UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8169
Summary Calendar

WILLIE RICHARD DUHR,

Petitioner-Appellant,

VERSUS

JAMES A. COLLINS,
Director of TDC,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas

(W-91-CV-297)

(March 29, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

In 1987, a Texas grand jury indicted Willie Richard Duhr for driving while intoxicated. The indictment alleged that Duhr had three prior DWI convictions, which if proved, would enhance Duhr's

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

misdemeanor DWI offense to a felony. Tex. Rev. Civ. Stat. Ann. Art. 6701l-1(e) (West Supp. 1994). The indictment also alleged that Duhr had five prior felony convictions, which if proved, would expose Duhr to a sentence of life or 25 to 99 years as a habitual criminal. Tex. Penal Code Ann. § 12.42(d) (West Supp. 1994). Duhr's defense to the DWI was that he was suffering from the effects of diabetes and was not intoxicated. The case was tried to a jury, which found Duhr guilty of felony DWI. The jury further found that Duhr had committed two or more prior felonies and sentenced him to 99 years in prison. The judgment was affirmed on direct appeal, and the court of criminal appeals denied Duhr's petition for discretionary review.

Thereafter, Duhr filed a petition for habeas corpus in state court, alleging that (1) the trial court erred by allowing his punishment for the felony DWI to be enhanced by unrelated prior convictions; (2) the double enhancement resulted in a sentence grossly disproportionate to the DWI offense; (3) the double enhancement violated the Double Jeopardy Clause of the Fifth Amendment; (4) the trial court erred by denying his motion for a continuance to secure the presence of defense witnesses, Dr. Daniel Salack and Lee Cantu; (5) his counsel was ineffective for failing to secure the appearance of such defense witnesses; (6) his counsel's uncertainty on the range of punishment precluded Duhr from making an informed choice on whether to plead guilty or stand trial; and (7) his counsel performed deficiently by failing to request the court to instruct the jury on the lesser included

punishment for DWI or to consider the remoteness of the non-DWI convictions used to enhance his sentence.

The state trial court summarily denied the petition. The court of criminal appeals remanded for development of the record, ordering the trial court to hold a hearing by affidavit or an evidentiary hearing. The state appellate court instructed the trial court to make findings on whether counsel presented medical testimony on Duhr's diabetes defense, and if not, why not; whether counsel's presentation of this defense fell within the range of reasonably effective assistance; and whether there was a reasonable probability that any of counsel's alleged errors prejudiced Duhr's defense.

Trial counsel submitted an affidavit in which he stated the doctor's testimony would not have had an impact on the outcome of trial because there was no dispute that Duhr was a diabetic or that a diabetic could fail field sobriety tests in a manner similar to an intoxicated person. Counsel asserted that the only real dispute was whether the intoxilizer machine could detect the difference between alcohol and acetone, and that the doctor's testimony would not have addressed this issue. Counsel further stated that Duhr had filed a motion for continuance prior to trial alleging two witnesses were unavailable to testify--a doctor who could verify Duhr was a diabetic and Lee Cantu, who would testify that Duhr was not intoxicated on the night in question. Counsel's affidavit indicated that the court denied the motion because Duhr could not remember the name of his doctor.

Based on this affidavit, the trial court found that defense counsel did not present any medical testimony concerning Duhr's diabetes because Duhr could not identify the name of his doctor; that counsel properly presented the diabetes defense through other witnesses as well as the defendant; and that counsel rendered reasonably effective assistance and committed no errors that could have had an effect on the outcome of the trial.

Shortly thereafter, Duhr submitted an affidavit to the court of criminal appeals in which he stated that he was in the process of obtaining affidavits and preparing a motion for an evidentiary hearing when the trial court issued its findings. He asserted that Dr. Salack refused to provide an affidavit because Robertson County authorities informed him that if he did so, he would be tied up in court for several days. Duhr further stated that he informed his trial counsel of Dr. Salack's name and address well before trial and that his trial counsel misconstrued the testimony Duhr gave in support of the motion for a continuance, contending that the doctor whose name he could not identify in that testimony was the doctor who was going to deliver Lee Cantu's baby.[1] Duhr also asserted that, contrary to counsel's statement, the prosecutor stressed that no doctor or any other witness had corroborated Duhr's claim that he had diabetes. The court of criminal appeals denied the petition without written order based on the trial court's findings.

Duhr then commenced this federal habeas action alleging essentially the same grounds for relief that he raised in state

[1]The record supports this reading of Duhr's testimony.

court. The magistrate judge recommended granting the State's motion for summary judgment and denying relief. The district court adopted the magistrate judge's recommendation over Duhr's objections. The court concluded that ground one, Duhr's attack on the double enhancement, raised only an issue of state law and did not provide a basis for federal habeas relief. The court rejected Duhr's Eighth Amendment challenge to the 99-year sentence based on Rummel v. Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). Duhr's double jeopardy claim failed, the court determined, because considering other crimes at sentencing does not implicate the Double Jeopardy Clause. Duhr's challenge to the denial of his motion for a continuance lacked merit, the court ruled, because he failed to comply with state procedural requirements in presenting the motion. Finally, the court rejected Duhr's ineffective-assistance claims, concluding that Duhr failed to demonstrate prejudice from any of counsel's alleged errors.

OPINION

Duhr argues that the state trial court erred by enhancing his felony DWI sentence under Tex. Penal Code Ann. § 12.42(d). He correctly points out that the DWI statute contains its own enhancement provisions to increase the punishment for repeat DWI offenders. Tex. Civ. Stat. Ann. Art. 6701l-1. Therefore, Duhr contends that § 12.42(d), the general enhancement provision, should not have been applied, and its application violated his rights to due process and equal protection.

The district court rejected this argument on the ground that it did not raise a constitutional claim. See Smith v. Phillips, 455 U.S. 209, 221, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). "Federal habeas courts are without authority to correct simple misapplications of state criminal law or procedure." Lavernia v. Lynaugh, 845 F.2d 493, 496 (5th Cir. 1988). A violation of state law which renders a trial so fundamentally unfair as to violate due process, however, provides a basis for federal habeas relief. Id. Here, as the State points out, no violation of state law occurred. In Phifer v. Texas, 787 S.W.2d 395, 396 (Tex. Crim. App. 1990) (en banc), the court held that punishment for a felony DWI conviction could be enhanced under § 12.42(d), as long as the convictions used for enhancement purposes could not have been used under Art. 6701l-1. Thus, Phifer forecloses Duhr's claim insofar as it is premised on a violation of state law.

The equal protection claim is asserted in Duhr's petition and brief in conclusory terms, and we do not address it. See Alexander v. McCotter, 775 F.2d 595, 602-03 (5th Cir. 1985) (conclusory allegations do not raise constitutional issue); Morrison v. City of Baton Rouge, 761 F.2d 242, 244 (5th Cir. 1985) (issues stated but not briefed need not be considered). In any event, the claim fails because Duhr has not alleged that he was a victim of intentional discrimination because of his membership in an identifiable group. See Lavernia, 845 F.2d at 496.

Duhr next contends that his 99-year sentence is so grossly disproportionate to the crime of DWI that it violates the Eighth

Amendment. He maintains that the district court erred by failing to analyze his claim under the proportionality test of Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). Id. at 4.

This Court recently observed that Solem must be viewed in light of Harmelin v. Michigan, ___ U.S. ___, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991), which upheld a sentence of life in prison without parole for a defendant convicted of possessing more than 650 grams of cocaine. See McGruder v. Puckett, 954 F.2d 313, 315 (5th Cir.), cert. denied, 113 S. Ct. 146 (1992). The controlling opinion in Harmelin concluded that Solem's test applied only when a threshold comparison of the crime committed to the sentence imposed leads to an inference of gross disproportionality. Id. at 316 (quoting Harmelin, 111 S. Ct. at 2707). Only if the Court infers "that the sentence is grossly disproportionate to the offense will [the Court] then consider the remaining factors of the Solem test and compare the sentence received to (1) sentences for similar crimes in the same jurisdiction and (2) sentences for the same crime in other jurisdictions." Id.

In McGruder, the defendant was convicted of auto burglary for stealing twenty cases of beer from a delivery truck, and was sentenced to life in prison without parole under the Mississippi habitual offender statute. Id. at 314. He argued that the sentence was so grossly disproportionate to the crime of auto burglary that it violated the Eighth Amendment. Id. at 316. The Court observed that his argument "ignores the essence of the

statute under which he was sentenced. Upon his conviction for auto burglary, he was sentenced under the habitual offender statute. Under that statute, his sentence is imposed to reflect the seriousness of his most recent offense, not as it stands alone, but in the light of his prior offenses." Id.

The Court then examined McGruder's prior crimes, and noted that he "had a record of convictions of armed robbery, burglary, escape, armed robbery, and lastly auto burglary." Id. The two armed robberies were "crimes of violence per se." Id. The auto burglary conviction, the Court observed, was "a concededly lesser offense." Id. at 317. The Court then relied on Rummel to determine whether the sentence of life in prison without the possibility of parole was grossly disproportionate to McGruder's crime.

The Court observed that Rummel, like McGruder, received a life sentence under a recidivist statute upon his third conviction. Id. "Unlike, McGruder, however, Rummel's predicate offenses were non-serious; he was convicted as a recidivist for obtaining $120.75 by false pretenses, following convictions for passing a no-account check and passing a forged check. Nevertheless, he received a mandatory sentence of life in prison with an opportunity of parole." Therefore, the Court concluded that, "[t]here can be no argument, in the light of Rummel, that McGruder's sentence is disproportionate, much less grossly disproportionate, to his offense." Id.

McGruder supports the district court's decision to apply Rummel here. See also Burt v. Puckett, 933 F.2d 350, 352 (5th Cir. 1991) (Rummel controls when facts are not clearly distinguishable). Like McGruder, Duhr's argument ignores the essence of the habitual offender statute under which he was sentenced: to impose a sentence that reflects the seriousness of his current crime in light of his prior convictions. See McGruder, 954 F.2d at 316. Moreover, Duhr's criminal record is virtually indistinguishable from the defendant's in Rummel. The indictment charged Duhr with DWI, and alleged three prior DWI convictions, thereby converting the crime from a misdemeanor to a felony. The five enhancement paragraphs in the indictment alleged felony convictions for possession of more than four ounces but less than five pounds of marijuana, theft by taking, and three separate thefts. As in Rummel, none of Duhr's convictions were for crimes of violence. However, as the district court observed, felony DWI is arguably a more serious crime than the theft conviction at issue in Rummel due to the obvious threat drunk drivers pose to other motorists and pedestrians. Finally, like the defendant in Rummel, Duhr will not necessarily serve his entire 99-year sentence and will be eligible for parole at some point. See Tex. Code Crim. Proc. Ann. Art. 42.12, § 15(b) (West 1979); Art. 42.18, § 8(b) (West Supp. 1991). Accordingly, although the sentence imposed on Duhr may be seen by some as harsh and unusual, Rummel and McGruder foreclose Duhr's Eighth Amendment claim.

Duhr next maintains that the double enhancement violates the Double Jeopardy Clause. His misdemeanor DWI offense was enhanced to a felony as the result of his three prior DWI convictions. Then, two of his prior felony convictions were used to enhance the felony DWI sentence under the habitual offender law. This, Duhr contends, had the effect of imposing multiple punishments for the same offense.

The district court correctly rejected this argument. This Court has held that "consideration of other crimes at sentencing does not implicate the Double Jeopardy Clause because the defendant is not actually being punished for the crimes so considered. Rather, the other crimes aggravate his guilt of, and justify heavier punishment for, the specific crime for which defendant has just been convicted." Sekou v. Blackburn, 796 F.2d 108, 112 (5th Cir. 1986). Moreover, the Court has determined that using the same prior conviction to enhance two subsequent sentences does not violate the Double Jeopardy Clause. Sudds v. Maggio, 696 F.2d 415, 417 (5th Cir. 1983) (Texas habitual offender statute does not violate prohibition on double jeopardy). Here, different convictions were used for each step of the enhancement process.

Duhr argues that the state trial court's denial of his motion for a continuance to obtain testimony from his doctor that diabetes rather than intoxication was the cause of his condition violated his right to a fair trial. Because of his failure to obtain the continuance, Duhr contends that Dr. Salack, who could have rebutted

the prosecution's assertion that he did not have diabetes, was unable to testify.

Duhr's counsel made an oral motion for a continuance after the State had presented its case and he had presented testimony from one defense witness. Counsel stated that two defense witnesses were not present: "Dr. Daniel Salack, who would testify that my client is a diabetic . . . . Also, Mr. Lee Cantu, . . . who is said to be with his wife having a baby." Counsel requested a continuance until the next morning. The trial court denied the motion without explanation.

The district court denied relief on this claim because Duhr failed to present his motion in accordance with state procedural law. The court noted that the motion was not in writing, that Duhr failed to exercise diligence in attempting to secure his witnesses, and that his motion did not indicate that the witnesses were the only sources of the testimony. Therefore, the court concluded that Duhr's claim did not raise a constitutional issue. Duhr contends that the district court erred by concluding that Texas law requires written motions for continuances after trial has commenced.

"When a denial of a continuance forms a basis of a petition for a writ of habeas corpus, not only must there have been an abuse of discretion but it must have been so arbitrary and fundamentally unfair that it violates constitutional principles of due process." Hicks v. Wainwright, 633 F.2d 1146, 1148 (5th Cir. Unit B Jan. 1981). Contrary to Duhr's contention, Texas law requires a motion for a continuance to be in writing, even when the motion is made

after trial has begun. See Gentry v. Texas, 770 S.W.2d 780, 786-87 (Tex. Crim. App. 1988) (en banc), cert. denied, 490 U.S. 1102 (1989). Likewise, as the district court observed, the motion did not indicate that Duhr had acted with diligence in attempting to secure the testimony of these witnesses. There is no evidence that Duhr had subpoenaed either witness, which would support a claim of diligence. See Hicks, 633 F.2d at 1149. Therefore, the district court correctly rejected this claim.

Duhr's final claim is that trial counsel provided ineffective assistance by (1) failing to interview Dr. Salack prior to trial and failing to ensure that he would testify at trial; (2) failing to inform Duhr of the exact range of his possible punishments; (3) failing to request jury instructions on lesser-included offenses and (4) failing to request an instruction on the remoteness of his prior convictions or to argue for law reform based on general principles of due process.

To prevail on his ineffective-assistance claim, Duhr must show that counsel performed deficiently and that counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient when it falls below an objective standard of reasonableness, considering all the circumstances of the case. Id. at 688. To establish prejudice, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in

the outcome." Id. at 694. When counsel's errors are so serious as to deprive the defendant of a fair and reliable proceeding, the prejudice test is satisfied. See Lockhart v. Fretwell, ___ U.S. ___, 113 S. Ct. 838, 842, 122 L. Ed. 2d 180 (1993).

With regard to Duhr's first allegation, the state court held a hearing and found that Duhr's trial counsel did not interview or call Salack to testify because Duhr could not identify the doctor. This finding would, ordinarily, be entitled to a presumption of correctness. 28 U.S.C. § 2254(d). Here, however, the state trial court made its finding before Duhr had a chance to submit any evidence. Additionally, the record reveals that the finding is clearly incorrect. The doctor Duhr could not identify was the doctor who was going to deliver Lee Cantu's baby.

The district court did not rely on this erroneous finding, however. Rather, the court concluded that Duhr failed to establish prejudice because he did not provide any evidence of the content of Salack's testimony. For Duhr to demonstrate prejudice from Salack's failure to testify, he must show that Salack's testimony would have been favorable and that he would have testified at trial. Alexander v. McCotter, 775 F.2d 595, 602 (5th Cir. 1985). Duhr has not satisfied this test. Duhr has not presented an affidavit from Salack to show what his testimony would have been; he simply asserts what Salack would have testified. See, e.g., United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983) (petitioner, who failed to produce affidavit from uncalled witness, could not establish prejudice; petitioner's speculation regarding

testimony insufficient), cert. denied, 467 U.S. 1251 (1984); Ross v. Estelle, 694 F.2d 1008, 1011 (5th Cir. 1983) (absent record evidence of uncalled witness's testimony, court cannot consider petitioner's bald assertions in pro se petition). Second, Duhr has provided no evidence to show that Salack would have appeared and testified at trial. See Alexander, 775 F.2d at 602. The record indicates that during a break in the trial, Duhr unsuccessfully attempted to subpoena Salack to obtain his testimony. This suggests Salack may not have been willing to testify for Duhr.

Finally, the district court concluded that, assuming Salack would have appeared and testified that Duhr was a diabetic, this would not have changed the outcome of the trial. The court reasoned that "[i]t was not disputed that Duhr was a diabetic and that a diabetic could fail a breathalizer. The only dispute involved whether or not the breathalizer could discriminate between alcohol and acetone. There is no evidence that Dr. Salack could accurately testify to the workings of a breathalizer."

Duhr argues that these statements do not reflect what transpired at trial. He correctly points out that in closing argument, the prosecutor questioned whether there was any evidence to support Duhr's claim that he suffers from diabetes. The prosecutor stated: "Now all of the smoke screen you heard about diabetes and we haven't had a doctor, we haven't had a family member, we haven't had anybody, the doctor or a family member, come and testify that . . . Duhr has . . . diabetes." Later, in response to Duhr's argument, the prosecutor again stated: "The

possibilities, he says, old diabetes, where was the doctor to tell you that he even has diabetes?" The prosecutor followed both of these statements by pointing out that even if Duhr did have diabetes, the State's expert witness testified that the breath test would still be accurate. The record supports this assertion.

Martin Simon, who is employed by the Texas Department of Public Safety as the Technical Supervisor for the breath alcohol testing program, testified about the effects diabetes could have on the results of an intoxilizer test. Simon testified that Duhr's test results revealed an alcohol level of .15, well over the legal limit of .10. Simon stated that the only way diabetes could interfere with the test would be if there was enough acetone in the subject's breath to trigger the interference detection mechanism. If that occurred, the interference detection system would show that acetone was present in the breath. Simon testified that this did not occur in Duhr's case. He stated that, in his opinion, the .15 reading was accurate and was not affected or caused by diabetes.

This testimony supports the district court's conclusion that the key issue at trial was whether Duhr's diabetes interfered with the result of the intoxilizer test. Duhr does not argue that Salack's testimony would have addressed this issue. In view of Simon's testimony, it is not reasonably probable that the result of the trial would have been different had counsel presented testimony from Salack concerning Duhr's diabetes. Moreover, Daniel Zan, a long time friend of Duhr's, testified that he had seen Duhr take a needle and inject insulin into his stomach on many occasions.

Therefore, the jury heard some evidence of Duhr's diabetes, and additional testimony on the issue would probably not have changed the result of the trial.

Duhr's next contention is that trial counsel performed deficiently by failing to inform him of the exact range of punishment he faced if convicted. The district court rejected this claim because Duhr's petition revealed that counsel correctly informed him of the potential range of punishment. Duhr's petition provides:

> counsel informed the petitioner that he believed the petitioner could receive no more than five (5) years imprisonment if the jury found him guilty of Felony D.W.I., however, there was a possibility that the prosecution would attempt to persuade the trial court that the offense carried a maximum punishment of ninety-nine (99) years or life imprisonment. That was so because at the time of the petitioner's trial the availability of unrelated non-D.W.I. felonies for enhancement was unresolved.

Id. at 13.

Counsel's advice, as described by Duhr, correctly informed him of the range of punishment, including the possibility of the double enhancement. At the time of Duhr's trial, Texas law was unsettled concerning the propriety of using § 12.42(d) to enhance sentences for crimes, such as felony DWI, which are not classified in the penal code. See Jones v. Texas, 796 S.W.2d 183, 184-85 (Tex. Crim. App 1990) (en banc). As previously noted, the Phifer case settled the issue, holding that non-DWI convictions could be used to enhance a felony DWI sentence under that statute. See 787 S.W.2d at 396-97. Because counsel correctly informed Duhr of the range of punishment, his performance cannot be termed deficient under

Strickland. Moreover, as the district court observed, Duhr cannot establish prejudice because he has not produced any evidence to support his claim that the prosecutor offered him a plea bargain before trial.

Duhr further contends that counsel performed deficiently by failing to move for instructions permitting the jury to consider lesser included punishments provided by the DWI law. Duhr was charged with felony DWI, which required the jury to find him guilty of DWI after having been convicted of two previous DWIs. Tex. Civ. Code Ann. art. 6701l-1(e). The jury was properly instructed of this. Moreover, regarding the § 12.42(d) enhancement, the judge correctly instructed the jury that if it found Duhr had been convicted of two previous felonies, it could sentence him to life, or 25 to 99 years in prison. The judge also provided the jury with instructions as to the range of punishment for one prior felony conviction, 2 to 20 years, and no priors, 60 days to 5 years. Therefore, adequate instructions were given, and counsel could not have been deficient for failing to request them.

Duhr also maintains that counsel performed deficiently by failing to request an instruction permitting the jury to consider the remoteness of his prior non-DWI convictions. Section 12.42(d), however, contains no time limit on the use of prior convictions for enhancement purposes. See Loud v. Texas, 499 S.W.2d 295, 298 (Tex. Crim. App. 1973) (remoteness does not affect validity of prior convictions used for enhancement purposes). Finally, Duhr's "law

reform" argument is framed in conclusory terms, and we do not consider it. See Alexander, 775 F.2d at 602-03.

Dismissal of the petition for writ of mandamus is AFFIRMED.