UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10535

DONNIE MACK McCULLAR,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(6:93-CV-90-C)

(May 30, 1995)

Before KING and JONES, Circuit Judges and KAZEN*, District Judge.

PER CURIAM:**

Donnie Mack McCullar was convicted of two savage murders, and two additional counts of attempted murder in 1985. He has previously filed four state applications for Writ of habeas corpus with the Texas Court of Criminal Appeals, and recently forwarded his claims to federal court with the filing of a petition for writ

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* District Judge of the Southern District of Texas, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of habeas corpus in the district court for the Northern District of Texas. That court denied relief, and refused to grant a motion for a certificate of probable cause (CPC) to appeal. McCullar now applies to this court to issue a CPC.

Our court has no jurisdiction to address the merits of McCullar's appeal from the district court's denial of habeas relief unless we grant a CPC. See Drew v. Scott, 28 F.3d 460, 462 (5th Cir.), cert. denied, 115 S.Ct. 5 (1994). To obtain a CPC, McCullar must make a substantial showing that he has been denied a federal right. See Barefoot v. Estelle, 463 U.S. 880, 893 (1983). Because the Supreme Court has dictated that "the issuance of a certificate of probable cause generally should indicate that an appeal is not legally frivolous," Barefoot, 463 U.S. at 894, we grant the CPC to resolve the merits of McCullar's claims. Nonetheless, this court is impelled to deny relief since ultimately McCullar's arguments[1] are not cognizable in a federal habeas proceeding.

I.

McCullar contends that his indictments did not satisfy state law because they failed to specifically plead a gun as a deadly weapon. Consequently, he argues his Sixth Amendment right to be informed of the nature of the accusation against him was violated.[2] However, the sufficiency of an indictment "is not a

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[1] McCullar's ineffective assistance of counsel claim may be raised in a collateral proceeding, but we do not discern any merit in his argument. See Sec. VI.

[2] He thus petitions for us to vacate his conviction. It is also possible to interpret his contention to be that the (attempted murder) deadly weapon finding should be vacated because it would improve his chances for parole. In either event,

matter of federal habeas corpus relief unless it can be shown that the indictment is so defective that the convicting court had no jurisdiction." Branch v. Estelle, 631 F. 2d 1229, 1233 (5th Cir. 1980). If the sufficiency of the indictment has been presented to the highest state court on appeal and that court holds that the trial court had jurisdiction then federal habeas corpus court is foreclosed from considering the issue. Sloan v. Estelle, 710 F.2d 229, 232 (5th Cir. 1983).

McCullar raised his defective indictment allegations in his third state writ. Relief was denied in a written opinion by the Texas Court of Criminal Appeals. "By refusing to grant the appellant's relief, however, the Texas Court of Criminal Appeals has necessarily, though not expressly, held that Texas courts have jurisdiction and that the indictment is sufficient for that purpose." Alexander v. McCotter, 775 F.2d 595, 599 (5th Cir. 1985).[3]

In response, McCullar objects to the state court's reference to cases decided subsequent to his conviction. Instead, McCullar contends that his claims should be evaluated under the law as it existed at the time of his conviction. (Specifically, McCullar argues that Polk v. State, 693 S.W.2d 391 (Tex. App. 1985), requires that a deadly weapon or firearm be specifically

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McCullar has attacked the validity of the indictment, which is analyzed similarly irrespective of the remedy he seeks.

[3] McCullar also complains of the trial court error in entering an affirmative finding on the use of a deadly weapon. McCullar admits, and the record reflects, he has already received relief on his claim as the state high court deleted the affirmative findings from the judgments.

plead as such in an indictment.) Nevertheless, an interpretation of state law by state court is not subject to review by a federal habeas court. Seaton v. Procunier, 750 F.2d 366, 368 (5th Cir. 1985). Moreover, McCullar cannot even raise an *Ex Post Facto* objection because "[i]t is well established that the *Ex Post Facto* clause applies only to legislative acts." United States v. Olivares-Martinez, 767 F.2d 1135, 1139 (5th Cir. 1985). If there has been no change in the statute, but only a novel interpretation of existing statutory law, an Ex Post Facto violation is impossible. Gabel v. McCotter, 803 F.2d 814, 815 (5th Cir. 1986), cert. denied, 482 U.S. 929 (1987).

II.

McCullar alleges the trial court denied him a fair trial by commenting on several exhibits and by limiting impeachment of a state witness. On direct state appeal, the state appellate court held that by failing to object, to these comments, McCullar had waived any error and thus failed to preserve anything for review. Thus, his claim is barred from federal habeas review. Coleman v. Thompson, 501 U.S. 722, 750 (1991) ("In all cases in which the prisoner has defaulted in his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claim is barred unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate their failure to consider the claims will result in the fundamental miscarriage of justice.") McCullar restated this exact claim in

his third state habeas application, and the trial court denied it as it had been disposed of on direct appeal. Without elaboration, the Texas Court of Criminal Appeals denied relief on this basis.

Of course, the procedural fault does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering judgment in the case clearly and expressly states that its judgment rests on the state procedural bar. Harris v. Reed, 49 U.S. 255, 263 (1989). Where the last reasoned opinion on the claim explicitly employs the procedural default, we will presume that a later decision rejecting the claim did not entirely disregard that bar and consider the merits. YLST v. Nunnemaker, 501 U.S. 797, 803 (1991). Finally, the fact that the state appellate court also addressed the merits of the claim does not remove the bar. Thompson v. Lynaugh, 821 F.2d 1080, 1082 (1987). Here, none of the exceptions to the procedural bar rule is applicable.

III.

McCullar also finds error in the lack of a jury charge on the affirmative defense of voluntary renunciation and on the jury instruction actually given regarding parole. In Texas it is an affirmative defense to prosecution for attempted murder that under circumstances manifesting a voluntary and complete renunciation of the criminal objective, the actor avoided commission of the offense attempted by abandoning his criminal conduct. Tex. Penal Code Ann. § 15.05(a) (Vernon 1994). An instruction on an affirmative defense need not be given unless there is evidence which supports the

defense, however. Tex. Penal Code Ann. § 2.04(c) (Vernon 1994). The state appellate court adeptly characterized the unavailability of such defense.

> [McCullar] asserts that the issue was raised as to the attempted murder of Loeffler by the evidence that he did not pursue Loeffler into the house after the latter man fled following the initial shots. However, renunciation is not voluntary if it is motivated in whole or in part by circumstances not present or apparent at the inception of the defendant's course of conduct that make more difficult the accomplishment of the objective. Tex. Pen. Code. Ann. § 15.04(c)(1) (1974). That [McCullar] chose not to pursue Loeffler after his initial effort to kill the man proved unsuccessful does not support the defense of voluntary renunciation.
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> The evidence also fails to raise an issue of voluntary renunciation with respect to the attempted murder of Michael Hensley. As previously noted, Hensley testified [McCullar] pointed a sawed-off shotgun at him and repeatedly pulled the trigger without effect, while voicing an intent to kill. [McCullar], on the other hand, testified he did not point a weapon at the younger Hensley, and denied making any sort of assault on him. Neither version supports the conclusion that [McCullar] avoided the murder of Michael Hensley by voluntarily abandoning his criminal objective.

The state court's determination of sufficiency is entitled to great weight. Parker v. Procunier, 763 F.2d 665, 666 (5th Cir.), cert. denied, 474 U.S. 855 (1985). The trial court is not required to instruct the jury on a defense theory if the evidence is insufficient as a matter of state law for the defendant to prevail on that theory. Solvang v. Blackmun, 804 F.2d 885, 887 (5th Cir. 1986), cert. denied, 41 U.S. 1019 (1987). McCullar fails to cite any portion of the record which refutes the state appellate

court's conclusion,[4] McCullar's complaint vis à vis the jury instruction and good time credit in parole eligibility cannot raise a constitutional issue.

In a non-capital case a jury instruction on good time credit or parole eligibility is not a constitutionally infirm instruction. Mendez v. Collins, 947 F.2d 189, 190 (5th Cir. 1991).

IV.

Each of McCullar's indictments alleged in two separate enhancement paragraphs that McCullar had been convicted of burglary in 1966 and again in 1970. He contends that the use of the prior convictions for enhancement in each offense violates due process. Prior to 1979, Texas law prohibited the prosecution from using a prior conviction more than once to enhance punishment. See Ex Parte Bonham, 707 S.W. 2d 107, 108 (Tex. Crim. App. 1986). This limitation was removed in 1979 by statute. Tex. Pen. Code § 12.46 (Vernon Supp. 1992). McCullar contends that because his prior convictions occurred prior to this statutory revision of 1979 they are unavailable for multiple use. This claims centers, however, on an alleged state procedural violation which is not reviewable by a federal court. Morano v. Estelle, 717 F.2d 171, 179 (5th Cir. 1983), cert. denied, 466 U.S. 965 (1984). "Federal courts hold no supervisory over state judicial proceedings and may intervene only to correct the errors of constitutional dimension." Smith v. Phillips, 455 U.S. 209, 221 (1982). To circumvent this bar,

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[4] Renunciation is not effective. Even taking solely McCullar's testimony into account, there was nothing to renounce because according to him he did not point any weapon at anyone.

McCullar argues that the use of his prior convictions is an *Ex Post Facto* violation because it inflicts a greater punishment than that which was prescribed when the crime was committed. This argument is foreclosed by Gryger v. Burke, 334 U.S. 728 (1948), where use of state's habitual offender statute was not found to be invalidly retroactive. See also United States v. Leonard, 868 F.2d 1393, 1399 (5th Cir. 1989)

V.

McCullar challenges the sufficiency of the evidence for the conviction of the murder of Mr. Travis Scoggins. He suggests that there was no evidence to negate the theory that he shot in the heat of sudden passion or self-defense. According to Jackson v. Virginia, 433 U.S. 307, 319 (1979), review of a state court conviction in a federal habeas action requires this court to ask whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The elements of a crime are determined by substantive state law. Alexander v. McCotter, 775 F.2d at 597. Here the state habeas court found that "[t]here is absolutely nothing in the record by way of probative evidence that would raise the issue of voluntary manslaughter or sudden passion . . . . Under the record in the circumstances there was no duty upon the state of [sic] negate the existence of sudden passion." McCullar has offered no evidence in the record to refute the state court's findings.[5]

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[5] McCullar is plain wrong to assert that there is no evidence linking him to the fatal shot killing Travis Scoggins. Although the firearms examiner could not state with certainty from which of the three weapons McCullar had control of the

VI.

Finally, McCullar asserts that he received ineffective assistance of counsel. To prevail on such a claim, a state prisoner seeking federal habeas corpus relief must show that his attorney's performance was deficient and that the deficiency prejudiced him to the point that he was deprived of a fair trial. Strickland v. Washington, 466 U.S. 668, 678 (1984). Ultimately, McCullar provides ten deficiencies that he believes indicate that "the counsel's representation fell below an objective standard of reasonableness." Id. at 678.

1. Regarding the recovered bullet, McCullar contends that his counsel should have taken measures of the bullet's trajectory, seized advantage from the state's failure to submit a paraffin test, and presented a defense expert to counter the state's firearm expert. Unfortunately, McCullar fails to explain how the results of these actions would have impacted a verdict. It is not this court's role to assume the existence of prejudice; Strickland requires that a petitioner "affirmatively approve" prejudice. Smith v. McCotter, 786 F.2d 697, 703 (5th Cir. 1986).

2. McCullar alleges that counsel did not interview the state's witnesses prior to trial. Nevertheless, the district attorney's file which contained any and all statements made by the witnesses was open and available for review by counsel. McCullar

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fatal bullet had been fired, by process of elimination she testified that the only weapons that could have fired the shots were the two pistols owned by McCullar. From this evidence the jury could draw the reasonable inference that McCullar shot the victim with his gun.

fails to allege any additional information the interviews would have yielded to his benefit.

3. McCullar further claims that counsel should have objected to an impossible date alleged to one indictment -- the first enhancement count of the indictment alleged that a burglary had been committed in 1966, while McCullar's other indictments contained a 1970 date. Aside from a different year alleged in one indictment, the month and day of the offense, case cause number, court and offense given in each of the four indictments were identical. A single typographical error could not have misled him as to a prior conviction alleged.

4. McCullar alleges that counsel did not object to multiple use of the prior convictions. Because the repeated use of prior convictions was permissible, any objection of counsel would have been to no avail. See McCoy v. Lynaugh, 874 F.2d 954, 963 (5th Cir. 1989) (counsel is not required to make futile objections.)

5. McCullar claims that counsel should have objected to the jury instruction on parole. Following his trial, the Texas Court of Criminal Appeals held in Rose v. State, 752 S.W.2d 529, 535 (Tex. Crim. App. 1987), that the statutory charge violated the state constitution. Hence, had counsel timely objected to the parole law charge, such objection would have been upheld on appeal. In applying ineffectiveness claims to a non-capital sentencing proceeding, "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." Spriggs v. Collins, 993 F.2d 85, 89 (5th Cir. 1993) (emphasis in original). As the magistrate judge observed in this case, this would be impossible here.

> This is a trial in which there is one simply cold-blooded murder. McCullar starts shooting at Loeffler. Then he fires through a window and kills Travis Scoggins. He then encounters Hensley. According to the findings of the jury it was a murder. The testimony of the witnesses with regard to Hensley indicated at the first contact between Hensley and McCullar, McCullar simply pulled out his shotgun and killed Hensley. He then, according to the evidence and obviously the findings of the jury, points a sawed-off shotgun at Michael Hensley. He tells him he is going to kill him. The only thing, based on those findings, which prevented young Hensley's murder is the weapon misfired. In addition, he goes from two murders and two attempted murders and crashes into and breaks into the house of some other innocent victims, and begins to terrorize them until he is apprehended by the authorities. These are the essential ingredients of the trial. While the Loeffler and Scoggins attempted murder and murder might be mitigated by the apparent drugs involved with those people, and what was happening among them, none of this is true with regard to either of the Hensleys' or the final house where he terrorizes the family. The remaining people are just innocent victims. There is nothing to indicate the imposition of a life sentence on a cold-blooded killer and attempted killer, who had two prior felony convictions, was affected or infected by an erroneous parole instruction, . . .

McCullar fails to demonstrate in this action that the state court would have found harm. Neither can McCullar prove prejudice under the federal habeas standard.

5. McCullar contends he provided counsel with the names of several potential witnesses to call as character witnesses during the punishment phase but that counsel did not do so. Where the only evidence of a missing witness's testimony is from the defendant, claims of ineffective assistance are viewed with great caution. Lockhart v. McCotter, 782 F.2d 1275, 1282 (5th Cir. 1986). "In order for the appellant to demonstrate the requisite strict with prejudice, the appellant must show not only that the testimony would have been favorable, but also the witness would have testified at trial." Alexander v. McCotter, 775 F.2d at 602. McCullar has not named any witness and provided any proof that each would have appeared at trial to testify.

7. The trial court made two brief comments regarding the questioning of Francis McLaughlin, a state witness. Upon recall of the witness by McCullar to testify, the defendant introduced three letters into evidence. The following exchange took place:

> Q. Do you have any idea who the writer of that letter is referring to when they say, "He' shot him with a 'rifle-a' deer rifle," excuse me.
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> A. (Witness shakes head in a negative response.)
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> Q. Your answer is "No"?
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> A. No.
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> The Court: Let me see that a minute.
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> (Thereupon, State's Exhibit Number 3 was tendered to the Court for perusal.)

The Court: Mr. Gray, that's not what the letter says. Now, you -

Mr. Gray: Well, just ---

The Court: I'll admit it ---

Mr. Gray: Yes, sir.

The Court: I will admit the letter, but that's not what that letter says. You may show the letter to the Jury.

Mr. Gray: All right.

(Thereupon, Defendant's Exhibit No. 3 was tendered to the Jury for perusal.)

Q: Would you have any idea what the writer means when they say - quote - "Travis was shot in the head from outside, not inside, of the house. 'He' used a deer rifle on him'"?

A: I don't know. I don't have any idea.

In actuality, the letter read "Travis was shot in the head! From the outside not from the inside of the house, he used a deer rifle on him . . ." Even assuming the comments constituted error by the trial court, the state appellate court found no harm in the incident. More importantly, McCullar fails to establish harm as measured by potential effect on the verdict from this incident.

8. McCullar assaults counsel for not laying the proper predicates to impeach Julie Scoggins. Although counsel initially did have difficulty in his impeachment, he eventually succeeded. No deficiency nor prejudice exists.

9. McCullar alleges that counsel improperly advised him to waive the appearance, confrontation and cross-examination of

witnesses and to consent to the introduction of testimony by affidavits. This attack is conclusory in that he does not specify the testimony and evidence of which he complains. Further, assuming that counsel's advice on the matter was erroneous, McCullar lacked a showing that a different course of action would have aided his case.

10. Again, McCullar faults counsel for not objecting to a jury charge in the use of a deadly weapon when the indictments did not allege such use. To the extent that the state courts have affirmed the validity of the indictment, counsel could not have been deficient in failing to contest the indictment.

Because no hearing is required on claims based upon unsupported generalizations, United States v. Fishel, 747 F.2d 271, 273 (5th Cir. 1984), all of his non-specified and nonconclusory allegations were properly rejected on the state court record. No need for a federal evidentiary hearing was present. McCullar could not circumvent this bar without showing cause and actual prejudice resulting from the failure to adequately develop the material facts for these claims in state court. Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1721 (1992). Because the district court, after due consideration of the magistrate judge's thorough and exhaustive memorandum, properly denied relief, the court's judgment is **AFFIRMED**.