

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10946
(Summary Calendar)

JERRY MAURICE ODHAM,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-1980-G)

(May 15, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant Jerry Maurice Odham, a state prisoner in Texas, appeals the district court's dismissal of his petition for

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition Odham complained of improper enhancement of sentence based on a prior conviction. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Odham was convicted of burglary of a vehicle and was sentenced to 40 years imprisonment. He filed a federal petition for writ of habeas corpus alleging that his sentence was improperly enhanced in reliance on a prior conviction for possession of a controlled substance in cause number F-89-69722-RM.¹ The district court denied relief and dismissed the petition, and also denied Odham's motion for a certificate of probable cause (CPC). We granted CPC and specifically ordered the respondent to brief the issue whether Odham alleged a cognizable federal constitutional claim in contending that his state sentence was enhanced by a void state conviction.

Odham argued that his conviction in F-89-69722-RM is void because the name on the indictment was incorrect. Essentially, Odham is arguing that the indictment is fatally defective because it failed to get his name precisely correct. The district court

¹ In his petition Odham also contends that his sentence was enhanced improperly by use of a nonfinal conviction for burglary of a vehicle in cause number F-82-89777-TQ. Although he identified this allegedly invalid enhancement as an issue on appeal, Odham failed to brief the issue and it is considered abandoned. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993) (issues raised but not briefed are considered abandoned). Moreover, even if this issue were properly before the court, Odham could not obtain relief. The conviction in 82-89777-TQ was not used to enhance Odham's sentence and therefore his allegations are not factually supported by the record.

determined that the state court finding of sufficiency of the indictment was entitled to a presumption of correctness and denied relief on that basis.

II

ANALYSIS

We may, of course, affirm on different grounds than those espoused by the district court. See Sojourner T. v. Edwards, 974 F.2d 27, 30 (5th Cir. 1992) (this court may affirm on any basis supported by the record), cert. denied, 113 S. Ct. 1414 (1993). Under Texas state law, an indictment must state the name of the accused. See Tex. Code Crim. Proc. Ann. art. 21.02(4) (West 1989). When an individual is known by more than one name, an indictment is sufficient if it states one of these names. Id. at art. 21.07. At the punishment phase of his trial, Odham pleaded untrue to the enhancement allegation. The prosecution introduced fingerprint evidence to establish that Odham's fingerprints matched the fingerprints in the "penitentiary packet" containing the indictment and judgment for cause number F-89-69722-RM. On direct appeal the intermediate state court of appeals found that this evidence was sufficient to establish that Odham was the person named in the prior indictment. This analysis may have been inconsistent with other Texas case law. See Ex parte Millard, 587 S.W.2d 703, 705 (Tex. Crim. App. 1979) (no offense charged in indictment in which name of victim was transposed with name of defendant).

The sufficiency of a state court indictment is not cognizable under § 2254 unless it can be shown that the indictment is so

defective that it deprives the convicting court of jurisdiction. McKay v. Collins, 12 F.3d 66, 68 (5th Cir.), cert. denied, 115 S. Ct. 157 (1994). If the highest state court has found the indictment sufficient under state law, a federal court need not address the issue. Alexander v. McCotter, 775 F.2d 595, 598 (5th Cir. 1985).

Under Alexander, the opinion of the intermediate state appellate court on direct appeal determining, at least implicitly, that the indictment in F-89-69722-RM was sufficient, does not bar habeas relief because the opinion was not adopted by the highest state court, the Texas Court of Criminal Appeals. Alexander, 775 F.2d at 598; but see McKay, 12 F.3d at 68 (a federal court need not address the issue if the "state courts have held that an indictment is sufficient under state law," but citing Alexander which requires the "highest state court" to address the sufficiency of the indictment). As Odham presented the issue in his state habeas petition, and as the petition was denied without written order, the highest state court has determined, at least implicitly, that the indictment is sufficient, see Alexander, 775 F.2d at 599; McKay, 12 F.3d at 68, so Odham's claim is thus not cognizable under § 2254. As Odham's prior conviction was not void, his sentence was properly enhanced.

Odham also argued that the state court finding of fact that he was the person named in the indictment is not entitled to the presumption of correctness. But, as Odham failed to allege a cognizable § 2254 claim, we need not and therefore do not address

this contention.

For the foregoing reasons, the district court's denial of Odham's petition for habeas relief is

AFFIRMED.