UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-30017

(Summary Calendar)

ROOSEVELT WILTZ,

Petitioner-Appellant,

versus

STATE OF LOUISIANA and
RICHARD P. IEYOUB, Attorney
General, State of Louisiana,

Respondents-Appellees,

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-93-3196-E)

(June 22, 1994)

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

PER CURIAM:[*]

Roosevelt Wiltz was convicted and sentenced to 20 years imprisonment for possession with intent to distribute crack cocaine in violation of Louisiana Revised Statute Annotated § 40:967(A). After exhausting his state court remedies, Wiltz brought a petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. The district court dismissed Wiltz's petition with prejudice, finding

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(a) there was sufficient evidence to support Wiltz's conviction; (b) Wiltz's Fourth Amendment claim of unlawful search and seizure was precluded by prior litigation in the Louisiana state court system; and (c) Wiltz could not show the prejudice necessary to succeed on his claim of ineffective assistance of counsel. Wiltz appeals, and we affirm the district court's denial of relief.

I

Wiltz and co-defendants Alfred Grinds and Elton Tapp stood on the corner of Fern Street and Mars Place in New Orleans. At about 4:00 a.m. Wiltz flagged down two New Orleans undercover police officers, Keith Debarbieres and Ida Sonier, who approached the intersection in an unmarked police car. Wiltz asked the officers what they were looking for.[1] Officer Debarbieres told Wiltz that he was looking for a "twenty," meaning $20 worth of crack cocaine. Wiltz responded by saying "Yeah, we got some of those," and directed the officers to pull over near co-defendant Grinds. Grinds took a match box from the bumper of a parked pick-up truck and then proceeded to hand officer Debarbieres a rock of crack cocaine. In return, officer Debarbieres gave Grinds a marked $20 bill. After the cocaine changed hands, the undercover officers drove away and relayed the description of Wiltz, Grinds, and Tapp to police back-up units. Relying on the officers' description,

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[1] The trial court heard controverted testimony about Wiltz's involvement in the drug transaction. Officers Debarbieres and Sonier testified that Wiltz actively solicited them to purchase crack cocaine from Grinds. Grinds testified that Wiltz did not flag down the undercover officers and when the officers stopped at the corner Wiltz only asked them for a cigarette.

Sergeant Michael Cimino and the rest of the back-up team arrested Wiltz, Grinds, and Tapp a short time later. Grinds was arrested with the marked $20 bill in his pocket, and Sergeant Cimino found approximately one-eighth of an ounce of powdered cocaine and several small rocks of crack cocaine in a match box lying on the bumper of the pick-up truck.

Alfred Grinds pleaded guilty to possession and distribution of crack cocaine immediately before Wiltz went to trial. At Wiltz's trial, Grinds testified that he alone sold the drugs and that Tapp and Wiltz were not involved. Additionally, Sergeant Cimino was accepted as an expert in the retail distribution and sale of narcotics and testified that drug dealers frequently work in teams of three: one person to flag down the cars, a second person to take the money, and a third person to handle the drugs.

Wiltz was convicted of possession with intent to distribute crack cocaine and due to his status as a repeat offender was sentenced to twenty (20) years at hard labor in the custody of the Louisiana Department of Corrections. After exhausting his state habeas remedies, Wiltz challenges his conviction through this § 2254 proceeding, contending that: (a) the evidence is insufficient to prove the elements of possession of cocaine with intent to distribute; (b) the trial court violated his Fourth Amendment rights by denying his motion to suppress police evidence; and (c) he was denied effective assistance of counsel at trial and on appeal.

II

A

Wiltz alleges that the evidence is insufficient to support his conviction for possession with intent to distribute cocaine.[2] He argues that the testimony of the undercover and arresting police officers failed to establish his possession of the cocaine with the specific intent to distribute.

The standard for evaluating sufficiency of evidence is well settled: "[We determine], after viewing the evidence in the light most favorable to the prosecution, [whether] *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979) (citing *Johnson v. Louisiana*, 406 U.S. 356, 362, 92 S. Ct. 1620, 1624-25, 32 L. Ed. 2d 152 (1972)). In applying this standard we will not substitute our own view of the evidence for that of the factfinder, rather, we will view all the evidence in the light most favorable to the prosecution. *Alexander v. McCotter*, 775 F.2d 595, 598 (5th Cir. 1985) (citing *Whitmore v. Maggio*, 740 F.2d 230, 232 (5th Cir. 1984)). We defer to the state court evaluation of the credibility of witnesses. *See Self v. Collins*, 973 F.2d 1198, 1214 (5th Cir. 1992) (noting that trial court's determination of witness credibility is entitled to presumption of correctness), *cert.*

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[2] The Due Process Clause of the Fourteenth Amendment protects defendants from criminal conviction except where every fact necessary for conviction of the crime is proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 338 (1970).

denied, __ U.S. __, 113 S. Ct. 1613, 123 L. Ed. 2d 173 (1993). Thus, it is the responsibility of the fact finder "to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789.

In assessing sufficiency of the evidence, this court will look to the substantive elements of Wiltz's criminal offense as defined by Louisiana law. *See Alexander*, 775 F.2d at 598. Section 40:967(A)(1) prohibits the knowing or intentional possession and distribution of cocaine.[3] The state has the burden to prove that Wiltz possessed the cocaine with the specific intent to distribute it.[4] *See State v. Johnson*, 529 So. 2d 142, 145 (La. Ct. App. 1988, writ denied) (using circumstantial evidence to meet state's burden of proof on "specific intent" element of possessory crime). Under § 14:24, however, "[t]he state does not have to prove actual possession or actual dominion and control over a controlled dangerous substance when the state proves that a defendant is a

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[3] LA. REV. STAT. ANN. § 40:967(A) provides:

> [I]t shall be unlawful for any person knowingly or intentionally: (1) To produce, manufacture, distribute, or dispense or possess with intent to produce, manufacture, distribute, or dispense, a controlled dangerous substance classified in Schedule II.

LA. REV. STAT. ANN. § 40:967(A) (West 1992).

[4] "Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." *Id.* § 14:10 (West 1986).

principal in the crime."[5] *State v. Green*, 476 So. 2d 859, 862 (La. Ct. App. 1985, writ denied). Mere presence at the scene of the crime is not enough to show that a person is a principal. *See State v. Pierre*, 631 So. 2d 427, 428 (La. 1994) (holding that "mere presence at the scene is . . . not enough to `concern' an individual in the crime"). A person may be convicted as a principal only when the person has the requisite mental state for the crime, *State v. Gordon*, 504 So. 2d 1135, 1143 (La. Ct. App. 1987, n.w.h.), and the specific intent required for possession and distribution of a controlled substance may be inferred from circumstantial evidence. *State v. Moffett*, 572 So. 2d 705, 707 (La. Ct. App. 1990, n.w.h.).

It was not alleged that Wiltz *actually* possessed the contraband. Grinds actually possessed and distributed the crack cocaine. However, these activities are imputed to other principals that have the requisite specific intent. *See Foy v. Donnelly*, 959 F.2d 1307, 1314 (5th Cir. 1992) (imputing elements of armed robbery to principal under § 14:24 even though principal did not personally hold weapon or actually take money); *cf. State v. Hutchins*, 502 So. 2d 606, 608 (La. Ct. App. 1987) (affirming conviction for distribution of cocaine where principal initiated and participated

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[5] LA. REV. STAT. ANN. § 14:24 provides:

> All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

Id. § 14:24 (West 1986).

in drug transaction with undercover police officers (citing § 14:24)). Thus, we review the record to determine whether Wiltz knowingly participated in the drug transaction with the specific intent to distribute. Clearly, Wiltz is a principal to the crime because he procured undercover officers Keith Debarbieres and Ida Sonier as customers: Upon finding the officers interested in purchasing a "twenty," Wiltz stated "Yeah, we got some of those" and directed the officers to Grinds.[6] Furthermore, the testimony of Sergeant Cimino))that it is rare in drug transactions for only one person to procure customers, hold the money, and distribute the drugs))supports the finding that Wiltz was a principal.

After viewing all the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found that Wiltz knowingly participated in the distribution of crack cocaine beyond a reasonable doubt.

B

Wiltz also argues that the trial court violated the Fourth Amendment, and abused its discretion, when the court denied his motion to suppress statements made by police officers Debarbieres, Sonier, Cimino, and co-defendants Grinds and Tapp.

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[6] Wiltz challenges the credibility of officers Debarbieres, Sonier, and Cimino. The factfinder is the ultimate arbiter of the credibility of a witness, and it is improper for a reviewing court to speculate upon or second guess its conclusions, unless the testimony is unbelievable on its face. *See United States v. Osum*, 943 F.2d 1394, 1405 (5th Cir. 1991) (stating that jury's determination of witness credibility should not be disturbed unless witness could not physically have observed reported events under laws of nature). The testimony in question is not facially unbelievable.

The reviewing court in a federal habeas corpus proceeding should not consider Fourth Amendment claims previously raised at trial, unless the trial court did not provide the defendant with the opportunity for "full and fair litigation of a Fourth Amendment claim." *Stone v. Powell*, 428 U.S. 465, 494, 96 S. Ct. 3037, 3052, 49 L. Ed. 2d 1067 (1967). Full and fair litigation of a Fourth Amendment claim requires consideration by the state trial court and "`the availability of meaningful appellate review by a higher state court.'" *Davis v. Blackburn*, 803 F.2d 807, 808 (5th Cir. 1986) (quoting *O'Berry v. Wainwright*, 546 F.2d 1204, 1213 (5th Cir.), *cert. denied*, 433 U.S. 911, 97 S. Ct. 2891, 53 L. Ed. 2d 1096 (1977)). A state court provides a full and fair hearing when the defendant is represented by counsel, and is given every opportunity to be heard. *Jernigan v. Collins*, 980 F.2d 292, 297 (5th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 2977, 125 L. Ed. 2d 675 (1993).

In the instant case Wiltz was provided with counsel, filed a motion for suppression of state's evidence, and was given the opportunity to cross examine witness Sonier at the suppression hearing. After the motion to suppress was denied, Wiltz was provided with the opportunity to litigate his case at trial and make a direct appeal to the Louisiana appellate court. Wiltz also pursued post-conviction relief in the state court system. Given the appointment of counsel to Wiltz, and the ensuing state court proceedings, there can be no doubt that Wiltz has been given a full and fair opportunity to litigate and appeal his claim on Fourth

Amendment grounds. Thus, under *Stone v. Powell*, this court is precluded from considering Wiltz's Fourth Amendment claim.

C

Wiltz alleges that his Fourteenth Amendment due process rights were violated because he was denied effective assistance of counsel at trial and on appeal to the Louisiana appellate court. Wiltz argues that trial counsel's failure to move for discovery and inspection, to make a bill of particulars, to pursue a jury trial, and to move for post-judgement acquittal, all violated his Fourteenth Amendment right to a fair trial. Wiltz also alleges that his appellate counsel was ineffective because she raised only the excessiveness of Wiltz's sentence on direct appeal. Such grounds, Wiltz argues, were "frivolous and perfunctory" in light of the fact that Wiltz is a repeat offender. Wiltz also argues that appellate counsel's failure to raise "a variety of other meritorious claims" constituted ineffective representation.

The benchmark for evaluating ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). To be successful on his claim, Wiltz must show that (1) counsel's performance was so deficient that (2) counsel's errors actually prejudiced his defense. *Strickland* 466 U.S. at 687, 104 S. Ct. at 2054. Failure to prove either prong of this two-prong test is fatal to a claim of ineffective assistance of counsel. *Id*.

The performance of counsel is evaluated by whether counsel acted reasonably under prevailing professional norms. *Id.* at 688, 104 S. Ct. at 2065. In doing so "a court must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action `might be considered sound trial strategy.'" *Id.* at 689, 104 S. Ct. at 2065 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83 (1955)). A finding of prejudice, sufficient to satisfy the *Strickland* test, hinges on whether Wiltz can show that but for counsel's errors the outcome of the proceeding would have been different. *Id.* at 694, 104 S. Ct. at 2068. Thus, Wiltz must affirmatively demonstrate actual resulting prejudice by showing that different conduct by counsel is reasonably likely to have produced a different outcome at trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); *see United States v. Lewis*, 786 F.2d 1278, 1283 (5th Cir. 1986) (holding that defendant's failure to identify exculpatory evidence defeated allegation of prejudice).

Wiltz's argument))that trial counsel was ineffective for not moving the court for inspection and discovery, or for making a bill of particulars))is without merit. Wiltz has not identified the exculpatory evidence that might have been obtained through discovery, nor has he described any relevant information counsel should have acquired thereby. Moreover, Wiltz has not shown how information acquired through a bill of particulars would have

helped him develop a more competent trial strategy.[7] Wiltz has, therefore, identified no prejudice.

Wiltz argues that:

> [Given] the Over-Whelming Lack of Evidence against [him], it was the defense counsel's obligation to pursue the very best line of defense for his client, by advising [Wiltz] that the potential of being found innocent, is greater at the hands of a jury, than at the mercy of a court whom initially denied the petitioner's motion to Suppress Evidence, when actually there wasn't any evidence to legally support an arrest to being [sic] with.

Wiltz's argument that trial counsel should have advised him to proceed with a jury trial rather than a bench trial is mistaken. State's evidence, largely consisting of police testimony, was properly admitted and is sufficient to support Wiltz's conviction. Wiltz has not shown that a different factfinder would have rendered a different verdict. *See Green v. Lynaugh*, 868 F.2d 176, 178 (5th Cir.) (holding that advising defendant to waive jury trial was not outside range of reasonably competent advice and did not support claim of ineffective assistance of counsel), *cert. denied*, 493 U.S. 831, 110 S. Ct. 102, 107 L. Ed. 2d 66 (1989).

Wiltz's contention that trial counsel was ineffective for not filing a post-verdict motion for judgment of acquittal is incorrect. A post-verdict motion for judgment of acquittal will only be successful if "the evidence, viewed in a light most

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[7] A bill of particulars sets "forth more specifically the nature and cause of the charge against the defendant." LA. CODE CRIM. PROC. ANN. art. 484 (West 1991). A bill of particulars allows the defendant to obtain further information about what the state intends to prove and enables the defendant to better defend himself. *See State v. Nelson*, 306 So. 2d 745, 747 (La. 1975).

favorable to the state, does not reasonably permit a finding of guilty." LA. CODE CRIM. PROC. ANN. art. 821(B) (West Supp. 1994); *see State v. Voorhies*, 590 So. 2d 776, 777 (La. Ct. App. 1991, n.w.h.) (finding that defendants only have right to post-verdict judgment of acquittal when evidence is insufficient to support conviction). Since the evidence is sufficient to support his conviction, Wiltz has no right to a post-verdict judgment of acquittal and has shown no prejudice.

Finally, Wiltz asserts that appellate counsel was ineffective for only arguing that his sentence was excessive and for not raising "a variety of other meritorious claims." Although Wiltz has argued insufficiency of the evidence, we have determined that the evidence supports his conviction. Apart from his insufficiency claim, Wiltz has not identified any other allegedly meritorious defense. Wiltz has shown no prejudice.

III

For the forgoing reasons we **AFFIRM**.