

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-9057
Summary Calendar

LARRY JOE LEE,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(3:90-CV-0005-P)

(February 7, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Lee, imprisoned after a guilty plea to aggravated robbery, exhausted his state court habeas remedies, and he applied for a federal writ of habeas corpus, which the district court denied. This Court vacated the judgment denying habeas relief 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

remanded for the district court to determine whether, before he pleaded guilty, Lee had been informed that a term of mandatory supervision could follow his incarceration.

On remand, the magistrate judge determined that Lee had not been so informed but that his plea, nevertheless, was not constitutionally infirm. The magistrate judge recommended that Lee's petition be denied. The district court adopted the magistrate judge's report, denied the petition, and granted CPC.

In this his second appeal of his federal habeas petition, Lee argues that the state trial court's instruction to the jury regarding the possibility of parole was unconstitutional and that his guilty plea was not knowing and voluntary. The magistrate judge held against Lee on these points, the district court accepted the magistrate judge's conclusions, and we affirm.

Lee first argues that the trial court violated his right to due process by instructing the sentencing jury about the possibility of parole. Whether to instruct the jury about parole, however, is a matter of state law that does not implicate the federal constitution. Simmons v. South Carolina, ___ U.S. ___, 114 S. Ct. 2187, 2195-96, 129 L. Ed. 2d 133 (1994); Mendez v. Collins, 947 F.2d 189, 189-190 (5th Cir. 1991). This argument has no merit.

Lee argues that the giving of the instruction on parole deprived him of equal protection. After Lee's trial, the Court of Criminal Appeals held unconstitutional the state statute providing for instructing the jury about parole. Rose v. State, 752 S.W.2d 529 (Tex. Crim. App. 1987) (en banc). After Rose, Texas amended

its constitution to permit the instruction that Rose condemned. See Madison v. State, 825 S.W.2d 202, 207 (Tex. Ct. App. 1992). Lee argues that, as a defendant who did not benefit from Rose, he was treated unequally to those defendants who did benefit from Rose.

The applicable law is that which is in effect at the time of appellate review. Craker v. McCotter, 805 F.2d 538, 542 (5th Cir. 1986). Lee pleaded guilty in 1986. The state habeas application in which he challenged the jury instruction was denied on February 4, 1987. The Court of Criminal Appeals issued its original Rose opinion on November 12, 1987, and its opinion on rehearing on June 15, 1988. Rose, 752 S.W.2d at 529. Lee has identified no constitutional defect in the state's not applying Rose when it had not yet been decided.

Lee further argues that the instruction regarding parole deprived him of due process because the instruction inaccurately explained parole and good-conduct time. The state responds that this issue is not cognizable because Lee did not raise it in state court or in the district court. Lee replies that, though he did not expressly present this issue before, it is a "necessary pre-issue to the constitutionality of the instruction vel non."

Lee is asking this Court to compare the actual instruction with Texas laws in effect at the time of trial. A federal habeas court, however, relies on the state court to interpret its own laws. Dickerson v. Guste, 932 F.2d 1142, 1145 (5th Cir.), cert. denied, 112 S. Ct. 214 (1991). As Lee did not

expressly bring this "necessary pre-issue" to the attention of the state courts, a federal court could not address the issue without disturbing the comity concerns that underlie the exhaustion requirement.

Even if Lee had presented the issue to the Court of Criminal Appeals, this Court need not address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this [C]ourt unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). We find no such manifest injustice where Lee never presented the issue of state law to the state courts.

Lee argues that his guilty plea was involuntary because the trial court did not inform him that a term of mandatory supervision could follow his incarceration. He also asserts that his term of incarceration, when combined with mandatory supervision, could exceed the 55-year prison term meted out by the jury. These contentions are flawed.

First, the relevant standard of comparison is not the jury's verdict of punishment, which was rendered after Lee's guilty plea, but the trial court's admonishment concerning his maximum possible term of imprisonment. Only that admonishment could have influenced his plea.

Second, this court has recently held that parole eligibility is not one of the consequences of the plea about which the defendant must be informed. Spinelli v. Collins, 992 F.2d 559,

561 (5th Cir. 1993). A defendant, however, must understand the maximum length of time to which he could possibly be sentenced. Id.

The trial court informed Lee that a plea of guilty to the charged offense, together with a plea of true to the enhancement paragraph, would subject him to imprisonment for a maximum of 99 years and a \$10,000 fine. The federal district court found that Lee was not informed of the possibility of mandatory supervision, but he adopted the magistrate judge's holding that in Texas, mandatory supervision, like parole, is part of the sentence and need not be separately brought to the defendant's attention in a guilty plea. The state agrees with this construction of state and federal law.

But even if mandatory supervision is imposed in addition to the potential term of incarceration, Lee's claim still fails. Mandatory supervision refers to the release of a prisoner from physical custody to serve the remainder of his sentence under supervision. Tex. Code Crim. Proc. Ann. art. 42.18 § 2(2) (West Supp. 1994). A mandatory supervisee remains in the legal custody of the state during supervision. Tex. Code Crim. Proc. Ann. art. 42.18 § 8(c) (West Supp. 1994). The state must release Lee on mandatory supervision when his accrued good-conduct time plus his calendar time served equals the maximum term to which he was sentenced. Id. That may not occur, however, until he has served at least one-half of his sentence in calendar time. Tex. Gov't Code Ann. § 498.003(b) (West Supp. 1994).

If mandatory supervision is revoked, Lee may be sentenced to incarceration for the time remaining on his sentence without credit for the time that he was on mandatory supervision. Tex. Code Crim. Proc. Ann. art. 42.18 § 14(a) (West Supp. 1994). In other words, revocation of supervised release may result in the defendant's serving in prison a period equal to his previously earned good-time credit, which would be in addition to the calendar time that he served in prison before mandatory supervision and the calendar time that he spent on mandatory supervision.

Lee was sentenced by the jury to serve 55 years in prison. At the earliest, he could be placed on mandatory supervision after serving 27.5 years. If that occurred, he would be required to serve the remaining 27.5 years of his sentence on mandatory supervision. In the most extreme case, Lee could serve almost the entire period of supervision before revocation, at which point he could be re-committed to prison to serve another 27.5 years. At the worst, then, Lee could be subjected to the "custody" of the state for almost 82.5 years, hypothetically representing an original incarceration of 27.5 years plus almost 27.5 years on mandatory supervision plus 27.5 years after revocation of mandatory supervision.

The trial court informed Lee that the maximum incarceration would be 99 years. Eighty-two and one-half years is less than 99 years. The longest time that Lee could be in state "custody" would not exceed the maximum penalty of which the trial court informed him. Accordingly, he was adequately informed of the

maximum possible sentence that would be a consequence of his guilty plea, even if he spent the longest possible times in prison and on mandatory supervision and even if he had to be informed of the consequences of mandatory supervision. The arithmetic shows that habeas relief is not appropriate.

For these reasons, the judgment of the district court is AFFIRMED.