

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-10102  
Summary Calendar

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PAUL EDWARD HOOD,

Petitioner-Appellant,

VERSUS

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

Respondent-Appellee.

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Appeal from the United States District Court  
for the Northern District of Texas  
(4:93-CV-241-Y)

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(August 25, 1994)

Before SMITH, WIENER, and PARKER, Circuit Judges.

PER CURIAM:\*

Paul Hood appeals the denial of his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Filing no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Hood was charged with theft of property valued at less than \$750 arising out of a shoplifting incident (Cause No. 0272988-D) and a class-A misdemeanor raised to a felony by two prior theft convictions, Cause No. 192595R in 1982 and Cause No. 0269916R in 1985. This was in accordance with the Texas Penal Code, which provides that if "the value of the property stolen is less than \$750 and the defendant has been previously convicted two or more times of a grade of theft," the offense is a third-degree felony. TEX. PENAL CODE ANN. § 31.03(e)(4)(E) (West 1974). In 1986, Hood was convicted under this three-time-offender provision of felony theft.

Hood's sentence was enhanced pursuant to the Texas Penal Code, which provides in pertinent part:

If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life, or for any term of not more than 99 years or less than 25 years.

TEX. PENAL CODE ANN. § 12.42(d) (West 1974). Hood had two prior felony convictions, for burglary of a habitation in 1975 (Cause No. 8381) and burglary in 1973 (Cause No. 88579). He was sentenced to forty years' imprisonment.

Hood's conviction was affirmed in 1988. He filed applications for state writs of habeas corpus. All were dismissed, and Hood is barred from filing further applications in the Texas courts because of the abuse of the writ principle.

Hood filed a federal petition for a writ of habeas corpus,

alleging (1) ineffective assistance of counsel because his appointed counsel (a) failed to make an independent investigation of the facts of the case or of the prior conviction, (b) failed to move for a continuance, (c) failed to object to the prior convictions, and (d) failed to move for a new trial based upon insufficient evidence; (2) that his prior felony conviction in Cause No. 8381 should not have been used to enhance his sentence, because that conviction is not supported by indictment; (3) that his prior felony conviction in Cause No. 0192596-R should not have been used to enhance his theft to a felony because the conviction was unsupported by the indictment, and the state court lacked jurisdiction "while assessing a punishment unauthorized by state law and conviction was unavailable as an element of enhancement to initial Cause 0272988-D"; and (4) that the prior theft convictions used to raise the theft to a third-degree felony "were not shown to be final convictions for a jury to find beyond a reasonable doubt each element of the offense as true." A magistrate judge recommended that relief be denied. Following Hood's objections to the magistrate judge's report and recommendation, the district court reviewed the record de novo, adopted the magistrate judge's findings and conclusions, and entered a final judgment denying relief. The district court issued a certificate of probable cause to appeal.

Hood, proceeding pro se, appeals, arguing that (1) the state court erred by denying his pretrial motion regarding arguments about prior nonfinal theft convictions; (2) the state court erred

by denying his pretrial motion to quash the indictment concerning the prior conviction in Cause No. 0192596-R; (3) the state court erred by enhancing his theft charge based upon Cause No. 8381 and denying his pretrial motion concerning that conviction; and (4) he was denied effective assistance of counsel and denied a fair trial in violation of the Sixth and Fourteenth Amendments.

## II.

Hood argues that the prior theft convictions (Cause Nos. 0269916-R and 01925966-R) used to raise the theft to a third-degree felony "were not shown to be final convictions for a jury to find beyond a reasonable doubt each element of the offense as true." When we test the sufficiency of the evidence in the context of a habeas petition, the state conviction must stand unless no rational trier of fact, when viewing the evidence in the light most favorable to the prosecution, could have found the essential elements of the offense proven beyond a reasonable doubt. Duff-Smith v. Collins, 973 F.2d 1175, 1184 (5th Cir. 1992), cert. denied, 113 S. Ct. 1958 (1993).

Because Hood was convicted of a violation of state law, the substantive law of Texas defines the elements of the crime that must be proved. Young v. Guste, 849 F.2d 970, 972 (5th Cir. 1988). Under Texas law, when the property stolen is valued less than \$750 and the defendant has two or more previous convictions for any grade of theft, it is a third-degree felony. TEX. PENAL CODE. ANN. § 31.03(e)(4)(E).

While in one sense the [prior] theft convictions become "elements" of the primary offense, they only function as a jurisdictional basis for defining the offense as a felony. They are not elements of that offense in the complete, traditional sense. For example, appellate reversal due to failure of proof on the prior convictions alleged under Section 31.03(e)(4)(C) does not result in acquittal, but in remand for transfer to a court of misdemeanor jurisdiction for retrial.

Menchaca v. State, 780 S.W.2d 917, 919 (Tex. App.) El Paso 1989, no writ) (citation omitted).

Hood argues that the evidence was insufficient to support his conviction of felony theft because the state did not introduce any evidence to prove that the prior convictions were final convictions. This argument lacks a factual basis. At trial, the state introduced a certified exemplified copy of the judgment in Cause No. 0269916-R, dated December 16, 1985. The chief prosecutor for the criminal district court testified that he witnessed Hood pleading guilty to that cause. A certified exemplified copy of the conviction in Cause No. 0192596-R, dated August 23, 1982, was entered into evidence. Testimony was presented matching Hood's fingerprints with those in the certified exemplified copy of the records showing Hood's conviction.

Hood presented no evidence showing that the convictions were not final. A reasonable jury easily could have found beyond a reasonable doubt that the prior convictions were proved to be final. The state trial court did not lack jurisdiction over the case. See Menchaca, 780 S.W.2d at 919.

III.

Hood argues that his prior felony conviction in Cause No. 0192596-R should not have been used to raise the primary theft offense to felony theft. Hood contends that he was convicted in Cause No. 0192596-R for an offense not charged in the indictment.

Hood was charged in the indictment with theft of property valued at more than \$20 and less than \$200. The indictment further alleged three prior theft convictions. Hood was convicted upon a guilty plea of theft of property valued at more than \$20 and less than \$200 and three prior misdemeanor theft convictions. He was convicted of the offense charged in the indictment.

Hood argues that he was improperly convicted under a general statute for theft (TEX. PENAL CODE ANN. § 31.03(d)(3) (Vernon 1974), when a special statute (TEX. PENAL CODE ANN. § 31.03(d)(4)(c) (Vernon 1974)) should have been applied. Hood contends that because the value of the property stolen was more than \$20 and less than \$200, he should have been charged with misdemeanor theft. See TEX. PENAL CODE ANN. § 31.03(e)(2)(A).

Hood does not address the three prior theft convictions alleged in the indictment. Under Texas law, if the value of the property stolen is less than \$750 and the defendant has been previously convicted two or more times of any grade of theft, the theft is a third-degree felony. TEX. PENAL CODE ANN. § 31.03(e)(4)(E) (West 1989) (formerly § 31.03(d)(4)(c) (Vernon 1974)). Hood fell squarely under this provision; his collateral attack of this conviction lacks merit. Cause No. 0192596-R was properly used to

raise the instant offense to a felony.

IV.

Hood argues that his prior felony conviction in Cause No. 8381 should not have been used to enhance his sentence because that conviction was not the crime charged in the indictment. Hood contends that he was charged with burglary of a building but convicted of burglary of a habitation.

This argument is without merit. Hood was charged in the indictment with burglary of a building that "was then and there a habitation." Hood pleaded guilty to and was convicted of burglary of a habitation. The conviction in Cause No. 8381 was properly used for enhancement purposes.

V.

To prevail on his claim of ineffective assistance of counsel, Hood must show (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687-94 (1984). "To satisfy the first Washington prong, a petitioner must demonstrate attorney performance outside the wide range of reasonable professional assistance and must overcome a strong presumption of adequacy. After surmounting this first hurdle, the petitioner further must demonstrate `a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different.'" Clark v. Collins, 19 F.3d 959, 964 (5th Cir. 1994) (footnote omitted). In order to show prejudice, Hood must demonstrate that counsel's errors were so serious as to "render[] the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993). A failure to establish either deficient performance or prejudice defeats the claim. Washington, 466 U.S. at 697.

A.

Hood argues that his trial counsel failed to make an independent investigation of the facts of the case or of the prior convictions. Hood contends that through investigation, "[c]ounsel could have assisted Appellant in getting records for evidence, the necessary documents consistent with Appellant's arguments made at the hearing such as indictments, judgments and sentences to the prior convictions complained about by Appellant and for a higher court to review for appeal, being counsel's responsibility." To make a case of ineffective assistance of counsel for failure to investigate, a habeas petition "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989).

As addressed above, challenges to the indictments, judgments, and sentences for the prior convictions would have been unsuccessful. Indeed, Hood filed pro se motions on each of these issues, which were rejected by the court at the pretrial hearing. Hood has



not shown how counsel's alleged failure to investigate would have altered the outcome of the trial.

B.

Hood argues that his defense counsel failed to move for a continuance to allow Hood time to prepare and to file pro se motions. Hood has not shown prejudice. At the pretrial hearing, the court granted Hood leave to file "more [pro se] motions in regards to enhancement." He does not state what other motions he would have filed had a continuance been granted or how the outcome would have been different.

C.

Hood argues, for the first time on appeal, that his trial counsel failed to inform him of his right to self-representation. A criminal defendant is not entitled to hybrid representation. Smith v. Collins, 977 F.2d 951, 962 (5th Cir. 1992), cert. denied, 114 S. Ct. 97 (1993). Hood had court-appointed counsel yet was granted leave of court at the pretrial hearing to file all pro se motions he had prepared. He has not shown how he was prejudiced by this alleged failure. Hood has not demonstrated that the alleged deficient performance of his trial counsel prejudiced his defense.

AFFIRMED.