

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8181
Summary Calendar

ROBERT DELGADO,

Petitioner-Appellant,

VERSUS

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

Respondents-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-91-CV-3)

(February 10, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Robert Delgado appeals from the district court's denial of habeas relief, contending that he was denied effective assistance of counsel in the trial court, because his attorneys failed adequately to investigate defenses available to him, and to move to suppress pretrial identification proceedings. We **AFFIRM**.

I.

Delgado was indicted in September 1989 on one count of aggravated robbery, arising out of a burglary of the home of

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Alfonso Lagunas. Lagunas, who was assaulted during the burglary, originally told police that he could not identify the burglar. A few days later, however, police showed Lagunas a photograph of Delgado; Lagunas stated that Delgado was the burglar. Delgado was arrested and indicted. The indictment contained enhancement provisions that provided for an increase in the possible sentence as a result of Delgado's prior convictions.

On the afternoon the indictment issued, Lagunas identified Delgado as the burglar in a police lineup. At the evidentiary hearing in December 1991 on Delgado's application for habeas relief (the "writ hearing"), Delgado's counsel testified that immediately before the lineup, police again showed Delgado's photograph to Lagunas. In the lineup, all the participants wore short-sleeved shirts; only Delgado had tattoos on both arms. At the writ hearing, Lagunas testified that the photographs of Delgado that police had shown him also showed Delgado's tattoos; and that he had identified Delgado in the lineup in part because of the tattoos.

After the lineup, the district attorney offered Delgado a plea bargain: in exchange for a guilty plea, the district attorney would recommend to the judge that Delgado be sentenced to only 15 years, and would drop the enhanced penalty portion of the charges. Because of his conviction record, the sentence for the burglary charge could have been enhanced to 99 years to life, with a possible fine of up to \$10,000. The district attorney advised Delgado's attorneys that the offer would be open only until 5:00 p.m. that day. Delgado's attorneys, Roy Greenwood and Jack

Robison, testified at the writ hearing that they knew the district attorney often placed deadlines on the acceptance of plea offers. They stated that once the district attorney withdrew a plea offer, it was unlikely to be extended again.

Delgado accepted the offer, and pleaded guilty to burglary. He was sentenced to a 15-year term of imprisonment. He did not appeal the conviction, but did apply for a state writ of habeas corpus, which was denied. He then applied for federal habeas relief under 28 U.S.C. § 2254. Following a two-day evidentiary hearing at which Delgado's attorneys, Lagunas, and several other witnesses testified, the magistrate judge recommended that the application be denied. The district court accepted this recommendation over Delgado's objections, and denied habeas relief; it granted a certificate of probable cause.

II.

Delgado contends that his guilty plea was involuntary because he did not receive effective assistance of counsel; specifically, that both Robison (court-appointed) and Greenwood (retained) failed adequately to investigate available defenses, including an alibi defense, and failed to move to suppress the pretrial identification procedures, including the lineup, in which Lagunas identified him. Where ineffective assistance of counsel is alleged, we undertake an independent review of the record. ***Martin v. McCotter***, 796 F.2d 813, 817 (5th Cir.), *cert. denied*, 479 U.S. 1057 (1987). We review the district court's factual findings, however, for clear error. ***Id.***;

United States v. Cockrell, 720 F.2d 1423, 1426 (5th Cir.), cert. denied, 467 U.S. 1251 (1984).

Normally, a knowing, intelligent, and voluntary guilty plea operates as a waiver of all but jurisdictional defects in the case against a defendant. **Mabry v. Johnson**, 467 U.S. 504, 508 (1984); **United States v. Jennings**, 891 F.2d 93, 95 (5th Cir. 1989). Delgado informed the court during the plea colloquy that he was entering his plea freely and voluntarily, and that he understood he waived his right to appeal. He also stated that he was satisfied with the services of his attorneys. This notwithstanding, Delgado contends that his plea was involuntary, because he was denied effective assistance of counsel.

A defendant who pleads guilty on the advice of his attorney may attack the voluntary and intelligent nature of the plea only by showing, first, that counsel's conduct was deficient and, second, that he was prejudiced by counsel's errors. **Hill v. Lockhart**, 474 U.S. 52, 56 (1985). To demonstrate deficiency, Delgado had the burden of showing that his counsels' performance did not meet the standard of "objective reasonableness" set out by **Strickland v. Washington**, 466 U.S. 668, 688 (1984), *i.e.*, that counsels' performance did not meet "prevailing professional norms". **Id.** Counsels' performance is entitled to a strong presumption of reasonableness. **Strickland**, 466 U.S. at 690.

To show prejudice in the context of his guilty plea, Delgado had to show "a reasonable probability that, but for counsel's errors, [he] would not have pleaded guilty and would have insisted

on going to trial." *United States v. Green*, 882 F.2d 999, 1002 (5th Cir. 1989) (internal citations and quotations omitted). Where the alleged error is a failure to investigate or discover evidence, the determination of prejudice depends on the "likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." *Hill*, 474 U.S. at 59.

A.

Delgado's first contention is that his attorneys failed adequately to investigate available defenses, including an alibi defense. In particular, he claims that when the district attorney made the plea offer, his appointed counsel (Robison) had not interviewed all the witnesses Delgado had identified as potential alibi witnesses or eyewitnesses; nor had Robison interviewed Mike Sanchez, the other suspect in the case. Thus, Delgado contends, his retained "legal consultant", Greenwood, could not properly advise him of his options.

The district court found that the evidence elicited at the writ hearing "establishe[d] that [Delgado's] defense counsel did, in fact, conduct an extensive investigation into the case... in the few short weeks between [Delgado's] indictment and entry of his guilty plea". It also found that Delgado "had full knowledge of the evidence he allege[d that] his counsel failed to obtain...."

Robison had conducted a detailed, if "preliminary", investigation into the case by the time the offer was made. He testified at the writ hearing that Delgado identified four possible alibi witnesses: his mother and father, his brother's girlfriend,

and Lupe Lozano. He specifically told Robison not to interview Lozano, however, until he (Delgado) had talked to her. Robison testified that he had had a hard time finding some of the witnesses, and had not yet interviewed Sanchez, but intended to do so. He had interviewed Lagunas. Also, he had interviewed Delgado's parents, and was satisfied that they would testify on Delgado's behalf.

Robison also testified that he had told Delgado that Lagunas had reported that he had known Delgado for years, and was certain of his identification of Delgado. And, Robison testified that, based on his investigation and the extremely favorable terms of the plea bargain offered by the District Attorney, it appeared to him that the state "had a lot of holes in their case". Finally, he testified that he had communicated to Greenwood the gist of all the interviews he had conducted. Robison was not involved in the discussion between Delgado and Greenwood regarding whether Delgado should accept the offer, however.

Greenwood, who did no independent investigation in the case, testified at the writ hearing that, based on his experience, he "would have conveyed this plea offer to anybody", because the sentence it proposed was "unbelievably low". He stated that unless he had evidence that Delgado had a "dead, bang, winner alibi" -- which Greenwood testified he did not have, either at the time of the plea offer, or at the writ hearing -- he still would recommend that Delgado take the plea offer.

We afford counsel's judgment a "heavy measure of deference", especially where, as here, "the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said". **Burger v. Kemp**, 483 U.S. 776, 795 (1987). And, based on our review of the record, it appears that Greenwood's recommendation that Delgado accept the plea offer was a reasonable exercise of professional judgment. This is especially the case given Delgado's personal knowledge of the strength or weakness of his alibi defense; the high sentencing range possible if Delgado was convicted; and the positive identification of Delgado by Lagunas. See *id.* at 794 (reaffirming **Strickland's** holding that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation" (citations omitted)). We find no error in the district court's holding that Delgado was not entitled to habeas relief based on his counsels' claimed failure to investigate.

B.

Delgado's second contention is that he did not receive effective assistance of counsel because Robison and Greenwood failed to move to suppress the pretrial identifications of Delgado by Lagunas.² Delgado contends that he was not adequately informed of the possibility that the identifications could be suppressed,

² The district court, adopting the magistrate judge's report, stated that, although the identification procedures were arguably impermissible, any challenge to them was rendered moot by Delgado's guilty plea.

and thus was not entirely aware of his options with regard to the plea offer.³

Again, however, the record indicates that counsel's recommendation that Delgado accept the guilty plea was based in part on the very favorable terms of the offer, the short time between the lineup and the offer, and the probability that the offer would be withdrawn a few hours later. And, as with Delgado's allegations about counsels' failure to investigate, we cannot say that, based on all these circumstances, counsel acted unreasonably in making that recommendation, or in failing to move to suppress the identifications.

In any case, Delgado also cannot meet the prejudice prong of **Strickland**. He knew of the possibility that the identifications were tainted, because he had discussed the flaws in the identification procedure with counsel, and been apprised of the possibility that the lineup was probably tainted and a "terrible procedure". Indeed, Robison had filed a motion at the probable cause hearing to have Delgado seated away from the counsel table as part of a strategy to challenge the identification procedure. Although fully aware of the possibility that the identifications were tainted, Delgado nevertheless pleaded guilty. Given Delgado's

³ Delgado's habeas petition listed the tainted identification procedure as one of the grounds for the petition. It did not cast the issue in terms of ineffective assistance of counsel, which was listed as a separate basis for the petition. In the course of the proceedings in the district court, however, Delgado argued that the failure to suppress the identifications was one factor that contributed to ineffective assistance of counsel. The district court addressed this issue; accordingly, it is appropriate for us to address it here.

knowledge of the possibility that the identifications could be challenged at trial, we are not convinced that a motion to suppress them after the lineup would have affected his decision to plead guilty.

III.

For the foregoing reasons, the denial of habeas relief is

AFFIRMED.