UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8670
Summary Calendar

DON ALLEN COOPER,

Petitioner-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
(W-93-CA-74)

(September 1, 1994)

Before DAVIS, JONES, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Don Allen Cooper, a Texas prisoner, appeals *pro se* from the summary judgment denying habeas relief. We **AFFIRM**.

I.

On May 30, 1990, Cooper pointed a firearm at a police officer. As a result, that October, a Texas jury convicted him for aggravated assault on a police officer; he was sentenced to 50

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 Pursuant to that rule, the court has determined that this opinion should not be published.

years imprisonment. His conviction was affirmed on direct appeal in October 1991. In March 1992, Cooper sought habeas relief in state court, claiming, *inter alia*, that his counsel, Mark Jaynes, had been ineffective for failing to investigate and assert an insanity defense. On the basis of Jaynes' affidavit, the state judge who had presided at Cooper's trial found that Jaynes' performance was not deficient and that, even if it had been, Cooper could not demonstrate prejudice. Based on the trial court's findings, the Texas Court of Criminal Appeals denied habeas relief.

Cooper filed an application for federal habeas relief on March 12, 1993, asserting that Jaynes had been ineffective for having failed to timely subpoena his medical records and present an insanity defense. Five days later, Cooper filed a motion for summary judgment, to which he attached Jaynes' affidavit from the state habeas proceedings and the brief Jaynes had filed on the direct appeal. The district court struck Cooper's motion because it was filed prematurely; it was re-filed on April 16. The State also moved for summary judgment, asserting, *inter alia*, that Cooper had not shown that an insanity defense would have been successful. Cooper responded to the State's motion, but did not explain how his medical records would have supported an insanity defense. On June 14, nearly two months after the State moved for summary judgment, the magistrate judge filed his report recommending that the State's motion be granted, having found that Jaynes' decision to present eyewitness testimony that Cooper did not commit the offense, rather

than to pursue an insanity defense, was "well within the bounds of sound professional judgment".

Cooper filed objections to the report, asserting that on June 26, 1990 (the offense occurred that May 30), his mental disorders were: (1) adjustment disorder with depressive mood, (2) chronic paranoid schizophrenic, (3) chronic personality disorder, (4) grand mal seizure disorder, and (5) chronic arthritis of the lower back. Cooper also asserted that the magistrate judge had failed to comply with Fed. R. Civ. P. 56(c) by not giving him the required ten-day notice,[2] and by failing to inform him of his right to file affidavits or other material in opposition to the motion. The district court adopted the recommendation, dismissed Cooper's habeas application with prejudice, and granted Cooper a certificate of probable cause.

II.

A.

Cooper contends that the district court erred by granting summary judgment without giving him the ten-day notice or advising him of his right to file materials in opposition to the motion. This contention is foreclosed by ***Young v. Herring***, 938 F.2d 543, 561 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1485 (1992), in which our court rejected the habeas petitioner's contention that the district court violated the notice requirements of Fed. R. Civ. P. 12(b) and 56(c) by summarily denying his claims.

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[2] Rule 56(c) provides, in relevant part, that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing".

Our court pointed out that Rule 8(a) of the Rules Governing Section 2254 Cases authorizes a district court to summarily dismiss a habeas petition if, after a review of the record, it determines that an evidentiary hearing is not required.[3] "To receive a federal evidentiary hearing, the burden is on the habeas corpus petitioner to allege facts which, if proved, would entitle him to relief". ***Ellis v. Lynaugh***, 873 F.2d 830, 840 (5th Cir.), *cert. denied*, 493 U.S. 970 (1989). "[A] hearing [is not] required when the record is complete or the petitioner raises only legal claims that can be resolved without the taking of additional evidence". ***Lavernia v. Lynaugh***, 845 F.2d 493, 501 (5th Cir. 1988). The following discussion shows that an evidentiary hearing was not required.

B.

Cooper contends that he was deprived of his Sixth Amendment right to effective assistance of counsel, because counsel failed to obtain his medical records and introduce them at trial in support of an insanity defense. The two prong standard for prevailing on an ineffective assistance claim is well known; a petitioner must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense". ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

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[3] Cooper's reliance on ***McBride v. Sharpe***, 981 F.2d 1234, *vacated & reh'g granted*, 999 F.2d 502 (11th Cir. 1993), is misplaced. On rehearing, the en banc court, citing ***Young v. Herring***, held that McBride's habeas petition was "`ripe for disposition' without regard to Rule 56(c)". ***McBride v. Sharpe***, ___ F.3d ___, 1994 WL 270003, at *7 (11th Cir. 1994) (en banc).

To prove the first prong, deficient performance, the petitioner must show that counsel's actions "fell below an objective standard of reasonableness". ***Id***. at 688. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment". ***Id***. at 690.

To prove the second prong, prejudice, the petitioner "must show 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 (1993). "A reasonable probability is a probability sufficient to undermine confidence in the outcome". ***Strickland***, 466 U.S. at 694. To prove unreliability or unfairness, the petitioner must show the deprivation of a "substantive or procedural right to which the law entitles him". ***Fretwell***, ___ U.S. at ___, 113 S. Ct. at 844.

In that both prongs must be satisfied, an ineffective assistance claim can be rejected because of an insufficient showing of prejudice, without the need to inquire into the adequacy of performance. ***Id.*** at 697. We follow that approach here.

Under Texas law, insanity is a defense to prosecution if, "at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong". Tex. Penal Code Ann. § 8.01(a) (West Supp. 1994). However, "[t]he

term `mental disease or defect' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct". Tex. Penal Code Ann. § 8.01(b) (West 1974). Of critical importance, involuntary intoxication is a defense only if (1) the accused has exercised no independent judgment in consuming the intoxicant; and (2) as a result of his intoxication he did not know that his conduct was wrong. ***Shurbet v. State***, 652 S.W.2d 425, 427 (Tex. Ct. App. 1982). Thus, "neither intoxication nor temporary insanity of mind produced by the recent voluntary use of alcohol constitutes a defense to the commission of a crime". ***Craig v. State***, 594 S.W.2d 91, 96 (Tex. Crim. App. 1980). On the other hand "[e]vidence of temporary insanity caused by intoxication may be introduced by the actor in mitigation of the penalty". Tex. Penal Code Ann. § 8.04(b) (West 1974).

Cooper did not testify at trial. His brother-in-law testified that Cooper took the gun from his back pocket and threw it on the ground when the officer ordered him to drop it, without pointing it at the officer. The officer testified that Cooper pointed the gun at him, but he also testified that Cooper did not seem to have been fully aware of what he was doing.

At the punishment phase, Jaynes introduced the testimony of Cooper's mother and wife. His mother testified that Cooper served in the Army in Korea, where he was hospitalized after an explosion; thereafter, he "seemed to have hallucinations" and would get upset. Cooper's wife testified that at times he could not sleep at night, then "he needs to go to the V.A."; and that he had seizures and had

attempted suicide four times. Both testified that Cooper became irritable when he drank or failed to take his medication.

In his affidavit, which the state court credited,[4] Jaynes stated that he had represented Cooper in numerous criminal proceedings since 1989; he knew that Cooper had been treated at the Veterans Administration medical center for depression, seizures, and affective disorders, and that at the time of the offense, he was under treatment for conditions which included Post Traumatic Stress Disorder; Cooper told him that he had consumed five or six bottles of champagne on the day of the offense; he knew that Cooper became violent when he drank and did not take his medicine; and Cooper could not remember whether he pointed the gun at the officer. Jaynes stated further that his request for a trial continuance in order to obtain Cooper's psychiatric records from the VA medical center was denied; and that the medical records "would have been cumulative ... and may have confused the jury. In retrospect, it would have been beneficial to have been able to review the records. Perhaps medical testimony would have made a difference". Cooper faced a minimum prison term of 25 years and a maximum of 99 years or life. After trial, one of the jurors told

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[4] "Although the ultimate question of whether or not counsel's performance was deficient is a mixed question of law and fact [to be considered *de novo*], state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of section 2254(d)". ***Carter v. Collins***, 918 F.2d 1198, 1202 (5th Cir. 1990). "[A] state court may evaluate an ineffective assistance of counsel claim by making credibility determinations based on affidavits submitted by the petitioner and the attorney". ***Id***. Such credibility determinations are entitled to a presumption of correctness under § 2254(d), even though the state court does not conduct a live evidentiary hearing. ***Id***.

Jaynes he had wanted to give Cooper the minimum because of his mental condition, "but the other jurors wanted the maximum". Jaynes opined in his affidavit that this showed "the probable lack of success of an insanity defense".

Cooper has not shown that his medical records would have proven that his intoxication was involuntary.[5] Accordingly, because he has not demonstrated that an insanity defense would have been viable under Texas law, he has failed to prove that he was prejudiced by Jaynes' performance.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

[5] Cooper did not file those records in the district court.