IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11024

HENRY ABBOTT CRIDER,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 6:94-CV-022

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(February 10, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

A movant for in forma pauperis (IFP) status on appeal must show that the he is a pauper and that he will present a nonfrivolous issue on appeal. Carson v. Polley, 689 F.2d 562, 586 (5th Cir. 1982). The economic standards for IFP status are not well-defined. The central inquiry is whether the movant can afford the costs of appeal without undue hardship or deprivation of the necessities of life. Adkins v. E.I. Du Pont de Nemours & Co., 335 U.S. 331, 339 (1948). Information regarding Crider's ability to pay our docketing fee convinces us that Crider is a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

pauper for purposes of IFP. The district court's grant of a certificate of probable cause (CPC) shows that the appeal is not frivolous. Therefore, Crider's motion for IFP is GRANTED, and we will consider the merits of Crider's appeal without requiring the other party to file an opposing brief. See Clark v. Williams, 693 F.2d 381, 382 (5th Cir. 1982) (granting motion and deciding appeal on merits without full briefing and screening).

This court construes Crider's attack on his 1985 conviction as an attack on his current sentence which has been enhanced by his 1985 conviction. See Maleng v. Cook, 490 U.S. 488, 493 (1989) (pro se petitions challenging convictions, the sentences of which are fully served, are read as challenges to the primary sentence as enhanced by the allegedly invalid prior convictions). A habeas petitioner has the right to challenge a prior conviction used to enhance a subsequent sentence for which he is "in custody," even if the term for the prior conviction has expired. Willis v. Collins, 989 F.2d 187, 189 (5th Cir. 1993).

Crider argues that his counsel was ineffective for failing to file a motion to quash the information in his 1985 conviction charging him with driving while intoxicated as the information was fundamentally defective for failing to describe the means by which he had allegedly become intoxicated. Crider alleges that if he had known of this information he would have insisted on going to trial.

"To be successful in a claim of ineffective assistance of counsel in regard to a guilty plea, a petitioner must show not only that his counsel's performance was deficient, but also that

the deficient conduct prejudiced him." Young v. Lynaugh, 821 F.2d 1133, 1140 (5th Cir.), cert. denied, 484 U.S. 986 (1987) and 484 U.S. 1071 (1988). To satisfy the prejudice requirement, Crider must establish that but for his counsel's error, he would not have pleaded guilty and would have insisted on going to trial. See Carter v. Collins, 918 F.2d 1198, 1200 (5th Cir. 1990).

At the time of the charged offense, Tex. Rev. Civ. Stat. art. 6701*l*-1(b) stated, in pertinent part, that "[a] a person commits an offense if the person is intoxicated while driving or operating a motor vehicle in a public place." Sorg v. State, 688 S.W.2d 133, 134 (Tex. Ct. App. 1985). "Intoxicated" was defined by that statute as "(A) not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or a combination of two or more of those substances into the body; or (B) having an alcohol concentration of 0.10 percent or more." Art. 6701*l*-1(a)(2). The information charging Crider with driving while intoxicated did not state the manner of intoxication or what substance allegedly caused Crider's intoxication.

Review of Texas law at the time of the charged offense in 1984 and at the time of Crider's 1985 conviction reveals that neither the manner of intoxication, nor the identification of the intoxicating substance needed to be alleged in the charging information. Gaudin v. State, 703 S.W.2d 789, 790-91 (Tex. Ct. App. 1985). The Texas Court of Criminal Appeals later determined that a charging instrument alleging an offense under art. 6701*l*-1

must allege the specific intoxicant. Garcia v. State, 747 S.W.2d 379, 381 (Tex. Crim. App. 1988) (en banc).

At the time of Crider's conviction, counsel was relying upon the law as it then existed. Nothing in Texas jurisprudence indicated that a motion to quash the information for failure to describe the means of intoxication would be successful. The law began to change after Crider's conviction. However, Crider does not demonstrate how counsel should have been aware of the impending change or that counsel could have been successful in any attack on the information given the law at the time of conviction. Without a potentially meritorious attack on the information, counsel had no reason to move to dismiss the case. Accordingly, Crider cannot adequately demonstrate deficient performance.

Even if the performance of Crider's counsel was deficient, Crider cannot adequately demonstrate prejudice such that, but for counsel's failure to file a motion to quash, he would not have pleaded guilty but would have gone to trial. After being arrested for the charged offense, Crider wrote a letter to the trial judge admitting that he had gone to a lounge and was driving across the street when he was arrested. Crider also admitted that he had a problem with alcohol and requested that he be sent to a hospital for alcohol and mental treatment instead of to jail. Crider does not demonstrate prejudice for his counsel's failure to file a motion.

IFP GRANTED. AFFIRMED.