IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10242
Summary Calendar

LINK POWELL, JR.,

Petitioner-Appellant,

v.

E.G. OWENS, WARDEN,
W.P. CLEMENTS UNIT,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(1:93-CV-123-C)

(December 22, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Link Powell, Jr., was convicted by a Texas jury of aggravated robbery and was sentenced to sixty years in prison. Upon exhaustion of all possible state court relief, Powell, proceeding *pro se* and *in forma pauperis*, filed a petition for a writ of habeas corpus in the federal district court, which denied his petition on the merits. We affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 15, 1985, two men robbed the Commodore Savings & Loan in Abilene, Texas. One man had a stocking over his head, but not over his face. The other man wore a ski mask which covered his face. The man with the stocking brandished a .22 caliber weapon and ordered three female employees to lie face down on the floor. Both men yelled at the employees and warned them not to hit the alarm. The robbers took approximately $24,000 in cash, including some "bait money," the serial numbers of which had been recorded by the bank. An eyewitness spotted the two robbers fleeing the scene in a green pickup truck and followed them to a house located at 1126 South Bowie. The eyewitness returned to the savings and loan and took the police to the Bowie Street address.

After obtaining consent, the police searched the Bowie Street house and discovered several incriminating items of evidence. First, underneath a couch located near the rear fence of the home, the officers discovered a blue corduroy jacket containing approximately $7,500 cash, a stocking mask, a ski mask, and several .410 shotgun shells. Second, inside the attic of the home, the officers discovered James Douglass, as well as a .22 caliber pistol and a metal drawer from Commodore Savings containing over $12,000 in cash. Both the money in the corduroy jacket and the money in the attic were later confirmed to include some of the "bait money" recorded by the savings and loan. In addition, the owner of the green pickup truck testified that she

had loaned the truck to Douglass, who later returned to the Bowie Street address, carrying the metal cash drawer and accompanied by Powell. She also testified that Powell was wearing a blue corduroy jacket when he entered the house. A neighbor testified that she saw Powell deposit a bundle in the backyard of the Bowie Street address and head out of the backyard onto the street.

A police officer discovered Powell in the street behind the Bowie Street home. Both Douglass and Powell were taken to the savings and loan for identification by the employees. The employees positively identified Douglass as the robber who wore the stocking on his head, but could not positively identify Powell as the other robber who wore the ski mask. A chemist testified that a hair found inside the corduroy jacket matched a hair sample taken from Powell. A fingerprint expert testified that a latent print lifted from the metal cash drawer matched the right thumbprint of Powell. Based on this evidence, the jury found Powell guilty of aggravated robbery.

On December 4, 1986, the Texas Court of Appeals affirmed Powell's conviction on the merits. The Texas Court of Criminal Appeals denied Powell's petition for discretionary review. Powell filed two successive applications for a writ of habeas corpus in state court, both of which were denied without written order. It is undisputed that Powell's state court remedies have been exhausted.

Powell next filed the instant petition seeking a writ of habeas corpus from the federal district court, asserting five

points of constitutional error: (1) there is no evidence or insufficient evidence to support the aggravating factor (use or exhibition of a deadly weapon) under which Powell was convicted, depriving Powell of his substantive due process liberty interest because the aggravating factor increased his minimum prison term; (2) Powell did not receive fair notice that the state intended to seek a law of the parties instruction, resulting in a denial of procedural due process; (3) the jury instruction sought by the state regarding the law of the parties constituted an "abandonment" of the original indictment, rendering Powell's trial violative of the Double Jeopardy Clause of the federal and state constitutions; (4) the taking of hair samples from Powell was done without a warrant in violation of the Fourth Amendment; and (5) Powell's trial and appellate counsel were ineffective for failing to prevent the above-described errors in violation of the Sixth Amendment. The district court, upon the Magistrate Judge's recommendation, denied all of these contentions on the merits. Powell filed a timely appeal to this court, reasserting the same five points of error.

II. STANDARD OF REVIEW

We note as an initial matter that we review the briefs of *pro se* litigants more liberally than those filed by counsel. Securities and Exch. Comm'n v. AMX, Int'l, Inc., 7 F.3d 71, 75 (5th Cir. 1993). In reviewing a habeas petitioner's claim of insufficient evidence, we must ask whether, viewing the evidence

in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); Callins v. Collins, 998 F.2d 269, 276 (5th Cir. 1993), cert. denied, 114 S. Ct. 1127 (1994). When, as here, a state appellate court has reviewed the sufficiency of the evidence to support a conviction, that state court's determination is entitled to great weight in a federal habeas review. Porretto v. Stalder, 834 F.2d 461, 467 (5th Cir. 1987). In considering a federal habeas corpus petition presented by a petitioner in state custody, federal courts must accord a presumption of correctness to state court factual findings. 28 U.S.C. § 2254(d); Barnard v. Collins, 958 F.2d 634, 636 (5th Cir. 1992), cert. denied, 113 S. Ct. 990 (1993). We review the district court's findings of fact for clear error, but review any issues of law *de novo*. Barnard, 958 F.2d at 636.

III. ANALYSIS

A. Sufficiency of the Evidence.

Powell argues that there was insufficient evidence to support his conviction for aggravated robbery because there was no evidence to indicate that he used or exhibited a deadly weapon. Because there was insufficient evidence to support the aggravating factor, Powell contends that he received a longer prison term than he would have received for simple robbery, resulting in a deprivation of his liberty interest protected by

the Due Process Clause. We find this argument to be without merit.

The so-called "law of the parties" in Texas permits an accused to be indicted as a principal and convicted on evidence that he merely aided or abetted the commission of the offense. Reyes v. State, 741 S.W.2d 414, 424 (Tex. Crim. App. 1987) (en banc); see also TEX PENAL CODE ANN. § 7.01(a) (stating that one may be held criminally responsible for an offense "committed by his own conduct, or by the conduct of another for which he is criminally responsible, or by both."). The same principle is permitted in the federal courts and is consistent with the federal constitution, including the Due Process Clause. See 18 U.S.C. § 2; United States v. Walker, 621 F.2d 163, 166 (5th Cir. 1980), cert. denied, 450 U.S. 1000 (1981); United States v. Vines, 580 F.2d 850, 853 (5th Cir.), cert. denied, 439 U.S. 991 (1978). There was abundant evidence that Powell aided or abetted a robbery in which a co-participant (Douglass) used or exhibited a .22 caliber pistol. Thus, Powell was not deprived of due process by being held criminally responsible for the foreseeable actions of Douglass.

B. Procedural Due Process: Fair Notice.

Powell argues that he was not given fair notice that the state would seek a "law of the parties" instruction at trial because his indictment alleged that he was a primary actor who used or exhibited a deadly weapon in the course of committing

robbery. Specifically, Powell characterizes the difference between the indictment (alleging primary actor status) and the jury instruction (alleging aider or abettor status) as a "fatal variance" which deprived him of procedural due process. This argument must fail. It is not error, much less error of a constitutional magnitude, to be indicted as a principal and then to be convicted under the law of the parties. Jacobs v. Scott, 31 F.3d 1319, 1329 (5th Cir. 1994); Reyes, 741 S.W.2d at 424; Rico v. State, 707 S.W.2d 549, 551 (Tex. Crim. App. 1983); English v. State, 592 S.W.2d 949, 955 (Tex. Crim. App.), cert. denied, 449 U.S. 891 (1980).

C. Double Jeopardy.

Powell contends that he was subjected to successive prosecutions for a single crime in violation of the Double Jeopardy Clause of both the federal and the Texas constitutions. Specifically, Powell argues that by charging the jury on the law of the parties, he was implicitly "acquitted" of the offense charged in the indictment, which alleged that Powell was a primary actor.

The Double Jeopardy Clause protects individuals from the imposition of multiple punishments for the same offense. Illinois v. Vitale, 447 U.S. 410, 415 (1980). Thus, the question in this case is whether the state's "abandonment" of the theory alleged in the indictment (primary actor status) and subsequent instruction regarding the law of the parties effectively placed

Powell's liberty in jeopardy twice. We think not. Providing a law of the parties instruction is not tantamount to an "acquittal" of the offense charged in the indictment. Powell was subjected to only one trial and faced the imposition of punishment only once; thus, there is no violation of the Double Jeopardy Clause.

D. Fourth Amendment Claim.

Powell contends that the collection of his hair samples amounted to an illegal search and seizure in violation of his Fourth Amendment rights. This argument must also fail. It is well-settled that a state prisoner may not prevail on a Fourth Amendment claim in a federal petition for a writ of habeas corpus if the state has provided a full and fair opportunity to litigate the claim in state court. Stone v. Powell, 428 U.S. 465, 493-95 (1976). A state prisoner has a full and fair opportunity to litigate if the state provides processes through which a defendant can obtain review of his Fourth Amendment claim. Caver v. Alabama, 577 F.2d 1188, 1192 (5th Cir. 1978).

Powell was given a full and fair opportunity to challenge his arrest and the taking of his hair samples during his state trial, appeal, and two state habeas petitions. Thus, the bar of Stone v. Powell applies, and Powell is not entitled to federal habeas review of his Fourth Amendment claim.

E. Ineffective Assistance of Counsel.

Powell asserts that both his trial and appellate counsel were constitutionally ineffective. Specifically, Powell claims that his trial counsel was deficient for two reasons: (1) failure to object to the instruction regarding the law of the parties; and (2) failure to file a motion to suppress the hair sample taken from Powell. Powell claims that his appellate counsel was defective in his failure to successfully argue the four preceding points of error discussed in this opinion.

The standard for assessing the effectiveness of counsel was announced in Strickland v. Washington, 466 U.S. 668 (1984). Strickland requires the defendant to prove two things: (1) that counsel's performance was deficient under an objective standard of reasonableness, id. at 687-88; and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. When assessing whether an attorney's performance was deficient, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689; Andrews v. Collins, 21 F.3d 612, 621 (5th Cir. 1994). The defendant, moreover, may not simply allege, but must "affirmatively prove" prejudice, which means "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 693, 687; Lockart v. Fretwell, 113 S. Ct. 838, 842

(1993). If the defendant makes an insufficient showing on either one of the two prongs of the Strickland test, the court need not address the other. Strickland, 466 U.S. at 697.

With regard to Powell's contention that his trial and appellate counsel should have objected to the law of the parties instruction, he cannot prevail because we have concluded that such an objection would have been fruitless; thus, Powell cannot meet the deficiency prong of Strickland and we need not address the prejudice prong. With regard to Powell's contention that his appellate counsel was deficient for failing to successfully argue the four preceding points of error discussed in this opinion, we likewise conclude that Powell cannot satisfy the deficiency prong because we have determined that these contentions lack merit. As such, appellate counsel's failure to argue these points of error was objectively reasonable.

Finally, with regard to Powell's contention that his trial counsel was defective for failing to file a motion to suppress the hair sample taken from Powell, we conclude that Powell cannot satisfy the deficiency prong of Strickland. At the time the hair sample was taken, Powell was in lawful custody pursuant to an indictment charging him with aggravated robbery. The question, therefore, is whether the taking of a hair sample constituted an "unreasonable" search and seizure within the meaning of the Fourth Amendment.[1]

[1] We note that there could have been no valid Fifth Amendment grounds for objecting to the hair sample as it was not "testimonial" in nature. United States v. Dougall, 919 F.2d 932,

The police had probable cause to believe that Powell had committed aggravated robbery and probable cause to believe that evidence of the crime would be found by taking a hair sample. In 1966, the United States Supreme Court determined that the warrantless taking of a blood sample from an individual suspected of driving while intoxicated, if taken for cogent reasons and in a reasonable manner, does not violate the Fourth Amendment. Schmerber v. California, 384 U.S. 757, 770-71 (1966). The Court noted that "the Fourth Amendment's proper function is to constrain, not against all intrusions [into the body] as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." Likewise, in Cupp v. Murphy, 412 U.S. 291 (1973), the Supreme Court determined that the taking of fingernail scrapings from an individual suspected of murder was not unreasonable where there is a legitimate concern that the evidence would disappear without expeditious recovery. In addition, at the time of Powell's trial, at least three other circuits had concluded that the taking of hair samples without a search warrant does not violate the Fourth Amendment. See In re Grand Jury Proceedings, 686 F.2d 135 (3d Cir.), cert. denied, 459 U.S. 1020 (1982); United States v. Weir, 657 F.2d 1005 (8th Cir. 1981); United States v. D'Amico,

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935 (5th Cir. 1990), cert. denied, 501 U.S. 1234 (1991); cf. United States v. Wade, 388 U.S. 218 (1967) (holding that asking accused to repeat words used in robbery is not testimonial and therefore not self-incriminatory); Gilbert v. California, 388 U.S. 263 (1967) (holding that taking of handwriting exemplars is not testimonial).

408 F.2d 331 (2d Cir. 1966). In light of these existing precedents and Strickland's strong presumption that such trial decisions are within the realm of reason, we cannot say that Powell has carried his burden of proving that his trial counsel's decision to forego a motion to suppress was objectively unreasonable; accordingly, his ineffective assistance of counsel claim must fail.[2]

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is, in all respects, AFFIRMED.

[2] We also note that even assuming arguendo that Powell has established the requisite deficiency, he has not borne his burden of affirmatively proving that this deficiency resulted in prejudice. Strickland, 466 U.S. at 697.