UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-9165
Summary Calendar

VALMOR STEVE BERNIER,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
Texas Dept. of Criminal Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(1:93-CV-31-C)

(December 21, 1994)
Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Valmor Steve Bernier was convicted of aggravated robbery with a deadly weapon and sentenced to fifty years in jail. Bernier now challenges his convictions on habeas corpus claiming that his Sixth Amendment rights to confront witnesses against him and to effective assistance of counsel were violated. Because we find that his arguments have no merit, we deny his appeal.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

On October 30, 1982, Bernier and his girlfriend, both Canadian citizens hitchhiking across the United States, went to a bar in Breckenridge, Texas. Bernier and his girlfriend observed the victim, Felipe Flores, buying drinks for other people in the bar. Bernier told another bar patron that Flores had a lot of money and that "we ought to roll him." A few minutes later, Bernier "rolled" Flores in the parking lot using a hammer to fracture Flores' skull. This assault was witnessed by two individuals who happened to be in the parking lot. Bernier admits that he assaulted Flores, but disputes the finding that he also robbed Flores. Flores was found behind the bar with several depressed skull fractures, which according to the doctor who testified, caused "a profound defect in his overall mentation," leaving him without the ability to care for himself or to be employed or self-sufficient.

Bernier exhausted state remedies before filing the instant petition on March 10, 1993. On September 30, 1993, the magistrate judge recommended denial of the petition without an evidentiary hearing. Based on the Statement of Facts, the magistrate judge determined *inter alia* that (a) no Confrontation Clause violation occurred because the State had a reasonable explanation for its failure to produce Flores as a witness because he was not mentally capable of testifying, and (b) Bernier's ineffective assistance claims did not establish deficient performance or prejudice.

The district court overruled Bernier's objections to the magistrate judge's findings, adopted the magistrate judge's Memorandum and Recommendation, and entered an Order denying Bernier's petition. Bernier noticed his appeal timely, and the district court granted a Certificate of Probable Cause.

DISCUSSION

Bernier argues that the district court erred by not holding an evidentiary hearing to determine if his Sixth Amendment right to confrontation was violated because the State did not call Flores as a witness and did not satisfactorily account for his absence. Without the ability to cross-examine Flores, Bernier contends, he was unable to prove that he did not commit the robbery. "A federal evidentiary hearing on a constitutional claim must be held only where the state court has not provided a hearing, where the petitioner alleges facts which, if proved, would entitle him to relief, and where the record reveals a genuine factual dispute." Lincecum v. Collins, 958 F.2d 1271, 1278 (5th Cir.), cert. denied, 113 S. Ct. 417 (1992). An evidentiary hearing is unnecessary in a § 2254 case if the record before the court is adequate for disposition of the case. Joseph v. Butler, 838 F.2d 786, 788 (5th Cir. 1988); Rules Governing 2254 Cases in the U.S. District Courts, Rule 8(a).

Bernier's right-to-confrontation argument is not based on disputed facts and can be determined from the facts in the record. "[T]he Sixth Amendment provides defendants a right to physically face and cross-examine witnesses who testify against them . . . It

does not require the government to produce witnesses whose statements are not used at trial." United States v. Sanchez, 988 F.2d 1384, 1392 (5th Cir.), cert. denied, 114 S. Ct. 217 (1993) (internal quotation, punctuation, and citation omitted). It is only when the prosecution seeks to present out-of-court statements from a witness at trial that the Confrontation Clause requires the prosecution to show "that the declarant is unavailable and that the statement bears adequate indicia of reliability." United States v. Flores, 985 F.2d 770, 775 (5th Cir. 1993). It is undisputed that the State did not call Flores as a witness or introduce any out-of-court statements he made. Therefore, Bernier had no right to confront Flores or demand an accounting of his absence, the record was adequate for disposition of the claim and the district court did not err in concluding that no evidentiary hearing was required.[1]

Bernier also asserts that the district court erred in deciding that he was not deprived of effective assistance of counsel at trial and on appeal. Bernier argues that his counsel erred at trial by failing to move to suppress his diary and certain photographs which Bernier alleges were illegally seized and by not challenging the State's failure to call the victim as a witness. Bernier also contends that his counsel was ineffective on appeal because he did not argue that Bernier's trial counsel was ineffective.

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[1] It is nothing short of incredible for Bernier to complain that Flores did not testify when his own act of smashing Flores' skull with a hammer rendered him incapable of testifying.

To obtain habeas corpus relief based on ineffective assistance of counsel, a petitioner must show not only that his attorney's performance was deficient but that the deficiencies prejudiced the defense. United States v. Smith, 915 F.2d 959, 963 (5th Cir. 1990). Judicial scrutiny of counsel's performance must be highly deferential, and courts must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2065, 80 L.Ed. 2d 674 (1984). To establish "prejudice," the petitioner is required to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. Id. at 694, 104 S.Ct at 2068. In Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993), this Court held that "[i]n order to avoid turning Strickland into an automatic rule of reversal in the non-capital sentencing context . . . a court must determine whether there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." Id. "`[P]rejudice' must be rather appreciable before a new trial is warranted in view of counsel's error." Id. at 88-89, n.4. If an insufficient showing on one of the components of the inquiry is made, the court need not address the other. Strickland, 466 U.S. at 697, 104 S.Ct at 2069.

The record supports that the district court's determination that counsel's failure to object at trial did not constitute deficient performance. No Confrontation Clause

violation occurred because the State did not call Flores as a witness and Bernier did not adduce any specific facts to support his allegations that the diary and the photographs were seized in violation of the Fourth Amendment. Further, Bernier did not challenge the sufficiency of the evidence on appeal and has failed to show that the result of his trial was rendered unreliable or fundamentally unfair by his counsel's allegedly deficient performance. See Lockhart v. Fretwell, -- U.S. --, 113 S. Ct. 838, 844, 122 L.Ed. 2d 180 (1993). Because Bernier cannot demonstrate that he was given ineffective assistance at trial, he also cannot show that appellate counsel was ineffective for not arguing the ineffectiveness of trial counsel.

For the foregoing reasons, we find that the district court did not err in denying § 2254 relief. **AFFIRMED**.