorne and searched him. They gave him $300 to consummate his deal with King. They also wired him for sound. The police then followed Hawthorne to King's shop. Brackin and Taylor rode in one police car, and Lieutenant Pickens and Patrolman Larry Taylor rode in another.

Pickens and Larry Taylor called Brackin and Taylor when Hawthorne entered the shop. Brackin heard Hawthorne ask for "that package now." Another person responded, "I'll have to go get it. I don't keep that much here with me because I can't get rid of that much at one time if somebody comes in. I'll need the money up front." Hawthorne emerged from King's shop, got into his car, and drove away. Brackin and Taylor pulled him over shortly thereafter.

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[2] According to Brackin, an "eight-ball" is between three and four ounces of cocaine. St. R. II, 25.

Hawthorne related that he had given the money to King, who told him to return in 15 or 30 minutes, when King would have the cocaine. Pickens and Larry Taylor remained to watch Hawthorne while Brackin and Taylor returned to watch King's shop.

Brackin saw Hawthorne return to the vicinity of King's shop. He did not see Hawthorne leave his car or enter the shop. Brackin heard sounds from Hawthorne's wire, then lost transmissions altogether. Shortly thereafter, Brackin and Taylor saw Hawthorne emerge from the front door of King's shop and walk to his car. Brackin called Pickens and Larry Taylor and directed them to allow Hawthorne to drive away, then stop him and find out what had happened.

About five minutes later, Pickens called Brackin and told him that Hawthorne had told him that King had given him a package of white powder. Brackin and Taylor proceeded into King's shop, where they arrested King for selling cocaine. The police did not recover the $300 they had given Hawthorne to purchase the "eight-ball."

Larry Taylor and Pickens testified that they watched Hawthorne enter and leave King's shop; followed him away from the shop and back again; and watched him enter and leave the shop once more. They followed Hawthorne after he left the shop the second time and stopped him. Hawthorne gave Larry Taylor the "eight-ball" of cocaine he had purchased from King.

Hawthorne also testified for the state. He gave a detailed account of his controlled purchase of the cocaine from King that was consistent with the police officers' testimony.

Mississippi Crime Laboratory chemist Jon Maddox (Maddox) identified the substance in the "eight-ball" package as cocaine. King moved for a judgment of acquittal after the state rested its case. The trial judge denied King's motion.

The trial judge admonished King that by testifying he opened himself to impeachment with his history on cross-examination. King's attorney asked him if he had a "varied past history involving the police department[.]" King responded affirmatively. The attorney then asked King to list his past convictions. King responded that he "done had aggravated assault, false pretense, uh, charged with arson, and they give me thirteen years in Mississippi State Department of Corrections[.]" King testified that the Supreme Court of Mississippi had reversed his arson conviction and that he had been released from prison after having served three-and-one-half years of his 13-year sentence. According to King, the police had harassed him for the three years following his release. While he might occasionally get into a fight or an argument, King did not believe in drugs and never had trafficked in drugs. King explained that he had children and would not want anybody selling them drugs. The police, however, regularly harassed King by searching his business and his taxi cabs for drugs. King flatly denied having sold cocaine to Hawthorne. None of King's earlier convictions involved drugs. He had never been arrested on drug charges. King's attorney asked him, "[b]asically, they say that you're a bad boy, is that right; say you like to hurt people?" **Id**. at 165. King responded,

> [t]hat what they said, and they said, you know, I do a lot of aggravated assault. When people do me wrong I get into it. I -- I admit that, but I do not mess with no drugs. I admit having a fight. I'll fight. You know if a man do me wrong, I feel like I got to get some justice and I do some fighting, but, uh, drug, no.

Id.

On cross-examination, King testified that he had been convicted in Alabama of assault with intent to commit murder. He added that he had "shot a boy over there; shot one over here, too. I ain't got nothing to hide on that, but it wasn't about no drugs[.]"

At King's sentencing hearing, the prosecutor introduced copies of King's Alabama conviction of assault with intent to murder, his Mississippi conviction of aggravated assault, and his Mississippi conviction of false pretenses. The trial judge asked if King or his attorney wished to speak before the imposition of the sentence. King's attorney answered, "[n]o, your honor." The trial judge then imposed sentence. The trial judge denied King's motion for a new trial or a judgment notwithstanding the verdict (JNOV).

The Supreme Court of Mississippi affirmed King's conviction. **King v. State**, 576 So. 2d 154, 154-55 (Miss. 1991). That court also denied King's post-trial motion to vacate his conviction and sentence.

King then filed a petition for federal habeas corpus relief. The magistrate judge recommended that the district judge deny King habeas relief. The district judge adopted the magistrate judge's report, supplemented it with his own observations, and denied King

habeas relief. The district judge granted King a certificate of probable cause (CPC) and leave to proceed in forma pauperis (IFP) on appeal.

II.

A.

King first makes a number of related arguments challenging the court's imposition of sentence under the habitual offender statute. He contends that the trial judge erred by not making an on-the-record finding regarding the probative value of his previous convictions; by sentencing him as an habitual offender without personally addressing him to determine whether he wished to deny that he had committed his previous offenses; and by sentencing him to the statutory maximum penalty without knowing that he had sentencing discretion. The respondent contends that King's contentions are precluded from federal habeas review because the Supreme Court of Mississippi found them procedurally barred from review on King's application for post-conviction relief.

King contended on appeal to the Mississippi Supreme Court that the jury wrongly convicted him and the trial judge wrongly denied his motions for a judgment of acquittal and for a new trial or JNOV because the evidence was insufficient to support his conviction. He contended in his post-conviction motion for relief that the trial judge erred by not making an on-the-record determination of the probative value of his earlier convictions; that counsel was ineffective regarding the use of his earlier convictions; that the trial court erred by sentencing him without ascertaining whether he

wished to challenge his prior convictions; and that the trial judge erred by sentencing him without realizing that he had sentencing discretion. The Supreme Court of Mississippi denied King's ineffective-assistance contention on its merits and denied his other contentions as procedurally barred because King did not raise them on direct appeal. **See** Miss. Code Ann. § 99-39-21 (supp. 1993).

The respondent raised the procedural bar in his answer to King's habeas petition. The district judge found that three of King's contentions were procedurally barred but considered the merits of those contentions "out of an abundance of caution[.]"

King does not address the district court's conclusion that three of his contentions are procedurally barred. Nor does he contend that he has shown cause and prejudice sufficient to avoid the effects of the procedural bar. "Failure to prosecute an issue on appeal constitutes waiver of the issue." **U.S. v. Green**, 964 F.2d 365, 371 (5th Cir. 1992), **cert. denied**, 113 S.Ct. 984 (1993). Even a pro se litigant like King must brief issues on appeal. **Yohey v. Collins**, 985 F.2d 222, 224-25 (5th Cir. 1993). King has failed to brief the procedural-bar issue and has therefore waived it.[3]

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[3] Additionally, the district court's procedural-bar conclusion appears correct. A habeas petitioner is barred from raising a contention in federal court if he is procedurally barred from raising that claim in state court unless he can show cause for the default and prejudice resulting from the default. **Smith v. Collins**, 977 F.2d 951, 955 (5th Cir. 1992), **cert. denied**, 114 S.Ct. 97 (1993). The Supreme Court of Mississippi will not consider issues raised for the first time in a post-conviction application that could have been raised on direct appeal but were not. Miss.

B.

King contends next that he was convicted on insufficient evidence. A court reviewing a habeas petition will not disturb a jury verdict so long as there is evidence, viewed in the light most favorable to the verdict, sufficient to allow a reasonable jury to find the defendant guilty beyond a reasonable doubt. **Young v. Guste**, 849 F.2d 970, 972 (5th Cir. 1988). Only the federal constitutional standard for sufficiency "need be satisfied, even if state law would impose a more demanding standard of proof." **Schrader v. Whitley**, 904 F.2d 282, 284 (5th Cir.), **cert. denied**, 498 U.S. 903 (1990).

Hawthorne testified about his meetings with King and testified that he and King exchanged cash for cocaine. The jury could have inferred from the testimony of Brackin, Larry Taylor, and Pickens that Hawthorne was under surveillance sufficient to ensure that he did not fabricate the cocaine transaction. Maddox identified the substance Hawthorne turned over to the police as cocaine. Additionally, while not identical in every detail, Hawthorne's testimony generally was consistent with the testimony of the police officers.

C.

Finally, King contends that his trial attorney was ineffective for failing to request an on-the-record determination of the probative value of his prior convictions; failing to object when the prosecutor asked King about his Alabama conviction; admitting

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Code Ann. § 99-39-21 (supp. 1993).

his prior convictions at sentencing; and failing to allow King to challenge his prior convictions at sentencing. King's arguments are unconvincing.

To prevail on an ineffective-assistance-of-counsel claim, a movant must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prove deficient performance, the movant must show that counsel's actions "fell below an objective standard of reasonableness." **Id**., 466 U.S. at 688. To prove prejudice, the movant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," **id**. at 694, and that "counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair." **Lockhart v. Fretwell**, ___ U.S. ___, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993). Additionally, "the defendant must overcome the presumption that, under the circumstances, the challenged action `might be considered sound trial strategy.'" **Strickland**, 466 U.S. at 689 (citation omitted).

The theory of King's defense was that he was an ex-convict who was harassed by police, particularly through attempts to bring drug charges against King, who abhorred drugs. King's attorney raised King's prior convictions to present his theory to the jury. King emphasized that none of his previous convictions were drug-related and that his arson conviction had been reversed.

The evidence against King was relatively strong. Under the circumstances, counsel's use of King's prior convictions during the trial was not outside the realm of reasonable trial strategy. Additionally, the only offense the prosecutor raised on cross-examination that was not raised on direct examination was the Alabama conviction of assault with attempt to commit murder. Given the theory of King's defense, solicitation of King's testimony regarding the Alabama conviction was not prejudicial to King. Finally, in light of King's defensive theory, counsel was not ineffective for not allowing King to object to the introduction of the convictions at sentencing. King already had admitted to the convictions at trial and he advances no legal theory that his counsel could have used to persuade the court to exclude the convictions at sentencing.

AFFIRMED.