

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8546
Summary Calendar

EUGENE SPENCER, JR.,

Plaintiff-Appellant,

VERSUS

WAYNE SCOTT,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA-82-CV-473)

(January 26, 1995)

Before SMITH, WIENER, and PARKER, Circuit Judges.

PER CURIAM:*

Eugene Spencer appeals the denial of his petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Finding no error, we affirm.

Pursuant to our prior opinion, see Spencer v. Collins,

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 Pursuant to that rule, the court has determined that this opinion should not be published.

No. 90-5578 (5th Cir. Dec. 22, 1992) (per curiam) (unpublished), the district court conducted an evidentiary hearing in order for Spencer to prove his claim that the prosecution knowingly used the perjured testimony of Samuel Walker to convict him of murder. The background facts are as follows:

I.

A.

In 1972, Spencer and his accomplice, Edwin Bates, robbed a gas station in San Antonio, Texas, with a sawed-off shotgun and were subsequently pulled over in their car by a policeman. According to our prior opinion, "The passenger shot and killed the policeman with a shotgun blast. The driver drove the car a short distance before ramming into a concrete pillar. Spencer and Bates ran from the car, in different directions." Bates was arrested shortly after the killing, and police caught Spencer later.

At Spencer's murder trial, Samuel Walker testified that he was present with Spencer on the morning of May 17, 1972, when Spencer and Walker picked up Bates downtown, and Spencer and Bates discussed plans for a robbery. He also testified that, during the evening before the shooting, Spencer showed him a shotgun wrapped in Spencer's windbreaker and stated that he knew how to use such a weapon. Bates was not present during Walker's evening with Spencer. Spencer dropped Walker off at his house, and Walker assumed that Spencer was going to meet with Bates and carry out the robbery. Walker's testimony placed the murder weapon in Spencer's

hands.

Bates was called as a witness before Walker was called, and Bates told the jury that he and Spencer committed the armed robbery of the gas station but that it was Spencer who shot the officer. On cross-examination, Bates denied meeting with Spencer during the day, and when Bates did meet up with Spencer on the night of the shooting, that was the first time that Bates went riding with Spencer. Further, no one else was present when they rode together.

Before trial, Walker gave two statements to authorities, one during June 1972 and one during November 1972, when Walker was detained in the Travis County, Texas, jail. In the June statement taken by Ben Hart, Walker stated that he had seen Spencer three to four days before the shooting and that Spencer showed him the sawed-off shotgun.

The November statement consisted of a handwritten four-page document containing Walker's signature on each page and without the name of the scribe, and of a typewritten and unsigned copy of the same document. Walker corrected his June statement through this statement, which essentially matched his testimony given at Spencer's trial.

Walker rode with Spencer the day before the killing. Spencer asked Walker to assist him in a robbery. They drove downtown and met up with Bates. Spencer and Bates discussed pulling off a robbery, and their conversation indicated to Walker that they had participated together previously in a robbery.

They picked up Bates's girlfriend, Jacquelyn, downtown. Later

that evening, Spencer showed Walker the shotgun, explained to Walker that he, Spencer, knew how to use such a weapon, and dropped off Walker at his home.

In July 1974, while detained in the Bexar County, Texas, jail, Walker executed an affidavit. He stated that his trial testimony was false and that he was forced into this perjury by Assistant District Attorney (ADA) Charles Conaway, Probation Officer Nick Reynolds, and Detective Frank Castillion.

B.

At the last federal hearing, Walker testified that his trial testimony was false concerning the presence of Bates and Jacquelyn. Walker insisted that he did not know these people in 1972, and Bates's and Braithwaite's testimony supported Walker's assertion. Walker also testified that his affidavit was false concerning his trial testimony being forced by Conaway, Castillion, or Reynolds, and Walker could not remember who was present when he gave his November 1972 statement to authorities. Further, Walker repeatedly changed his answer as to whether he or the authorities initiated contact leading to the November statement.

Through Walker's testimony and documentary evidence, it was adduced that Walker and Spencer had been housed in the same cell block when Walker executed his July 1974 affidavit. Further, Walker admitted that he has been diagnosed as a paranoid schizophrenic.

Conaway, Reynolds, and Castillion denied taking Walker's

statement in November 1972, and they did not know, nor could they determine from the handwriting, who took that statement. District Attorney Investigator Robert Laurel testified, however, that he spoke with Rudy Garza, an unavailable witness who had been the DA's chief investigator in 1972, who indicated that the handwriting of the November 1972 statement resembled his own handwriting, but that he did not recall taking the statement or traveling to Travis County. Another former investigator, Ish Garza, also was unavailable to testify.

Conaway's testimony included a description of his and the prosecution office's practices on maintaining statements in the case files, how and when supplemental statements would be taken, and witness preparation before a trial. But Conaway could not recall preparing Bates or Walker to testify for Spencer's trial. At the hearing, the district court pointed to the statement of facts, which indicated that Conaway delivered the witnesses' statements to the defense. Thus, Spencer's 1973 defense team had the potentially impeaching documents with which to discredit Walker's testimony. Defense counsel did not cross-examine Walker at trial.

Spencer's habeas counsel tried to discredit Conaway's testimony with alleged past misconduct concerning failure to disclose a witness's plea agreement and tampering with a transcript in an unrelated case. At the time of the hearing, Conaway was serving a fourteen-month federal sentence for tax evasion and structuring cash transactions in order to avoid filing currency

reports.

II.

The district court, in a forty-six-page opinion, denied habeas relief. Pursuant to this court's opinion, the district court characterized Spencer's claim as a Giglio¹ claim, the knowing use by the prosecution of perjured or false testimony. The burden falls on the petitioner to prove that (1) testimony was false or perjured; (2) the prosecution knew it; and (3) the testimony was material.

The court noted that the state conceded, and Spencer agreed, that Walker had testified falsely at trial about knowing Bates in May 1972, being in the car with Bates and Spencer on May 17, picking up Braithwaite downtown, and overhearing Bates and Spencer plan a robbery. The court acknowledged that it was bound to accept the state's concession, but it explained its opinion that, based upon the entire record, Bates, not Walker, testified falsely at Spencer's trial concerning the events leading up to the robbery and killing.

The court found that there was no evidence to support, and much evidence to negate, Walker's assertion in his affidavit that Conaway, Reynolds, or Castillion coerced his false testimony. Based upon Conaway's testimony concerning the common situation of conflicting testimonies and upon the prosecution's offer to the jury of the conflicting trial facts relayed by Bates and Walker,

¹ Giglio v. United States, 405 U.S. 150, 153-54 (1972).

"the [c]ourt f[ou]nd[] that Conaway did not know Walker's testimony concerning Bates was false." The court found Spencer's attempt to impeach Conaway's credibility to be unpersuasive.

As to the third part of the equation, materiality, the court adopted by reference its earlier order of April 22, 1992, and concluded that Walker's testimony concerning Bates was not material and that, in light of the other evidence proving Spencer's guilt, the admission into evidence of Walker's false testimony was harmless beyond a reasonable doubt.

III.

A.

Spencer argues that the district court erred in its determinations and findings on all three portions of the Giglio analysis. See United States v. Anderson, 574 F.2d 1347, 1355 (5th Cir. 1978) (noting that due process is violated by the prosecution's knowing use of false or perjured testimony that is material to the conviction). Because the district court's order acknowledged the state's concession that Walker did testify falsely at Spencer's trial concerning the presence of Bates during Spencer and Walker's May 17 activities, we assume, as does the state's appellate argument, that Spencer met his burden of proving that Walker testified falsely.

Spencer argues that the district court erred by finding that the prosecutor did not know of Walker's false testimony concerning Bates. The district court's factual findings are reviewed for

clear error, and it's legal conclusions are reviewed de novo. DeVille v. Whitley, 21 F.3d 654, 656 (5th Cir.), cert. denied, 115 S. Ct. 436 (1994). "[A] district court's findings are clearly erroneous when, after considering all the evidence, [this court is] 'left with the definite and firm conviction that a mistake has been committed.'" Bryant v. Scott, 28 F.3d 1411, 1414 n.3 (5th Cir. 1994) (citation omitted). Moreover, a district court's credibility determinations receive deference. See FED. R. CIV. P. 52(a).

First, Spencer argues that the prosecutor had actual knowledge of the falsity of Walker's testimony because, at the hearing, Bates and Walker testified that Conaway had asked each of them whether Bates rode with Spencer and Walker on May 17, and each denied knowing the other person. Spencer mischaracterizes Walker's testimony by pulling out one or two answers to questions in order to draw the inference that Walker consistently maintained that he told Conaway during trial preparation that he, Walker, neither knew nor rode with Bates on May 17.

A review of the evidentiary transcript that covered this issue indicates that Walker wavered in his answer. Walker testified that (1) he told Conaway that he did not know Bates; (2) he relayed the facts concerning riding only with Spencer without mentioning Bates; (3) he could not remember what was said during preparation; and (4) he told Conaway that he was with Spencer and Bates. Moreover, Conaway could not recall prepping either witness. We note that the district court, before it made its ruling on Spencer's Giglio claim, ordered the transcription of the 1993 evidentiary hearing

and reviewed the entire record.

Spencer also argues that the prosecutor, Conaway, had constructive knowledge of the falsity of Walker's trial testimony based upon circumstantial evidence. Spencer bases his argument upon Conaway's testimony concerning Conaway's practice of directing investigators to obtain supplemental statements from potential witnesses, the strong inference that Rudy Garza scribed Walker's November 1972 statement, the enlargement of detail in the November 1972 statement compared to the June 1972 statement, the prosecution's need for corroboration of Bates's testimony, Bates's and Walker's alleged statements to Conaway during trial preparation, and Conaway's past misconduct from another case.

Although Conaway testified that his general practice was to order additional or supplemental statements when needed, Walker wavered in his testimony regarding whether he informed Bexar County authorities of his desire to correct his June 1972 statement or whether the authorities contacted him in the Travis County jail. Implicit in Spencer's argument is the inference that whoever questioned Walker in the Travis County jail deliberately planted in Walker's answers and mind the added and false facts concerning Bates. As noted in Spencer's closing argument, the intentional use of suggestive questioning in November 1972 is speculative.

The district court's finding that the prosecution did not know of Walker's false testimony is supported by the record. Although Bates testified that he told Conaway before the trial that he did not know Walker and did not ride with Spencer during the day, the

court was entitled to rely upon Conaway's testimony concerning the common occurrence of inconsistency in the testimony and concerning the resolution of any inconsistency resting with the jury. Moreover, Walker's testimony, varied as it was, tends to support the district court's finding on what the prosecution know.

For the above stated reasons, the district court did not clearly err by finding that the prosecution did not know of Walker's false testimony. See Bryant, 28 F.3d at 1414 n.3. Because Spencer failed to overcome the district court's ruling on the second part of the Giglio analysis, we need not address the third part, materiality, in order to affirm. See Anderson, 574 F.2d at 1356 (in order to address the materiality issue, reviewing court assumed the existence of the first two Giglio elements, that the prosecution knowingly used perjured testimony).

B.

Spencer, acting pro se, has filed with this court two motions for mandamus. Spencer expresses his frustration over the length of time his habeas petition has lingered in the federal courts and his counsel's alleged failure to file punctual briefs. He also alleges a coverup and, presumably, a conspiracy between the state officials and his counsel in preventing his release from his allegedly unconstitutional conviction. He requests release and an investigation. These motions are DENIED.

The judgment is AFFIRMED.