

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8853
Summary Calendar

CLIFFORD JACKSON FAIRFAX,

Petitioner-Appellant,

VERSUS

WAYNE SCOTT, Director,
Texas Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
For the Western District of Texas

(M0-93-CV-168)

(October 19, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Clifford Jackson Fairfax, a Texas state prisoner, was convicted by jury of engaging in organized criminal activity and received a 45-year term of incarceration. His conviction and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sentence were affirmed on direct appeal. His pro se Petition for Discretionary Review (PDR) was denied as untimely. Fairfax filed a state habeas application which was dismissed without written order based on the findings of the state trial court.

Fairfax then filed the instant federal habeas petition. The respondent answered but did not assert a procedural bar argument. The magistrate judge recommended that Fairfax's petition be denied. Fairfax filed objections, and the respondent also filed objections, raising a procedural-bar argument. The district court, although stating that petitioner and respondent had filed objections, did not indicate that it had considered them. The court adopted the magistrate judge's report, and final judgment dismissing Fairfax's petition was entered accordingly.

The district court granted a certificate of probable cause.

OPINION

Fairfax contends that the prosecution knowingly used perjured testimony to obtain his conviction. Specifically, he argues that inconsistencies and discrepancies in the testimony of state witnesses Sandra Arnold and Arthur Morris Prince mandate a conclusion that the prosecution knowingly used perjured testimony. He also maintains that the district court's determination that the state habeas court's factual findings, which found no prosecutorial misconduct, were supported by the record was erroneous because the Statement of Facts (SOF) from his state trial was not part of the record. He is mistaken.

The record contains the SOF from Fairfax's state trial as well as the remainder of his state court record. To prove a due process violation because of perjured testimony, Fairfax must show that the testimony was false, that the prosecutor knew that it was false, and that it was material to the issue of guilt. See Koch v. Puckett, 907 F.2d 524, 531 (5th Cir. 1990). Contradictory testimony from witnesses, inconsistencies within a witness's testimony, and conflicts between reports, written statements, and the trial testimony of prosecution witnesses do not, standing alone, establish perjury. Id.; United States v. Martinez-Mercado, 888 F.2d 1484, 1492 (5th Cir. 1989).

At trial, Arnold testified on direct examination that she observed Fairfax and his cohorts receive their share of the proceeds from the sale of the ill-gotten lucre. On cross-examination, she clarified her testimony to indicate that although she observed Prince physically hand Lavanson Rhone his share of the proceeds, she only observed Prince, with a sum of money in each hand, go into another room where Fairfax and another accomplice, Kevin Rose, were waiting. That complained-of testimony does not establish the prosecutor's knowing use of perjury.

The state habeas court made a factual finding that Arnold's testimony was not false and that the discrepancy between her direct and cross-examination testimony "amounted to no more than clarification . . . of truthful testimony." That factual finding is entitled to a presumption of correctness which Fairfax has not

rebutted. See Sumner v. Mata, 449 U.S. 539, 546-47, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981); 28 U.S.C. § 2254(d).

Fairfax also contends that the prosecutor used Prince's perjured testimony to obtain a conviction. Regarding Prince's testimony, the state habeas court found as a matter of fact that "all the testimony of Prince which [Fairfax] now contends was false was brought out entirely on cross-examination by [Fairfax] and not by the State." Fairfax has not rebutted the presumption of correctness which attaches to that finding. See Sumner, 449 U.S. at 546-47. Fairfax offers no specific arguments regarding Prince's testimony nor does he offer any factual support for his conclusion that the prosecution knowingly presented false evidence. Therefore, his argument fails.

Fairfax also contends that his state trial counsel was ineffective for failing to impeach Arnold and Prince "in spite of their inconsistent and contrary testimony that conflicted with prior statements and prior testimony in [Fairfax's] and his co-defendant Kevin Rose's trial."

To prevail on a claim of ineffective assistance of trial counsel, Fairfax must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2252, 80 L. Ed. 2d 674 (1984). To establish prejudice, Fairfax must show that his attorney's unprofessional errors were so serious that they rendered the proceeding unfair or the result unreliable. Lockhart v. Fretwell, ___ U.S. ___, 113 S. Ct. 838, 844, 122 L. Ed.

2d 180 (1993). If Fairfax fails to prove either prong, he will get no relief. Strickland, 466 U.S. at 687. Additionally, there is a strong presumption that counsel exercised reasonable professional judgment. Id. at 690.

Fairfax's state trial counsel, Mr. Pipes, cross-examined Arnold in an attempt to impeach her testimony. Likewise, Pipes cross-examined Prince in an attempt to impeach his testimony.

Fairfax contends that the evidence is insufficient to support his conviction, and that federal habeas review of this issue is not procedurally barred. The respondent contends that the issue is procedurally barred, not only because the Texas Court of Criminal Appeals denied Fairfax's PDR as untimely, but because he was precluded from state habeas relief.¹

Fairfax counters that cause exists because he did not receive notification that his conviction and sentence were affirmed within the period allotted for filing a PDR or an extension of time to file same. He refers to the federal habeas court's dismissal order of his first federal habeas petition (for failure to exhaust state remedies).

That opinion indicates that: 1) the state court of appeals rendered an unpublished opinion on or about April 12, 1989, 2) Fairfax alleged that he was not informed of the decision until May

¹ Texas state law precludes the review of an insufficiency-of-the-evidence claim in a habeas proceeding. See ex parte Easter, 615 S.W.2d 719, 721 (Tex. Crim. App.) (en banc), cert. denied, 454 U.S. 943 (1981). The Texas Court of Criminal Appeals' denial of Fairfax's state habeas application raising a sufficiency argument was based on a procedural bar.

22, 1989, 3) on May 31, 1989, the state court of appeals informed Fairfax that any motion to extend the time to file a PDR should be filed directly with the Texas Court of Criminal Appeals, 4) on or about June 16, 1989, Fairfax filed a PDR (but did not seek an extension of time in the Texas Court of Criminal Appeals), and 5) on or about July 5, 1989, the Texas Court of Criminal Appeals refused his PDR as untimely.

Procedural bar applies when the last reasoned state-court opinion addressing a claim explicitly rejects it on the ground of procedural default. Ylst v. Nunnemaker, 501 U.S. 797, 797-801, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). The principle also applies when that court finds a procedural default but proceeds to address the merits in the alternative. Sawyers v. Collins, 986 F.2d 1493, 1499 (5th Cir.), cert. denied, 113 S. Ct. 2405 (1993).

The last reasoned state-court opinion explicitly relied on both grounds -- the merits and procedural default. Therefore, procedural bar applies. Even so, a federal court may consider the merits of a barred claim if the petitioner makes a showing of cause and prejudice for the procedural default or a showing that failure to address the merits would result in a complete miscarriage of justice. Young v. Herring, 938 F.2d 543, 546 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1485 (1992). To establish cause, Fairfax must show that he was prevented from raising the issue on appeal by some external impediment. McCleskey v. Zant, 499 U.S. 467, 493, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).

Fairfax's argument that untimely notice by the state appellate court prevented him from timely presenting the sufficiency argument in his PDR is not sufficient to establish cause. Under Texas law, a PDR should be filed, inter alia, within 30 days after entry of judgment. Tex. Code Crim. Proc. Ann. art. § 44.45(b)(2) (West 1994). An extension of time for complying with § 44.45(b)(2) must be applied for in the Texas Court of Criminal Appeals. See § 44.45(d).

By his own admission, Fairfax did not file for an extension of time in the Texas Court of Criminal Appeal. He has not shown cause, only negligence on his own part. Thus, this Court need not consider prejudice. See McCleskey, 499 U.S. at 502.

To obtain habeas relief based on a miscarriage of justice, a petitioner "must show that a constitutional violation prevented him from showing his actual innocence" or "resulted in the conviction." Ellis v. Collins, 956 F.2d 76, 80 (5th Cir.), cert. denied, 112 S. Ct. 1285 (1992). An insufficiency-of-the-evidence claim is, by itself, not a constitutional issue that permits an "actual innocence" analysis. Renz v. Scott, 28 F.3d 431, 432-33 (5th Cir. 1994). Because, as discussed above, Fairfax has not established any other constitutional violations, an "actual innocence" analysis is not required. Fairfax's insufficiency claim is procedurally barred.

AFFIRMED.