

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10026

Summary Calendar

LILLION DICK CRUSE,

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
(5:93-CV-26-C)

(July 28, 1994)

Before HIGGINBOTHAM, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

A Texas jury found that Lillion Dick Cruse committed an aggravated robbery by holding up a gas station using a rifle. Cruse received a sentence of life imprisonment. Cruse petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court adopted the magistrate judge's recommendation to dismiss Cruse's application with prejudice. We affirm.

Cruse's petition questions the content and reliability of testimony by Gene Ray Page, a gas station employee and the victim of the robbery. Cruse claims that Page never identified him at trial as the person who committed the crime and that Page's testimony was tainted by suggestive pretrial identification procedures. The record indicates otherwise.

The record of the trial undermines Cruse's claim that Page never identified him. The prosecutor asked Page, "Would you please point [the perpetrator] out to the jury by telling them where he is seated and what he is wearing?" Page answered, "He's seated right here, right behind his attorney." The prosecutor confirmed the identification, "All right. I am pointing to Lillion Dick Cruse, the Defendant in this cause, is this the man you have just identified that came into the station with the rifle?" Page responded, "Yes, sir."

The record also belies Cruse's contention that the pretrial identification procedures were impermissibly suggestive. Cruse recounts that Page selected three photographs from the police albums, and then was unsure when he chose Cruse's photograph from among the three. Cruse does not explain how Page's hesitance could have tainted the later identification.

Cruse also points out that the police initiated a line-up without a request from Page. Cruse does not explain how the police affected Page's judgment by deciding on their own to use a line-up.

Moreover, Page's testimony at trial about the line-up indicates its reliability: "I didn't talk to anyone [about the line-up]. I just went in and [a police officer] told me just to wait here in the room that we would go in in a little while and that's it. . . . I recognized [Cruse] right as I went in, when I first went in the door." Cruse offers no evidence controverting this account.

Finally, Cruse argues that the prosecutor affected Page's testimony. Page identified Cruse at the pretrial hearing but then stated that he could not "really" see Cruse from where he was sitting. The prosecutor then confirmed the identification. Cruse contends that the confirmation somehow tainted Page's later testimony. If Page could see Cruse, then he could identify him; if Page could not see Cruse, then the prosecutor's comments could not have influenced him. In either case, the prosecutor could not have affected Page's ability to recognize Cruse.

Cruse cannot prevail for a second reason. An identification based on observations made independently of suspect identification procedures does not violate due process. See Herrera v. Collins, 904 F.2d 944, 946 (5th Cir.), cert. denied, 498 U.S. 925 (1990); Lavernia v. Lynaugh, 845 F.2d 493, 500 (5th Cir. 1988). Page looked directly at Cruse's face when Cruse entered the gas station, the rifle Cruse was carrying captured Page's attention, Page described Cruse accurately, Page identified Cruse confidently at trial, and the interval that passed between the event and Page's identification of Cruse was relatively brief. These circumstances indicate reliability. See Neil v. Biggers, 409 U.S. 188, 199-200

(1972). Page stared down the barrel of a rifle into Cruse's face from two feet away. The impression Cruse made on Page provides a solid basis for identification independent of any suggestive pretrial identification procedures.

AFFIRMED.