IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-11075
Summary Calendar

HIPOLITO FLORES,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeals from the United States District Court
for the Northern District of Texas
(5:94-CV-182-C)

(June 9, 1995)

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

PER CURIAM:[*]

Hipolito Flores appeals the denial of his state prisoner's petition for habeas corpus relief brought pursuant to 28 U.S.C. § 2254. Finding no error, we affirm.

I.

Flores was found guilty by a jury of indecency with a child

[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

and sentenced to life imprisonment. His state conviction was affirmed on direct appeal. Flores exhausted his state habeas remedies.

On June 15, 1994, Flores filed the instant petition, asserting that his appellate counsel had been ineffective for failing to raise ineffective assistance of trial counsel on appeal because trial counsel failed to object to the use of extraneous offense evidence, leading questions, and hearsay evidence. This assertion questioned the effectiveness of both trial and appellate counsel.

Respondent filed an answer on August 18, 1994. On October 21, 1994, the magistrate judge issued his findings, conclusions, and recommendation that the petition be dismissed with prejudice. Among other things, the magistrate judge found that the extraneous offense evidence was admissible under Texas law and that the claims of ineffective assistance were unsupported by any specific references to the record.

Flores objected to this recommendation, citing specific instances in the record to support his claims. The district court adopted the recommendation of the magistrate judge, noting that

> there are no particulars in some instances with regard to the claims of ineffective assistance of counsel set out in the Petition presented to this Court. In his Objections the Petitioner alleges these necessary facts were set out in some of his State Court Applications for a Writ of Habeas Corpus. The Petitioner has filed no Motions with this Court seeking leave of Court to amend his present pleadings so as to incorporate in them what he alleges to be sufficient pleadings to sustain a consideration of his claims of ineffective assistance of counsel on the merits.

II.

A.

Flores argues that his appellate counsel was ineffective for failing to assert that trial counsel should have challenged the testimony regarding his extraneous offenses. Flores must show that "the neglected claims would have had a reasonable probability of success on appeal." See Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992). To prevail on an ineffective-assistance-of-counsel claim, Flores must have demonstrated that his trial attorney's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984).

Flores also argues that his trial attorney was ineffective for failing to object to the victim's testimony of repeated sexual abuse. Flores contends that this testimony was inadmissible evidence of unadjudicated extraneous offenses and that the trial court instructed the prosecutor not to question the victim about extraneous offenses. Id. In Flores's direct appeal, the Texas Court of Appeals found that any objection to this evidence had been waived because no objection had been made. See Flores v. State, No. 08-91-00343-CR, slip op. at 6-7 (Tex. Ct. App. Oct. 28, 1992) (unpublished).

The appeals court specifically noted that the trial court properly could have admitted the extraneous-act evidence because its probative value outweighed any prejudicial effect. Id. at 7. "We note that under the appropriate circumstances, evidence of

distinctively similar sex acts committed by the same actor against the same minor victim is, as a general proposition, highly relevant to illustrate the actor's unnatural attention toward the complainant." Id. at 7 n.8. As the evidence could have been admitted, Flores cannot show that his attorneys' performance was deficient or that he suffered any prejudice from the failure to object or to raise the issue on appeal. See McCoy v. Lynaugh, 874 F.2d 954, 963 (5th Cir. 1989) (holding that attorney's performance not deficient for failing to make a futile objection).

B.

Flores argues that the district court abused its discretion in holding him to the same standard as it would hold an attorney. The district court found that Flores did not seek to amend his complaint to include specific record citations to support his claims for ineffective assistance of counsel for failure to object to leading questions and hearsay testimony at trial. Pro se pleadings must be liberally construed. Haines v. Kerner, 404 U.S. 519, 520 (1972).

In some contexts, issues raised for the first time in objections to the magistrate judge's report and recommendation are not properly before the district court and need not be addressed. United States v. Armstrong, 951 F.2d 626, 630 (5th Cir. 1992). In this case, however, the issue of ineffective assistance of counsel for failure to object to leading questions and hearsay evidence was raised in the original petition, but was only fleshed out by

specific allegations and record citations in the objections to the magistrate judge's report. Flores contends that the district court should have allowed him to amend his complaint to include these references.

Because of the timing, Flores's attempt to amend the original petition must have been done with leave of the district court. See FED. R. CIV. P. 15(a). "Rule 15(a) instructs that `leave shall be freely given when justice so requires.'" Whitaker v. City of Houston, 963 F.2d 831, 836 (5th Cir. 1992). This court's "review of the district court's denial of leave to amend under 15(a) is limited to determining whether that court's action constituted an abuse of discretion." Id. In ruling on a permissive motion to amend, the district court may consider "`undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of the amendment.'" Id. (quoting from Foman v. Davis, 371 U.S. 178, 182 (1962)).

Although the district court did not make a specific attempt to have Flores cite the record to support his claims, it does not appear that the court abused its discretion in failing liberally to construe Flores's objections as a motion for leave to amend the complaint. Flores had been alerted by the respondent's answer that his petition did not contain specific factual support for the claims of ineffective assistance for failure to object to leading questions and hearsay testimony at trial. Prior to the answer, the

magistrate judge warned Flores that he would not construe arguments made in a brief or a reply brief as a supplement to the claims asserted or factual support for those claims contained in the original petition. Flores chose not to seek permission of the district court to supplement his claims; rather, he argued that such a supplement was not necessary, and he did not give any specific facts until the magistrate judge recommended dismissing his petition.

It also appears that allowing the amendment would have been futile. Flores cited to the record to show that the prosecutor improperly asked the victim leading questions during the testimony regarding the offense. This demonstrates neither an evidentiary error nor a substantial and injurious effect on the verdict. Under Texas law, a trial court may, in its discretion, permit leading questions during the examination of a child complainant in sexual abuse cases. See Uhl v. State, 479 S.W.2d 55, 57 (Tex. Crim. App. 1979). A fair reading of the questions in the context of the trial shows that the trial court permitted the leading of the ten-year-old witness. It is likely that counsel viewed constant objections to leading as a poor trial strategy.

With respect to the claim that counsel did not object to hearsay testimony, the record cite given by Flores occurred during a pre-trial hearing, outside the presence of the jury. The purpose of this hearing was to determine whether the witness, Imelda Chavez, was the first person whom the victim had told of the crime. In this context, what the victim said was not hearsay, because it

was not presented to establish the truth of the victim's statement, but rather only to show that she made the statement. The district court did not abuse its discretion in not construing Flores's objections to the magistrate judge's recommendation as a motion to amend.

Flores has made an identical argument with respect to his allegation that his trial counsel was ineffective for failing to object to the prosecutor's opening statement and that appellate counsel was ineffective for failing to raise the point on appeal. Unlike the issues of ineffective assistance of counsel for failure to object to leading questions and hearsay testimony, the issues related to improper argument were not raised in the original petition. Flores did not assert improper opening statements, but only made a general reference to "many improper comments by the prosecutor to the jury." His references to the other issues of ineffective assistance were much more specific, and the above statement appears to have related to those other more specific claims. The claims related to improper opening arguments were new claims presented for the first time in the objections to the magistrate judge's report. The issues, therefore, were not properly before the district court and need not be addressed. Armstrong, 951 F.2d at 630.

AFFIRMED.