IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8383
(Summary Calendar)

RUDY RIOS,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
TDC, ET AL.

Respondents-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-92-CV-692)

(September 13, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Petitioner-Appellant Rudy Rios appeals the district court's denial of his habeas corpus petition filed pursuant to 28 U.S.C.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

§ 2254. Petitioner also moves this court to vacate an order extending the time within which appellees can file their brief and to strike appellees' tardy brief. For the reasons set forth below, we affirm the district court's denial of habeas corpus and we deny Rios's motions.

I

FACTS AND PROCEEDINGS

A state jury convicted Rios of murder and sentenced him to life in prison. Rios v. Texas, 661 S.W.2d 775 (Tex. Ct. App. 1983). After unsuccessfully challenging his conviction in state habeas proceedings, Rios filed the instant petition in district court seeking a writ of habeas corpus. He alleged, among other things, that he was denied due process by the trial court's refusal to give an instruction on circumstantial evidence and by the state appellate court's retroactive application of Hankins v. Texas, 646 S.W.2d 191 (Tex. Crim. App. 1981), rev'd on reh'g en banc, 646 S.W.2d 197 (Tex. Crim. App. 1983) (abolishing requirement for circumstantial evidence instruction), to affirm the conviction. Rios further asserted that his trial counsel provided ineffective assistance by, inter alia, failing to submit an application for probation.

The State responded and moved for summary judgment. Rios opposed the State's motion and requested an evidentiary hearing. In a lengthy memorandum, the magistrate judge recommended denying the petition. The district court adopted the magistrate judge's recommendation over Rios's objections. This appeal followed.

II

ANALYSIS

A. Jurisdiction

"Prior to reviewing the merits of any case, this Court must be satisfied that it has subject matter and appellate jurisdiction. Indeed, the Court must assess its jurisdiction sua sponte, if necessary." Bader v. Atlantic Int'l, Ltd., 986 F.2d 912, 914 (5th Cir. 1993) (internal citation omitted). As a habeas corpus action is civil in nature, Archer v. Lynaugh, 821 F.2d 1094, 1096-97 (5th Cir. 1987), a petitioner must file a notice of appeal within 30 days after the entry of the judgment denying the petition. See Fed. R. App. P. 4(a)(1).

The district court's judgment denying Rios's petition was entered on April 16, 1993. On May 3, within the time for filing a notice of appeal, Rios moved for an extension of time in which to file a motion for a certificate of probable cause (CPC). On May 24 the district court granted an extension to May 31. Also on May 24SQmore than 30 days after entry of judgmentSQRios filed a notice of appeal, a CPC request, a motion to appeal in forma pauperis (IFP), and a declaration in support of IFP. The district court granted a CPC on August 11.

Although Rios's notice of appeal was untimely, he had filed his motion for an extension of time in which to move for a CPC within 30 days following the date of the judgment. That motion evinces Rios's intention to appeal. Under such circumstances we construe that motion as a timely notice of appeal. See Stevens v.

Heard, 674 F.2d 320, 322-23 (5th Cir. 1982). Alternatively, because a CPC is a prerequisite for appeal in a § 2254 proceeding, Fed. R. App. P. 22(b), we construe the district court's order granting the extension as an order extending the time in which to file a notice of appeal under Fed. R. App. P. 4(a)(5). Under such a construction, Rios's notice of appeal, filed within the extended period, would be timely. Either way, we have jurisdiction to hear this appeal.

B. Due Process

Rios suggests that the state appellate court violated his right to due process by applying Hankins retroactively to affirm the trial court's refusal to give a "circumstantial evidence" instruction.[1] Rios maintains that under Texas law in effect at the time of his trial, which ended on July 12, 1982, he was entitled to

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[1]The Texas circumstantial evidence instruction in effect prior to the rehearing opinion in Hankins provided:

> In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence, beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion and producing, in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged. But in such cases it is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the defendant. They must exclude, to a moral certainty, every other reasonable hypothesis except the defendant's guilt; and unless they do so, beyond a reasonable doubt, you will find the defendant not guilty.

Hankins, 646 S.W.2d at 207 (Onion, J., dissenting) (citations omitted).

a circumstantial evidence instruction.

In Hankins, however, the Texas Court of Criminal Appeals held: "The arguments in favor of abolishing the requirement of a circumstantial evidence charge are meritorious and we now hold that such a charge is improper." Id. at 197. The court further stated that "[t]he rule should be that circumstantial evidence alone may suffice only if the inferences arising therefrom prove the fact in question beyond a reasonable doubt." Id. at 199. Thus, "the jury should consider the totality of the direct or circumstantial evidence and the reasonable inferences which may be drawn therefrom, in determining whether it was sufficient to establish guilt beyond a reasonable doubt." Id.

Rios correctly points out that he requested a circumstantial evidence instruction at trial and that the trial court did not give the instruction. Rios also raised the issue on direct appeal but the appellate court rejected his argument, stating: "we overrule ground of error five asserting error for the trial court's not submitting a charge on circumstantial evidence." Rios, 661 S.W.2d at 777 (citing Hankins v. State, 646 S.W.2d 191 (Tex. Crim. App. 1981).

The Court of Criminal Appeals issued its final decision in Hankins on March 1, 1983. See Hankins, 646 S.W.2d at 191. The appellate court decided Rios's direct appeal on December 7, 1983. Rios, 661 S.W.2d at 775. Thus the rehearing opinion was available to the appellate court months before it decided Rios's appeal. The appellate court's citation to Hankins is ambiguous, however, as it

cites the 1981 Hankins opinion and does not refer to the opinion on rehearing. But the cursory manner in which the appellate court rejected Rios's argument suggests that it applied the rehearing opinion to Rios's case. The State's arguments, that Rios failed to make a prima facie case of retroactive application of Hankins and that the evidence presented at Rios's trial brought it within an exception to the circumstantial evidence rule were not raised in the district court and need not be considered on appeal. See United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990).

Rios correctly notes that the Due Process Clause "protects criminal defendants against action by the judiciary that would contravene the Ex Post Facto Clause if done by the legislature." Rubino v. Lynaugh, 845 F.2d 1266, 1271 (5th Cir. 1988); see Bouie v. City of Columbia, 378 U.S. 347, 353-54, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). The Ex Post Facto Clause prohibits the following types of laws:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Collins v. Youngblood, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (quotation omitted). "Procedural" changes, even if they disadvantage the accused, do not violate the Ex Post Facto Clause. Id. at 45. The Court described procedural changes as "changes in

the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." Id. Simply labeling a law procedural, however, will not immunize it from scrutiny under the Ex Post Facto Clause. Id. at 46.

Applying this distinction, the Court upheld a Florida law that changed the role of the judge and jury in death penalty cases. See Dobbert v. Florida, 432 U.S. 282, 292-97, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). Under the law in effect when Dobbert committed two murders, a person convicted of a capital felony received the death penalty unless the verdict included a recommendation of "mercy" by the majority of the jury. Id. at 288. But, under the law in operation at the time of trial, a defendant found guilty of a capital felony received a sentencing hearing at which evidence of aggravating and mitigating circumstances could be introduced, id. at 290-91, after which the jury rendered an advisory decision, with the final sentencing determination made by the court. Id. at 291. In Dobbert's case, the jury voted 10-to-2 for life imprisonment, but the judge overruled the jury's decision and imposed a death sentence. Id. at 287. In finding the change procedural rather than substantive, the Court observed: "The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." Id. at 293-94.

The Court in Dobbert noted that it had previously upheld changes in evidentiary rules which allowed certain previously excluded evidence to be admitted against a defendant. Id. at 293.

The Court explained:

> For example, in Hopt v. Utah, 110 U.S. 574 (1884), as of the date of the alleged homicide a convicted felon could not have been called as a witness. Subsequent to that date, but prior to the trial of the case, this law was changed; a convicted felon was called to the stand and testified, implicating Hopt in the crime charged against him. Even though this change in the law obviously had a detrimental impact upon the defendant, the Court found that the law was not ex post facto because it neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict. Id. at 589.
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> In Thompson v. Missouri, 171 U.S. 380 (1898), a defendant was convicted of murder solely upon circumstantial evidence. His conviction was reversed by the Missouri Supreme Court because of the inadmissibility of certain evidence. Prior to the second trial, the law was changed to make the evidence admissible and defendant was again convicted. Nonetheless, the Court held that this change was procedural and not violative of the Ex Post Facto Clause.

Id. at 293.

Likewise, the Court in Collins found no ex post facto violation in "the application of a Texas statute, which was passed after respondent's crime and which allowed the reformation of an improper jury verdict in respondent's case." 497 U.S. at 39. Youngblood had been sentenced to a term of life imprisonment and a fine of $10,000. Texas law at the time of the offense did not authorize a fine in addition to a term of imprisonment. Therefore, under Bogany v. Texas, 661 S.W.2d 957 (Tex. Crim. App. 1983), the judgment and sentence were void, and Youngblood was entitled to a new trial. Collins, 497 U.S. at 39. Before his

state habeas application could be reviewed, however, Texas passed a new law designed to modify Bogany, which allowed appellate courts to reform a verdict that assessed a punishment not authorized by law. Id. at 40-41. The Supreme Court upheld the law, stating:

> The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed.

Id. at 52.

Here, the magistrate judge, in rejecting Rios's claim, employed this analysis and concluded that the Hankins decision abolishing the requirement for the circumstantial evidence instruction amounted to nothing more than a procedural change. Although the question is close, the reasoning of the Supreme Court's Ex Post Facto Clause decisions supports the conclusion of the magistrate judge. The circumstantial evidence instruction was not a defense to the murder charge, and it did not alter the quantum of proof necessary to convict a criminal defendant:[2] The standard remains proof beyond a reasonable doubt. Although not controlling on the constitutional issue, Texas courts have characterized Hankins as effecting a procedural change and have applied it retroactively. See, e.g., Patton v. Texas, 696 S.W.2d

[2]In a different context, the Supreme Court has held that "where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect." Holland v. United States, 348 U.S. 121, 139-40, 75 S.Ct. 127, 99 L.Ed. 150 (1954).

249, 251 (Tex. Ct. App. 1985).

Rios's reliance on Rubino v. Lynaugh, 845 F.2d 1266 (5th Cir. 1988), as support for his due process claim is misplaced. That case involved retroactive application of a Texas Court of Criminal Appeals decision abandoning the so-called "carving doctrine," a "judicially developed rule barring multiple prosecutions and convictions for offenses `carved' out of a single criminal transaction." Id. at 1268. We held that abandonment of the carving doctrine worked a substantive rather than simply a procedural change in the law because it "authorizes distinct, additional prosecution and convictions rather than simply changing the course to a result." Id. at 1274. Moreover, we concluded, "the demise of the doctrine affects a substantial right, the right to be free of multiple prosecutions and punishments for offenses arising out of one criminal transaction." Id.[3] In contrast, abolition of the circumstantial evidence instruction merely changes the course to a result in criminal cases but does not change the substantive criminal law.

C. Ineffective Assistant of Counsel

Rios next argues that trial counsel was ineffective for failing to submit an application for probation, as required by Texas law to enable the jury to consider probation in lieu of a

[3]The continued viability of Rubino is questionable in light of Collins, which abandoned the "substantial protections" or affecting "substantial personal rights" language used in earlier cases. Collins, 497 U.S. at 45-47. The Collins Court also overruled Kring v. Missouri, 107 U.S. 221 (1883), see 497 U.S. at 50, which was relied on by the Rubino Court. See 845 F.2d 1273-74.

term of imprisonment. Texas Code of Criminal Procedure article 42.12, § 3a (West 1979), in effect at the time, provided that a jury may recommend a sentence of probation only "when the sworn motion and proof . . . show, and the jury . . . find[s] . . . that the defendant has never before been convicted of a felony in this or any other state." The record confirms that counsel for Rios did not file a motion for probation. Rios correctly notes that during deliberations, the jury sent out a note stating: "May we have some information about probation vs. jail term? Is this a matter that we may consider?" The trial judge responded to this inquiry by instructing the jury to refer to the "Court's Charge."

To prevail on his ineffective-assistance-of-counsel claim, Rios 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). Performance is deficient when it falls "below an objective standard of reasonableness." Id. at 688. In order to show prejudice, Rios must establish 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). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Strickland, 466 U.S. at 694. Fundamental unfairness occurs when

the petitioner is deprived of a "substantive or procedural right to which the law entitles him." Fretwell, 113 S.Ct. at 844.

In Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993), we held that "[i]n order to avoid turning Strickland into an automatic rule of reversal in the non-capital sentencing context . . . a court must determine whether there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." To make this determination, the court considers the defendant's actual sentence, the possible minimum and maximum sentences, the placement of the actual sentence within that range, and any relevant mitigating or aggravating circumstances. Id.

Assuming, arguendo, that counsel rendered a deficient performance by failing to submit the application for probation, the Spriggs factors show that Rios did not suffer prejudice. The jury imposed a life sentence, the maximum available in this case. See Tex. Penal Code Ann. § 12.32(a). If Rios had no prior convictions,[4] the jury could have sentenced him to probation; or imprisonment for life or "any term of not more than 99 years or less than 5 years." Id. Rios directs us to no mitigating factors other than his relatively clean prior criminal record. Given that the jury imposed the maximum possible sentencesQlifesQand given the absence of any significant mitigating circumstances, Rios has

[4]The record is not entirely clear on this point. At the sentencing phase of the trial, there was testimony that Rios was previously convicted of burglary of a vehicle for which he received a sentence of five years of probation.

failed to establish a reasonable probability that the jury would have imposed a significantly less harsh sentence had counsel submitted an application for probation. See Spriggs, 993 F.2d at 90. The jury's inquiry concerning probation makes this issue somewhat more difficult, but the jury's choice of the maximum available punishment strongly supports the conclusion that counsel's failure did not prejudice Rios.

D. Denial of Evidentiary Hearing

Rios next argues that the district court erred by rejecting his request for an evidentiary hearing. This claim lacks merit. A hearing is not necessary if the state court records are adequate to dispose of the case. Wiley v. Puckett, 969 F.2d 86, 98 (5th Cir. 1992). The state court records here are adequate to dispose of Rios's claims; thus, no hearing was necessary.

E. Motions

Rios has filed two motions with us: one, pursuant to Fed. R. App. P. 31(c), to have the appeal heard on his brief only because the appellees' brief was untimely; and another, pursuant to Fed. R. App. P. 27(b), to vacate an extension of time for filing the appellees' brief granted by the deputy clerk. Rios served his brief on February 23, 1994, and it was filed on February 28, 1994. According to a letter to the clerk of court from the appellees, on March 31, 1994, Deputy Clerk Nancy Dolly granted appellees until April 29 to file a brief. The clerk's office received appellees' brief on May 11, 1994. Although appellees' dilatory conduct should not be condoned, we are not required to strike the brief and

consider the appeal on Rios's brief only. See Marcaida v. Rascoe, 569 F.2d 828, 829-30 (5th Cir. 1978). Rios has failed to show any prejudice as the result of appellees' briefing delay. We therefore deny his motions.

MOTIONS DENIED and JUDGMENT AFFIRMED.