

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-10672  
(Summary Calendar)

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ROBBY LYNN VAUGHN,

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  
(5:92-CV-100)

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( April 12, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:\*

In this appeal of the district court's denial of habeas corpus relief under 28 U.S.C. § 2254, Petitioner-Appellant Robby Lynn

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Vaughn, a state prisoner in Texas, asserts that he was deprived of effective assistance of counsel in violation of his rights under the Sixth Amendment of the United States Constitution. For the reasons set forth below, we affirm the ruling of the district court.

I

FACTS AND PROCEEDINGS

Vaughn is a prisoner of the State of Texas, serving an enhanced, 20-year sentence for aggravated assault with a deadly weapon. The Court of Appeals for the Seventh District of Texas affirmed the judgment of the trial court and made findings of fact as set forth below.

During a surveillance of a stolen pickup, Police Detective Dennis Kelley watched as a blue Suburban approached the pickup and stopped behind it. A man, later identified as Vaughn, got out of the Suburban and approached the pickup. Both vehicles left the area, and Kelley followed at a distance. The Suburban reappeared, rammed Kelley's vehicle, and caused an interlock involving the pickup, Kelley's vehicle, and the Suburban. Kelley got out of his vehicle and called for the occupant of the pickup to get out. Vaughn got out of the Suburban and started running toward an adjacent apartment complex.

Kelley saw that Vaughn had a gun in his hand and ordered him to drop it. Vaughn continued to run but stopped twice and pointed the gun at Kelley as if "trying to take a sight picture." Kelley fired twice at Vaughn, missing him the first time and hitting him

in the belt area the second time. The second shot caused Vaughn to falter and eventually to stop and rest against an apartment building. Kelley questioned Vaughn as to whether he had a gun, and Vaughn answered that he did not.

Kelley returned to his car to retrieve his radio, and a resident of the complex, Wayne Sandlin, watched over Vaughn while Kelley was gone. A holstered pistol was found near the scene, and Kelley identified it as being similar to the gun Vaughn pointed at him.

Vaughn filed a federal petition for writ of habeas corpus, alleging that his counsel was ineffective for failing to conduct an independent investigation or interview potential witnesses. The respondent filed a motion to dismiss and answer, asserting that Vaughn's "conclusory allegations" did not state a claim, and that if Vaughn were permitted to amend his pleadings, the exhaustion requirement had not been met. Vaughn filed a response demonstrating that he had exhausted his remedies in state court. The magistrate judge determined that, although the federal pleadings were "conclusory," they were "within the claim of ineffective . . . assistance of counsel on failure to interview and summon witnesses," and that Vaughn had exhausted state court remedies.

Approximately one month later, the magistrate judge addressed the merits of Vaughn's claim and concluded that Vaughn's pleadings were "nothing more than a set of conclusory allegations." The magistrate judge recommended that the district court dismiss the

petition with prejudice.

Vaughn filed objections to the magistrate judge's report and recommendations. Vaughn argued that he did not interpret the district court's order, which found that the claims had been exhausted, as a requirement that he amend his pleadings "with the same care and diligence he applied in his State Court pleadings." He requested that, should the district court decide that dismissal was proper, the case be dismissed without prejudice. The district court adopted the determination of the magistrate judge that the pleadings were "conclusory" and found that Vaughn had neither sought to amend the pleadings nor indicated in his objections "what he would plead if he were permitted to file amended pleadings." Judgment was entered dismissing Vaughn's habeas petition with prejudice. The district court denied a certificate of probable cause (CPC) and denied Vaughn leave to proceed on appeal in forma pauperis.

We granted CPC and IFP, vacated the judgment of the district court, and remanded for further proceedings. The district court in turn referred the case to the magistrate judge who issued an order allowing Vaughn 30 days in which to amend his complaint. Vaughn filed amended pleadings but did so untimely. Without objection from the respondent, the district court nevertheless permitted the late pleadings to be filed.

The magistrate judge determined that there was no merit to Vaughn's claim of ineffective assistance of trial counsel because Vaughn had not demonstrated prejudice. After de novo review and

consideration of Vaughn's objections to the magistrate judge's report and recommendation, the district court again denied relief and dismissed the petition with prejudice. The district court granted CPC this time but again denied Vaughn leave to proceed on appeal IFP; we, however, granted IFP status.

## II

### ANALYSIS

Vaughn asserts that he was deprived of his Sixth Amendment right to effective assistance of counsel at trial. He argues in particular that counsel (1) failed to interview Vaughn until 15 minutes before the trial began, (2) did not seek out or interview witnesses favorable to his defense, and (3) failed to conduct a proper investigation because he did not visit the scene of the offense. Vaughn informs the court that he was acquitted in federal court on a charge arising out of the same facts, attributing his acquittal to the effective performance of his counsel in that case.

To support this claim, Vaughn must prove two components: 1) that his counsel made errors that were so serious that they deprived him of his Sixth Amendment guarantee, and 2) that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." Id. at 689. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. In order to show prejudice, the defendant must demonstrate that counsel's errors

were so serious as to deprive him of a trial whose result is fair or reliable. Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993).

Failure to call or cross-examine witnesses

Vaughn contends that counsel's failure to consult with him before trial left counsel insufficient time to seek out and interview potential witnesses and to subpoena those who would support his defense. He asserts that, at the time of the trial, counsel did not even know that four witnesses existed: Sandlin, Patricia Robards, Carol Cornwell, and Sherry McCain.

Only Sandlin and Cornwell testified at trial. Sandlin testified that, as Vaughn turned the corner of the building, Sandlin saw Vaughn throw "something," but he could not tell what the object was. Sandlin indicated the area where the object had been thrown, and that he and the officer found a gun in a holster in that area.

Cornwell and McCain did not make statements or testify concerning whether Vaughn had a gun. Cornwell testified that she did not "take note" of Vaughn as he rounded the corner, she was not wearing her glasses, and she was so frightened that she ran into her apartment and called 911. Vaughn contends that counsel failed to cross-examine Cornwell regarding her statement to the police that she did not see him with a gun. His argument lacks a factual basis because Cornwell's statement to the police is silent on the issue of Vaughn's gun possession. At the federal trial McCain testified that Vaughn could have had something in his hand but that she did not know because she "wasn't directly watching that one

thing."

Vaughn argues that the statement of Patricia Robards, who witnessed the incident, is significant because it calls into question the credibility of Officer Kelley. Vaughn insists that, as Kelley was the only person who stated that he saw Vaughn with a gun, a challenge to Kelley's credibility was important.

In her statement, Robards recounted that it was Kelley's car that crashed into the Suburban, not the other way around. According to Vaughn, if Robards' statement had raised a reasonable doubt as to who was responsible for the crash, it also could have raised doubt as to Kelley's testimony concerning the gun. Vaughn's argument that Robards' testimony concerning the details of the crash would have called into doubt Kelley's credibility concerning the presence of a gun is speculative at best.

Vaughn further argues that Robards told police officers in her statement that "only" the police officer had a gun. Robards' statement does not address the question whether Vaughn had a gun; she stated only that she saw Kelley with a gun and heard two shots.

Vaughn does not indicate how the evidence would have been different had counsel interviewed Sandlin, Cornwell, or McCain earlier. Accordingly, Vaughn has not shown that counsel's failure to interview and call these witnesses, who knew nothing about the gun, deprived him of a trial with a fair or reliable result.

#### Failure to visit the scene

Vaughn contends that his trial counsel's failure to visit the scene led to his failure to cross-examine Sandlin concerning the

large fence that separated the apartment complex where Vaughn lay wounded from the apartment complex where the gun was found. Implicitly, he argues that it was crucial to his defense to show the impossibility of his having thrown the gun that was found hidden behind an air conditioning unit in an adjacent apartment complex. Further, the gun was still in a holster, which was snapped closed, and there was no sign of fingerprints.

The jury heard evidence that the gun was found in a holster behind an air conditioning unit on the other side of a fence and that there were no fingerprints on the gun or holster. Officer Vernon Conner testified that he was trying to secure the area when Sandlin told him what he had observed. Conner accompanied Sandlin to an area where Conner found a pistol in a holster behind an air conditioning unit. The gun was in a brown leather holster that exposed only the grips of the pistol.

Bill Hubbard, the supervisor of the Street Crimes Unit, testified that the gun was a .22 caliber, semi-automatic handgun and that it was loaded. Hubbard stated that if the safety was off and the gun was slightly withdrawn from the holster to expose the trigger, the gun could be fired while in the holster.

Vaughn had not demonstrated how counsel's failure to visit the scene to investigate the area where the incident occurred rendered "the result of the trial unreliable or the proceeding fundamentally unfair." See Lockhart, 113 S. Ct. at 844.

#### The federal trial

Vaughn asserts that he was acquitted by a federal jury on a



charge of possession of a firearm by a felon that arose out of the same set of facts. He states that he is aware that we will not base our decision whether counsel at the state trial was ineffective by comparing his performance to that of counsel in the federal trial. He contends nonetheless that there is a marked contrast inasmuch as he was interviewed by federal counsel a number of times before trial, and federal counsel conducted an investigation into the facts. Vaughn argues that, because of federal counsel's performance, a federal jury did

not believe that Vaughn had the ability to run through a huge apartment complex while being chased by a man with a gun (Officer Kelley), pause twice and aim a gun that he was allegedly carrying at the man that was chasing him; have the ability to wipe all fingerprints from the gun, (clad only in a t-shirt and jeans), reholster the gun, snap it shut and throw it over a 5 to 6 foot fence, in an adjacent apartment complex, after being chased and shot . . . , where the gun conveniently missed a large window and landed on a patio snugly behind an air conditioning unit some distance from where he fell wounded.

The subsequent verdict of "not guilty" of the charge of possession of a firearm by a felon in federal court is not pertinent to the question whether counsel in the state trial rendered effective assistance in representing Vaughn on the state charge of aggravated assault. As the federal offense required proof of different elements, we cannot possibly know what swayed the federal jury. Vaughn has not shown that counsel in the state court rendered deficient performance which caused a fundamentally unfair trial or an unreliable result.

AFFIRMED.