IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8396
Summary Calendar

JOHNNY R. CRAWFORD,

Petitioner-Appellant,

VERSUS

JAMES A. COLLINS,
Director, Texas Department of Corrections,
Institutional Division,

and

DAN MORALES,
Attorney General,

Respondents-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-92-CV-964)

(December 30, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Johnny Crawford appeals the dismissal of his petition for writ

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 Pursuant to that rule, the court has determined that this opinion should not be published.

of habeas corpus brought pursuant to 28 U.S.C. § 2254. Finding no error, we affirm.

I.

In 1974, Crawford was convicted by a jury of possession of heroin and sentenced to serve ten years' imprisonment, in No. 74-CR-1923. His conviction was affirmed on direct appeal. See Crawford v. State, 540 S.W.2d 735 (Tex. Crim. App. 1976).

Crawford filed a federal petition for writ of habeas corpus, challenging the 1974 conviction based upon the absence of a search warrant, the state's use of perjured testimony, and ineffective assistance of counsel. The federal petition, No. 77-CA-308, was dismissed after an evidentiary hearing before a magistrate judge. This court denied a certificate of probable cause ("CPC").

Crawford then filed a subsequent federal petition, No. 92-CA-0964, which is at issue in this appeal. The petition indicates that Crawford subsequently was convicted on two other drug charges in Texas state courts, Nos. 88-CR-4209 and 90-CR-6686, and that the prior conviction in No. 74-CR-1923 was used to enhance his sentences. The state urged that the petition be dismissed as abusive, asserting that Crawford had been denied federal habeas relief in an order dated August 9, 1979, on the identical claims raised in the present petition. Crawford responded that the state has not made an allegation of prejudice, the facts and law have changed, and he did not know when the search warrant was issued until the court conducted the evidentiary hearing.

The magistrate judge determined that Crawford (1) ignored the fact that the district court had ruled on each of his Fourth and Sixth Amendment claims on the merits; (2) erroneously asserted that newly discovered evidence will support his claims and permit him to relitigate them; (3) has not asserted a factual-innocence argument based upon evidence that was deemed reliable and legally obtained; and (4) failed to assert any facts establishing that he and habeas counsel were prevented by some external force from presenting the new issues regarding ineffective assistance of counsel in the first petition. The magistrate judge concluded that Crawford had failed to meet the factual-innocence test and, therefore, was not entitled to a reconsideration of the issues previously raised. The magistrate judge further concluded that Crawford had not met the prejudice standard permitting a review of the new theories underlying the ineffective-assistance-of-counsel issue.

Over Crawford's objections, the district court adopted the magistrate judge's report and dismissed the petition under rule 9(b) of the Rules Governing Section 2254 Cases as both (1) successive and repetitive and (2) successive with new allegations. Crawford was granted CPC and in forma pauperis status for purposes of appeal.

II.

A district court's decision to dismiss a petition pursuant to rule 9(b) is reviewed for abuse of discretion. Hudson v. Whitley, 979 F.2d 1058, 1062 (5th Cir. 1992). Rule 9(b) provides, in part,

that a second or successive petition may be dismissed if the district court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits. Sawyer v. Whitley, 945 F.2d 812, 815-16 (5th Cir. 1991), aff'd, 112 S. Ct. 2514 (1992).

The state correctly asserts that the issue concerning the search warrant was addressed in the prior 1977 petition, No. 77-CA-308. The magistrate judge's report and recommendation indicates that the Fourth Amendment issue challenging the warrant was raised and ruled upon by the court. To the extent that Crawford's petition failed to allege new or different grounds on these issues, which were decided on their merits, it was subject to dismissal under rule 9(b) as successive.

A successive claim that has already been considered in a previous habeas petition may be reviewed if the petitioner makes a colorable showing of factual innocence. Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986); Sawyer, 945 F.2d at 815. Crawford has not made a credible argument that he was factually innocent of the crime charged.

A second or successive federal habeas petition also may be dismissed if the petitioner alleges new or different grounds and "the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." Rule 9(b). The Supreme Court has delineated factors that are to be considered in determining whether a second petition is abusive. See McCleskey v. Zant, 499 U.S. 467 (1991). The McCleskey principles apply to pro

se petitioners. Saahir v. Collins, 956 F.2d 115, 118-19 (5th Cir. 1992).

After the issue of writ abuse arises, the petitioner bears the burden of demonstrating (1) cause for not raising the new claims in a previous federal habeas petition and (2) prejudice if the court does not consider them. Saahir, 956 F.2d at 118. Cause must be some objective factor external to the defense. Id. An impediment such as governmental interference or the reasonable unavailability of an essential fact could qualify as cause. Hudson, 979 F.2d at 1063.

The "cause" question is whether the petitioner knew of the claim or, with reasonable diligence, could have known of it at the time of his first federal petition. Id. Prejudice is irrelevant if the petitioner does not show cause. Saahir, 956 F.2d at 118. If the petitioner shows cause, prejudice must be considered. Hudson, 979 F.2d at 1064. If the petitioner cannot satisfy the cause-and-prejudice standard, the court still may reach the merits to prevent a fundamental miscarriage of justice, which occurs when a constitutional defect probably has caused the conviction of an innocent person. Hudson, 979 F.2d at 1063.

Crawford argues that the district court erred by not conducting an evidentiary hearing on the new and different constitutional violations alleged in his petition. Crawford's allegations challenge the search warrant that resulted in the possession of heroin conviction in No. 77-CA-308. He specifically argues that the warrant was issued nine hours after he was booked

and that the state admitted false testimony at trial regarding when the warrant actually was acquired. Crawford further asserts that this issue was not presented earlier because the evidence regarding the issuance of the warrant was not available to him when he filed his prior petition.

The gist of Crawford's argument is that he was not aware that the warrant was issued after the search and, therefore, he was unable to present this argument earlier. "Omission of the claim will not be excused merely because evidence discovered later might also have supported or strengthened the claim." McCleskey, 111 S. Ct. at 1472. Crawford also explained that the names of the persons who overheard the prosecuting and defense attorneys confer regarding the suppression of the warrant at his state trial were not discovered until after his mother's death. This evidence, however, appears to have consisted of handwritten names of persons noted by his mother. Crawford fails to cite any external force that prevented the discovery of this information earlier that would satisfy "cause" for his failure to present this argument earlier. Saahir, 956 F.2d at 118.

Crawford's failure to show cause eliminates the consideration of prejudice and warrants dismissal under rule 9(b) unless he can show that "a fundamental miscarriage of justice would result from a failure to entertain the claim." McCleskey, 111 S. Ct. at 1470. This is a very narrow exception that is triggered when the alleged constitutional violation probably has caused an innocent person to be convicted. Id. at 1475; Woods, 933 F.2d at 323.

"`[A]ctual innocence' means factual, as opposed to legal, innocence" resulting from a constitutional violation. Johnson v. Hargett, 978 F.2d 855, 859 (5th Cir. 1992), cert. denied, 113 S. Ct. 1652 (1993). To show "actual innocence," a petitioner is required to show that "there is a fair probability that, in light of all the evidence, a reasonable trier could not find all the elements necessary to convict the defendant of [a] particular crime." Id. at 860 (footnote omitted).

Crawford has not made a colorable showing of factual innocence. His brief suggests that his attorney relied upon the prosecutor's assistance and that he furthered his "carrier" by aiding to convict an innocent person. He also argues that he was not guilty of possessing the heroin but that he "took the rap" for the charge to prevent his wife's sister from being charged with the offense. Crawford alludes to his innocence in another statement that reads, "Their [the State's] true interest is to merely maintain a conviction on an innocent person." No evidence has been presented to support a contention that Crawford actually was innocent of the offense.

Because Crawford failed to make a showing of cause and prejudice or factual innocence, the district court did not abuse its discretion in dismissing the petition as successive and for abuse of the writ under rule 9(b). The judgment of dismissal is AFFIRMED.