

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10838
Summary Calendar

DALE LEEROSS ROBINSON,

Petitioner-Appellant,

VERSUS

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

Respondent-Appellee.

Appeal from the United States District Court
For the Northern District of Texas

(1:94-CV-69)

(April 4, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

Per Curiam:*

Dale Leeross Robinson (Robinson), proceeding *pro se* and *in forma pauperis* (IFP), filed a Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, collaterally attacking his Texas

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

murder conviction. Respondent, Wayne Scott, Director of the Texas Department of Criminal Justice, Institutional Division (Respondent or "the State") conceded that state court remedies have been meaningfully exhausted and after a review of the record, we agree. See, *Picard v. Connor*, 404 U.S. 270, 278, 92 S.Ct. 509, 513 (1971).

The Magistrate Judge entered Findings, Conclusions and Recommendations, to which Robinson filed objections. After making a *de novo* review of the record, the district court denied all relief sought in the petition, and dismissed it with prejudice. Robinson appeals.

FACTS

Robinson was convicted of the first-degree murder of Donald Chambers (Chambers) and is serving a 50-year sentence in the custody of the Texas Department of Criminal Justice, Institutional Division. At trial, Robinson's former girlfriend, Rebecca Morris (Morris) testified that she had moved into Chambers's home after leaving Robinson. That evening, Morris and Chambers answered a knock to find Robinson who had been drinking, standing at the front door with a gun in his hand. Robinson asked Morris about some missing marijuana, and Morris told him that she had left it on his kitchen counter. Chambers told Robinson to get off his property, and they exchanged angry words. Robinson shot Chambers at close range in the neck, then got in his truck and left.

Robinson introduced evidence that Chambers was a large man who was reputed to be violent and dangerous and that Chambers had threatened to kill him. Robinson testified at trial, admitting that he fired a shot, but denying that he intended to kill

Chambers. Robinson stated that he was backing off the porch when he lost his balance. When he raised up, Chambers was "right on" him with his fists "balled up." Robinson fired the gun and ran to his truck and drove off. After he left the scene, he threw the gun out of the truck window. Robinson then went to a club, later to a restaurant, and ended up at his mother's house, where he remained until he was arrested. He testified that he was unaware that Chambers was dead until his mother informed him late that night. The prosecutor asked Robinson when he first told somebody the story he was telling the jury. Robinson replied that he first told the story to his lawyer, two days after he was arrested. There was no objection.

Robinson testified in response to the prosecutor's inquiry about his temper, "It's hard to rile me, ma'am. I have a nice temper, I think...[I lose my temper] only when provoked." The state then elicited testimony that Robinson had slapped and choked Morris, leaving bruises on her neck and face just before she moved out of his house. There was no objection made by Robinson's lawyer to this line of questioning.

In closing, the prosecutor argued that Robinson's failure to mention his story to anyone until after he was arrested was proof that the killing was intentional. She also made reference to Robinson's assault on Morris. Robinson's lawyer made no objection on either issue.

INEFFECTIVE ASSISTANCE OF COUNSEL

Robinson claimed that his attorney failed to provide him with

effective assistance of counsel due to five alleged errors. First, counsel made no objection to the prosecutor's comment with regard to his post-arrest, post-*Miranda* silence. Second, counsel failed to object to the use of an extraneous offense, the unadjudicated assault on Morris. Third, he says counsel failed to make an independent investigation of his case, particularly in regard to the scientific tests conducted by the pathologist, and in a fourth, related complaint, counsel did not properly cross examine the pathologist. Finally, he complains that counsel did not object to characterizations of the evidence made by the prosecutor during closing argument.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) set out a two pronged standard for ineffective assistance of counsel. The first prong requires pleading and proof that counsel's performance was deficient. This requires an error so serious as to demonstrate counsel was not functioning as guaranteed by the Sixth Amendment. The court's scrutiny of counsel's performance is to be highly deferential, with a diligent attempt to eliminate the distorting effects of hindsight. There is a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance and that he employed sound trial strategy. This presumption must be rebutted to prevail on the deficiency prong of a claim of ineffective counsel. *Id.* at 693, 104 S.Ct. at 2064.

The second prong of the test requires the petitioner to plead and prove that the deficient performance prejudiced the defense.

To prevail, the petitioner must prove that counsel's professional deficiency deprived the defendant of a fair trial, that is, a trial with a reliable result. *Id.* at 687, 104 S.Ct. at 2064.

a. Post-arrest silence.

The Fifth Amendment operating through the Fourteenth Amendment, prohibits a prosecutor in a state criminal action from making jury arguments concerning a criminal defendant's post-arrest, post-*Miranda* warning silence. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976). Robinson testified that he did not tell anyone until after his arrest the version of the events that he told at trial. The prosecutor attacked Robinson's story in closing argument, emphasizing that Robinson did not contact the authorities and report the shooting. At the end of that portion of the argument, the prosecutor said, "In fact, he admitted to you that he not once told anybody the story he sat here and told you 'til he talked to his lawyer. However many days after he had been arrested." (emphasis added) Presuming, as we must, that Robinson's counsel was acting within a broad range of professional effectiveness, we find that his failure to object was the result of a conscious, informed decision. At the time of this trial, in January 1987, the Fifth Circuit required *Doyle* violations to be examined in light of the harmless error rule as expounded in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 827-28 (1967). *United States v. Shaw*, 701 F.2d 367 (5th Cir.) *cert. denied*, 465 U.S. 1067, 104 S.Ct. 1419 (1984). We find that it was reasonable trial strategy not to object to the prosecutor's *Doyle* statement in

order to avoid calling the jury's attention to it, based on the conclusion that the trial and appellate courts would have found that it was harmless error.

b. Admission of extraneous offense.

Robinson contends that his counsel was ineffective for failing to object to the admission of evidence concerning Robinson's assault on Morris, the government's chief witness. The evidence was relevant to show Robinson was aggressive and had been an aggressor, and to rebut his claim of self defense and his fear of the victim. This was admissible under Texas law. *Robinson v. State*, 844 S.W.2d 925, 929 (Tex.App.--Houston, 1st Dist. 1992). The district court found that there was no constitutional or procedural violation in the admission of this evidence, and that counsel was not ineffective for failing to object. We agree.

c. The medical examiner

Robinson contends that counsel's failure to investigate forensic evidence and to cross-examine the medical examiner rendered his counsel ineffective and his trial unfair. The medical examiner testified that paralysis, if not death, would have been immediate from the gun shot wound. There was speckling around the wound, indicating that the gun was fired very close to the victim's skin. The medical examiner also testified there was a flake of something he presumed was a paint chip and some blue fibers in the wound. Robinson would have had his counsel, through scientific testing of the evidence and cross-examination of the medical examiner, call into question the fact that the shooting occurred at

close range and attempt to establish that the bullet picked up a paint chip from the screen door prior to killing Chambers. The district court found that these arguments, proposed by Robinson after the fact, would have been inconsistent with Robinson's theory of the case and his testimony at trial. Therefore, the district court held that Robinson's counsel was not deficient in failing to develop these arguments. We agree.

d. Prosecutor's closing arguments.

Robinson complains that his counsel was ineffective for permitting the prosecutor to insert prejudicial comments and personal opinions into the closing argument without objection. He cites three quotations from closing argument, one urging the jury to find Robinson guilty of murder, rather than manslaughter, one referencing his attack on Morris and one statement that Robinson "went over there with a gun to kill." The district court found that all of the arguments were fair comments on the weight and credibility of the evidence or appropriate suggestions concerning what the evidence indicated or showed. We agree.

e. No ineffective assistance of counsel.

In sum, we find that the district court was correct in finding that Robinson has not established that he was denied effective assistance of counsel.

OTHER CLAIMS

Although we liberally construe *pro se* briefs, see *Haines v. Kerner*, 404 U.S. 519, 522, 92 S.Ct. 594, 3 L.Ed.2d 652 (1972), we require arguments to be briefed in order to be preserved. *Yohey v.*

Collins, 985 F.2d 222, 225 (5th Cir. 1993). Claims not adequately argued in the body of the brief are deemed abandoned on appeal. See, *id.* Robinson has failed to satisfy this requirement in regard to the remainder of his claims asserted in the district court. Thus, the other issues raised in the district court have been abandoned.

CONCLUSION

Robinson has moved for appointment of counsel. Although there is no constitutional right to the appointment of counsel in habeas actions, this Court may appoint counsel in "exceptional circumstances." *Santana v. Chandler*, 961 F.2d 514, 515-16 (5th Cir. 1992). The Court may appoint counsel for financially eligible individuals if the interests of justice so require. *Id.* Although Robinson is proceeding IFP, the interests of justice do not require the appointment of appellate counsel. Robinson has demonstrated that he is capable of representing himself by filing competent pleadings and a brief which states his issues and arguments. The case does not present exceptional circumstances warranting the appointment of counsel. The motion for appointment of counsel on appeal is, therefore, DENIED.

The order of the district court dismissing Robinson's petition with prejudice is AFFIRMED.