

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20650
Summary Calendar

DARIUS DURON ELAM,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Texas
(H-91-CV-3667)

(June 2, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Darius Duron Elam filed his habeas petition alleging six grounds: (1) insufficient evidence to support the conviction; (2) ineffective assistance of counsel; (3) denial of a speedy trial; (4) erroneous admission of extraneous offenses; (5) improper jury charge; and, (6) erroneous admission of non-disclosed evidence.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

We agree with the district court that Elam's points of error 1, 4, 5, and 6 are barred by the procedural default doctrine and therefore unreviewable by this court. We should make it plain that Elam also fails to sustain his claim of miscarriage of justice exception to the procedural bar rule, because the evidence does not in the slightest show factual innocence; instead, the evidence is fully sufficient for a jury to have determined his guilt beyond a reasonable doubt.

Of the remaining issues, Elam does not raise the question of a speedy trial on appeal. With respect to his ineffective assistance of counsel claim, we are fully satisfied that the claim is meritless. We agree that a determination resolving a claim of ineffective assistance of counsel is not a fact finding accorded a presumption of correctness under 28 U.S.C. § 2254(d), but instead is a mixed question of law and fact. Black v. Collins, 962 F.2d 394, 401 (5th Cir.), cert. denied, 112 S.Ct. 2983 (1992). "However, any subsidiary factual findings made by a state court in the course of determining that effective assistance was rendered [are] entitled to the § 2254(d) presumption." Id. In essence, Elam argues that the presumption of correctness should not be applied to such fact findings of the trial court because he was not afforded a full evidentiary hearing. State courts, however, are not obligated to hold live, evidentiary hearings and may resolve factual disputes on the basis of written affidavits. Lincecum v. Collins, 958 F.2d 1271, 1279 (5th Cir.), cert. denied, 113 S.Ct.

417 (1992). Thus, the state court's findings of fact here bear the presumption of correctness and require our respect and deference; and this is true notwithstanding the fact that the state court decided this claim on affidavits and not on live testimony. On this basis, we conclude that Elam's claim of constitutionally ineffective counsel is meritless.

Finally, Elam's due process claim, based on the failure of the district court to address all issues raised in his petition, is meritless.

Accordingly, the judgment of the district court dismissing this habeas petition is

A F F I R M E D.