IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10703

Summary Calendar

EDWARD CHARLES CROCKETT,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director, Institutional Division, Texas Department of Criminal Justice,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CV-838-Y)

(February 6, 1995)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:[*]

Crockett had no Sixth Amendment right to have an attorney present at his live lineup because he had not yet been indicted. United States v. McClure, 786 F.2d 1286, 1290 (5th Cir. 1986). This lineup was not impermissibly suggestive because everyone in the lineup was wearing jail clothes. Even if the lineups were

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

suggestive, Williams's testimony is admissible because Williams had a good opportunity to see the robber, immediately identified him on videotape, and was positive that Crockett was the robber. See Cantu v. Collins, 967 F.2d 1006, 1014 (5th Cir. 1992), cert. denied, 113 S. Ct. 3045 (1993).

We defer to the trial court's acceptance of the prosecution's race-neutral reason for striking two black jurors. See United States v. Collins, 972 F.2d 1385, 1403 (5th Cir. 1992), cert. denied, 113 S. Ct. 1812 (1993). We also defer to the state habeas court's finding that the prosecution did not knowingly use perjured testimony regarding when an officer used a baton against Crockett. 28 U.S.C. § 2254(d). And the baton incident was immaterial to the defense, so failure to disclose the police report did not violate Brady v. Maryland, 373 U.S. 83, 87 (1963). Crockett argues for the first time on appeal that the state suppressed a videotape of the robbery, but we will not consider this new argument.

Admission of evidence that suggested that Crockett had previously robbed cigarettes from the same store was not unconstitutional, since there was a rational link to the charged offense. Enriquez v. Procunier, 752 F.2d 111, 115 (5th Cir. 1984), cert. denied, 471 U.S. 1126 (1985). It was not fundamentally unfair to admit the witness lineup identification form, since it was merely cumulative of Williams's in-court testimony. Nor was the prosecutor's closing argument about the need to deter criminals and incapacitate Crockett fundamentally unfair.

Crockett's attorney made a reasonable professional judgment not to call Crockett's previous attorney and parole officer as witnesses because that testimony would have been cumulative and seen as biased. Finally, because Crockett has not alleged any facts which, if proven, would entitle him to habeas relief, he had no right to an evidentiary hearing. AFFIRMED.