UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8527
Summary Calendar

RICHARD EDWARD McCOY,
a/d/a/ Gary Caldwell

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-92-CV-861)

(May 3, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Appellant McCoy, having been convicted of aggravated robbery in Texas, seeks relief under 28 U.S.C. § 2254. He raised nineteen claims in the district court and reasserts six of them here. We find no error and affirm.

Appellant first claims that the evidence was insufficient to support his conviction because it did not show that he used or

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

exhibited a deadly weapon as was required by Texas law for the commission of the crime. We review under the familiar standard of Jackson v. Virginia, 443 U.S. 307 (1979). To use a deadly weapon "means that the deadly weapon was employed or utilized in order to achieve its purpose." Patterson v. State, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989). To exhibit a deadly weapon "means that the weapon was consciously shown or displayed during the commission of the offense." Id. The crime was committed in a convenience store and the manager was the victim. She testified that she came upon Appellant crouched down in the office and that when she turned on the light and approached him he rose holding a knife in his right hand and approached her. She backed away and he ran off. She also testified that she was in fear of death or serious bodily injury. We find this testimony sufficient to allow a reasonable jury to find that McCoy consciously exhibited the knife during the robbery.

Appellant complains of the in-court identification of him by the victim. The victim saw Appellant the day before the trial being brought into the courtroom in handcuffs. The district court correctly found that this was impermissibly suggestive. We therefore examine the facts in light of the factors outlined in Herrera v. Collins, 904 F.2d 944, 946 (5th Cir.), cert. denied, 498 U.S. 925 (1990) and when we do we find the in-court identification reliable. The victim saw McCoy twice in her office on the night of the robbery. She had ample time to observe him carefully. She picked him out from a photographic lineup three days after the robbery. While there were some inconsistencies in her testimony

and while she may have seen him in the store at some time before the crime, we see nothing which undermines the reliability of her in-court identification.

Next, Appellant complains that his speedy trial rights were violated by the fifteen-month delay between his indictment and trial. The district court correctly found that this delay was presumptively prejudicial. Appellant concedes that the state consistently announced ready for trial, and it is clear that the delay in trial was caused by the trial court's efforts to appoint counsel for Appellant. We balance the respective interests at stake according to Barker v. Wingo, 407 U.S. 514 (1972), and when we do, we find no federal constitutional speedy trial right violation. The claim that an alibi witness died prior to trial carries little weight because Appellant has not provided the name of the witness nor the substance of the testimony that this witness would have given. Little, if any, prejudice is shown.

In a related issue, Appellant contends that the district court erred in failing to grant relief on his claim that there is an incomplete state court appellate record. As we have demonstrated, McCoy's speedy trial rights have not been violated and he has produced nothing with respect to this claim of an incomplete appellate record which shows either bad faith on the part of the prosecution or prejudice to the defense. We find no error in the district court's ruling.

Two witnesses testified that Appellant and another individual were at the scene of the crime several days before carrying a

pillow case and that the police were summoned and directed them to leave the premises. Appellant argues that this was evidence of an extraneous offense which was improperly admitted. We disturb state court evidentiary rulings on habeas only if they result in a denial of fundamental fairness. Scott v. Maggio, 695 F.2d 916, 922 (5th Cir.), cert. denied, 463 U.S. 1210 (1983). The evidence, assuming that it is evidence of an extraneous offense, was properly admitted because it bears a rational relationship to the charged offense. There is no lack of fundamental fairness.

Finally, Appellant complains of a violation of his equal protection rights because he was convicted on the testimony of the victim alone uncorroborated by other testimony. He argues on appeal only that the district court ignored this issue. The record clearly demonstrates that the district court did not fail to take note of the issue but indeed dealt with it specifically at p. 54 of the record.

AFFIRMED.