

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-8014  
Conference Calendar

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MILTON MERLE MILBURN,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director  
TDC, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. SA-92-CV-270  
- - - - -  
(November 1, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:\*

Milton Merle Milburn, a Texas prisoner, was convicted of aggravated robbery and was sentenced to 45 years' imprisonment. He filed this petition for writ of habeas corpus alleging, along with other grounds of error which he does not raise on appeal,<sup>2</sup>

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

<sup>2</sup> Because Milburn did not raise or brief his other grounds of error in his appellate brief, they are deemed abandoned. Weaver v. Puckett, 896 F.2d 126, 128 (5th Cir.), cert. denied, 498 U.S. 966 (1990).

ineffective assistance of counsel because his attorney allegedly failed to attempt to locate witnesses who could have testified that at the time of the robbery, Milburn wore a beard. One eyewitness to the robbery identified Milburn as the robber, but testified that the robber did not have a beard.

Milburn testified at trial that he had a beard on the date of the robbery and that he shaved it off when he went to work at a bar some time after the robbery. His testimony was corroborated by Sylvia Cono, who testified that she knew Milburn from the bar, that he had a beard in April of 1981, and did not have a beard when he began to work at the bar.

To prevail on his claim of ineffective assistance, Milburn must show 1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness; and 2) that the deficient performance prejudiced his defense.

Strickland v. Washington, 466 U.S. 668, 687-94, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to show prejudice, Milburn must demonstrate that counsel's errors were so serious as to "render the result of the trial unreliable or the proceedings unfair." Lockhart v. Fretwell, \_\_\_ U.S. \_\_\_, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993). A failure to establish either deficient performance or prejudice defeats the claim. Strickland, 466 U.S. at 697.

The district court's legal conclusion that Milburn failed to demonstrate prejudice was correct. Milburn and another witness testified that he wore a beard at the time of the robbery. Testimony by additional witnesses on this same point would have

been cumulative. Failure to call witnesses whose testimony would have been cumulative does not prejudice the defendant. Lincecum v. Collins, 958 F.2d 1271, 1280 (5th Cir.), cert. denied, 113 S.Ct. 417 (1992).

Because Milburn failed to show prejudice, there was no need for an evidentiary hearing.

AFFIRMED.