UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-30097
Summary Calendar

DARRYL CLAYTON,

Petitioner-Appellant,

VERSUS

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary 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 93-3912 F)

(July 25, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

A jury found Darryl Clayton and Joann Isom guilty of second degree murder in the shooting death of Sharon Heim. State v. Clayton, 427 So.2d 827, 828 (La. 1982).

Clayton and Isom both filed motions for new trials based on new evidence. After an evidentiary hearing, the trial court denied their motions, and Clayton and Isom were sentenced to life imprisonment without benefit of parole, probation, or suspension of sentence. While their appeals were pending, Clayton and Isom again filed motions for new trials based on new evidence. After the Louisiana Supreme Court remanded their cases for new evidentiary hearings, the trial court denied the motions again. During the pendency of their state appeals, Isom died. The Louisiana Supreme Court initially reversed Clayton's conviction and remanded his case for a new trial. On rehearing, the state supreme court reversed its earlier decision and affirmed Clayton's conviction and sentence.

The following account of the murder is drawn from the Louisiana Supreme Court's initial decision and its subsequent rehearing affirming Clayton's conviction. In December 1980, at about 6:00 p.m., Isom and a man named Lewis Johnson were arguing outside of an apartment because Johnson believed that Isom owed him $60. Isom left and returned with Clayton, who was armed with a gun. Johnson stood outside of the apartment holding a baseball bat. At trial, two eyewitnesses offered differing accounts of what Johnson did with the bat. Kevin Draughn, the murder victim's brother, testified that Clayton made no threatening movement with

the bat. Heinrine Brown, a friend of the victim's sister, testified that Johnson was about to hit Clayton with the bat. Isom and Clayton both testified that Johnson was about to swing the bat at Clayton.

Clayton allegedly asked Johnson something and then shot him in the upper shoulder. Hearing the shot, Heim, who lived with Johnson, ran out of the apartment towards the spot where Johnson lay on the ground. According to the eyewitnesses, Draughn and Brown, Isom then said to Clayton "shoot that bitch Sharon for me." Clayton shot Heim in the chest and she subsequently died. Isom denied that she said anything to Clayton.

Clayton testified that he shot Heim in self-defense, because Heim was running at him with a knife. According to Clayton's testimony, Heim was about two or three feet away from him at the time he shot her. Draughn testified that Heim was about six feet away from Clayton at the time of the shooting. Isom testified that she saw Heim clutching a knife to her chest after the shooting. Both Brown and Draughn testified that Heim was not carrying a knife at the time of the shooting.

Defense witness Ida Mae Smith, Isom's aunt, testified that Brown called her on the evening of the shooting and said "Sheila, get to the hospital as fast as you can. Sharon done got shot. Don't worry because I have the money, the sets, and the knife. You just get to the hospital." After Smith informed Brown that she was not Sheila, the victim's sister, Brown replied, "Oh, I made a mistake."

No knife was recovered. Following the trial, at two different evidentiary hearings, evidence was offered that Heim was carrying something or armed with a knife at the time of the shooting. At the first evidentiary hearing, a new witness, Freddie Johnson (a friend of Isom's cousin and unrelated to Lewis Johnson), testified that Heim was holding something in her hand and running towards Clayton. According to Freddie Johnson, he saw a man swing a bat and then heard a shot. He then heard a woman scream and saw a woman run out of the door holding "some kind of object in her hand" with both her hands in the air. Johnson testified that he heard another scream and then heard another shot. Johnson indicated that Heim was in "arm's reach" of the several people, apparently including Clayton, that were present at the time of the shooting.

At the second evidentiary hearing, which took place while Clayton's and Isom's cases were on appeal, Heinrine Brown recanted her trial testimony that Heim was not armed and testified that Heim had a knife in her hand when she was shot. When Brown first notified Clayton by letter that she saw Heim holding a knife, Brown and Clayton had been incarcerated at the same facility for over three months. Brown explained that she did not testify truthfully because Heim's family had threatened her before the trial.

The Louisiana Supreme Court justified its initial decision to reverse Clayton's conviction and remand for a new trial by observing that:

> [t]he testimony of Freddie Johnson, which corroborated Henrine Brown's recanted version, when considered with the testimony of Joann Isom and Ida Mae Smith, who testified on

> behalf of the defense (on the trial), was such evidence that would have cast serious doubt upon the credibility of Keith Draughn, the state's remaining primary witness. The totality of this new evidence would probably have changed the verdict or judgment of guilty.

On rehearing, the Louisiana Supreme Court observed that it "erred in according any weight whatsoever to [Brown's] new testimony." The court ruled that the trial court did not abuse its discretion in denying the motion for a new trial and that there was no new evidence offered that would have produced a verdict different from that delivered at trial. The court found that "the coincidences" (that Brown waited a year before supposedly telling the truth, that Brown was housed in the same facility as Clayton, that Brown came forward at the same time that Freddie Johnson appeared, and that Brown testified that Heim was unarmed before the grand jury and at trial) were "too convenient to ignore." Thus, the court found Brown's recanting testimony "incredulous" and "simply too suspicious to be believed." The court also found that Freddie Johnson's testimony alone, if it had been offered at trial, ought not to have changed the verdict because it would have been contradicted by Brown's and Draughn's testimony, and because it was unlikely that the jury would have accorded it any significant weight considering that Johnson's observations were made "close to dark" from an "extreme distance."

One Louisiana Supreme Court judge dissented from the opinion, for the reasons expressed in the court's earlier decision. Another judge concurred in the result, pointing out that "[t]he evidence is

more favorable to the defendant than the majority opinion may indicate." The judge referred to Brown's testimony at the second evidentiary hearing that Heim was armed; a letter Brown had written to Clayton before the hearing asserting that Heim was armed; and Ida Mae Smith's testimony that Brown talked about a knife when she mistook Smith for Heim's sister during a phone call shortly after the shooting.

Clayton filed a petition for habeas corpus relief in the district court, alleging that he was denied effective assistance of counsel because: (1) his counsel failed to call witnesses who would have testified that he acted in self-defense; and (2) his counsel failed to object when the trial court neglected to include a reasonable doubt instruction in its charge to the jury.

The magistrate judge notified Clayton that the court was considering dismissing his petition as an abuse of the writ under Rule 9(b) of the Rules Governing 28 U.S.C. § 2254 and provided him with a form to explain why his petition should not have been so dismissed. Clayton responded by arguing that his petition should not be dismissed because: (1) his trial counsel filed his habeas petition and "[h]e couldn't or wouldn't very well file ineffectiveness on himself"; (2) the State had not been prejudiced by his successive petition; and (3) he had just received the jury instructions which formed the basis of his second argument.

According to the district court, the sole basis of Clayton's earlier federal habeas petition was "that the state courts committed error in failing to grant him a new trial on the ground

that a prosecution's witness recanted her trial testimony." A copy of the earlier habeas petition is not part of the record. After considering Clayton's arguments on the merits in light of McCleskey v. Zant[1], the district court denied Clayton's petition as an abuse of the writ. Clayton appealed. The district court construed Clayton's notice of appeal as an application for a certificate of probable cause (CPC) and granted Clayton a CPC. The court granted Clayton's motion to proceed in forma pauperis on appeal.

OPINION

On appeal, Clayton does not address the Rule 9(b) issue. Instead, he argues that he was denied the effective assistance of counsel, as he did in the habeas petition under consideration, and asserts for the first time that the district court erred by not convening an evidentiary hearing.

A district court's decision to dismiss a motion for abuse of the writ is reviewed for abuse of discretion. Saahir v. Collins, 956 F.2d 115, 120 (5th Cir. 1992). Under McCleskey, a "second or subsequent habeas corpus petition which raises a claim for the first time is generally regarded as an abuse of the writ." United States v. Flores, 981 F.2d 231, 234 (5th Cir. 1993) (§ 2255).

When there has not been a prior determination on the merits, the State has the initial burden of pleading and proving abuse of the writ. Kirkpatrick v. Whitley, 992 F.2d 491, 495 (5th Cir. 1993). After the State has pleaded abuse of the writ, the petitioner must rebut that claim. Id. The district court may

[1] 499 U.S. 467, 111 S. Ct. 1454, 113 L.Ed.2d 517 (1991).

raise the Rule 9(b) issue sua sponte, if "the [movant] is afforded an adequate opportunity to explain why his [motion] should not be barred as successive or abusive." Williams v. Whitley, 994 F.2d 226, 231 (5th Cir.), cert. denied, 114 S. Ct. 608 (1993).

A petitioner may avoid dismissal for abuse of the writ if he can show "(1) cause for his failure to raise the claim, as well as prejudice from the errors which form the basis of his complaint; or (2) that the court's refusal to hear the claim would result in a fundamental miscarriage of justice." Flores, 981 F.2d at 234 (citing McCleskey, 499 U.S. at 493-94, 111 S. Ct. at 1470).

State Court Fact-Findings

Federal habeas courts treat state court fact-findings with deference, and such findings are ordinarily accorded a presumption of correctness, subject to exceptions, such as whether the fact-findings are fairly supported by the record. Self v. Collins, 973 F.2d 1198, 1203 (5th Cir. 1992), cert. denied, 113 S. Ct. 1613 (1993); see 28 U.S.C. § 2254(d) (listing exceptions to the presumption of correctness). "Deference to a state court's findings is particularly important `where a federal court makes its determination based on the identical record that was considered by the state appellate court.'" Id. at 1213 (quoting Sumner v. Mata, 449 U.S. 539, 547, 101 S. Ct. 764, 66 L.Ed.2d 722 (1981)).

Cause and Prejudice

None of Clayton's allegations of cause amount to cause under McCleskey. First, ineffective assistance of counsel cannot constitute cause in the Rule 9(b) context. Johnson v. Hargett, 978

F.2d 855, 859 (5th Cir. 1992), cert. denied, 113 S. Ct. 1652 (1993). Next, Clayton's argument that the State would not be prejudiced by his successive petition constitutes neither a justification for filing another habeas petition nor demonstrates prejudice to him. Finally, his assertion that he just received the jury instructions, over ten years after the Louisiana Supreme Court affirmed his conviction, does not amount to cause. When a petitioner attempts to demonstrate that neglect of a claim was excusable, he must first explain his failure to present the claim by identifying some objective factor, external to the defense, which impeded counsel's efforts to raise the claim previously and must also demonstrate actual prejudice resulting from the error. Kirkpatrick, 992 F.2d at 495. Examples of such external objective factors include interference by officials and a showing that the factual or legal basis for a claim was not reasonably available to counsel. McCleskey, 499 U.S. at 493-94. Clayton offers no explanation why he could not obtain the jury instructions earlier. He thus fails to establish an objective external factor, of the kind specified in McCleskey, showing that the jury instruction issue was not reasonably available to him at the time of his initial habeas petition.

Innocence

Absent a showing of cause and prejudice, a repeat petitioner seeking to avoid dismissal under Rule 9(b) can claim that a fundamental miscarriage of justice would result from the court's failure to consider the issue. McCleskey, 499 U.S. at 494.

A fundamental miscarriage is confined to those "extraordinary instances" where the constitutional violation has probably resulted in the conviction of an innocent person. Id. The term "actual innocence" means factual, as opposed to legal innocence. "Legal innocence" arises whenever a constitutional violation, by itself, requires reversal. "Actual innocence," as the Court stated in McCleskey, means that the person did not commit the crime. Johnson, 978 F.2d at 859-60. Actual innocence means that, in light of all the evidence, there is a "fair probability" that a reasonable trier of fact could not find all the elements necessary to convict the defendant of that particular crime. Id. at 860.

Clayton was convicted of second degree murder in violation of La. Rev. Stat. Ann. § 14.30.1 (West 1986). In relevant part, a defendant is guilty of second degree murder "[w]hen the offender has a specific intent to kill or to inflict great bodily harm . . . ." Id. at § 14:30.1(1). Clayton argues that he was not guilty of second degree murder because his shooting of Heim was a justifiable act of self-defense. "A homicide is justified as self-defense only if a person using such force reasonably believes that he is in imminent danger of losing his life or receiving great bodily harm and that deadly force is necessary to save his life." State v. Brockington, 437 So.2d 994, 996 (La. Ct. App. 1983); see La. Rev. Stat. Ann. § 14:20 (West 1986).

In order to overcome a Rule 9(b) dismissal, Clayton must demonstrate both that he was factually innocent of the crime of second degree murder and that there is a fair probability that his

counsel's failure to call several witnesses or request a proper reasonable doubt jury instruction caused him to be improperly convicted.

Ineffective Assistance of Counsel

Counsel's assistance is ineffective if the defendant can show that his performance was deficient and that this substandard representation prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). To show deficient performance, the defendant must demonstrate "that counsel made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment." Id.

Therefore, Clayton must show that his counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional standards. Yohey v. Collins, 985 F.2d 222, 228 (5th Cir. 1993). When reviewing an attorney's performance in hindsight, the court must accord the attorney a strong presumption that his representation was reasonable at the time. Strickland, 466 U.S. at 689. The court must "be highly deferential to counsel's trial tactics and decisions." Valles v. Lynaugh, 835 F.2d 126, 128 (5th Cir. 1988). To establish that counsel's deficient performance prejudiced the defense, Clayton "must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687; Lockhart v. Fretwell, ___U.S.___, 113 S. Ct. 838, 842, ___L.Ed.2d___ (1993). If the defendant fails to demonstrate

either prejudice or deficient performance, the court need not consider the other prong. Id. at 697.

Because Clayton's assertion that he was innocent of second degree murder necessitates an investigation into the underlying merits of his claim, and because the 9(b) analysis and the merits analysis overlap, they will be considered together.

Counsel's Failure to Call Witnesses:

Clayton first asserts that his counsel, John Dolan, was ineffective because he failed to call Joyce Banks, Addison Mitchell, and Patricia Johnson. According to Clayton, Dolan brought Banks, Addison, and Johnson to the district attorney to explain that Heim was armed with a knife at the time of the shooting. Clayton indicates that Patricia Johnson was present at the trial.

Ineffective assistance claims based on counsel's failure to call a witness "are not favored in federal habeas review." Murray v. Maggio, 736 F.2d 279, 282 (5th Cir. 1984). Complaints that defense counsel failed to call a witness are disfavored "because the presentation of testimonial evidence is a matter of trial strategy, and because allegations of what a witness would have testified are largely speculative." United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984). An appellant must demonstrate that he was prejudiced by defense counsel's failure to call a witness before such a claim will provide the basis for habeas corpus relief. Alexander v. McCotter, 775 F.2d 595, 602 (5th Cir. 1985).

Banks and Addison

In one of his motions for reconsideration, and again in his current brief, Clayton suggests that both Banks and Addison would have testified that Heim was armed with a knife at the time of the shooting.

"In order for the appellant to demonstrate the requisite Strickland prejudice, the appellant must show not only that this testimony would have been favorable, but also that the witness would have testified at trial." Alexander, 775 F.2d at 602. Neither Banks nor Addison came forward to identify the content of their intended testimony or indicate that they would be willing to testify. "Where the only evidence of a missing witness's testimony is from the defendant, this Court views claims of ineffective assistance with great caution." Schwander v. Blackburn, 750 F.2d 494, 500 (5th Cir. 1985) (internal citation and quotation omitted). Dolan brought Banks and Addison to the district attorney's office to provide eyewitness accounts of the shooting. The record does not indicate why Banks and Addison were not called as witnesses. However, Banks and Addison did not provide affidavits identifying the content of their intended testimony or indicating they would be willing to testify. Therefore, the only information about their potential testimony comes from Clayton.

Patricia Johnson

Attached to one of Clayton's motions for a new trial was the sworn and signed statement of Patricia Johnson, who claimed that Heim was running at Clayton with a knife when he shot her.

Patricia Johnson testified to these facts before the grand jury and stated that she was prepared to testify at Clayton's trial.

The state habeas court rejected Clayton's claim that Dolan was ineffective for failing to call Patricia Johnson, finding that Johnson's testimony did not support his theory of self-defense. The court concluded, "[i]t appears from the affidavit that the affiant's version of where the victim and petitioner were standing is not significantly different from the version relied upon by the State. It cannot be said that petitioner `reasonably' believed that he was `in imminent danger of losing his life or receiving great bodily harm.'" Considering that Clayton testified that Heim was two or three feet away from him and that Draughn testified that Heim was about six feet away from Clayton at the time of the shooting, the state court's fact finding is not supported by the record.

Although this finding is not supported by the record, counsel for both defendants provided reasons for not calling Patricia Johnson at the second evidentiary hearing. Dolan, Clayton's defense counsel, explained his decision in the following terms:

> Patricia Johnson, unfortunately, she is a junkie. She went before the Grand Jury and on that basis there I don't know what the testimony was as to what was alleged by [the assistant district attorney]. I don't know what the Grand Jury testimony was and that she saw anything. She has a problem and actually we've got this situation where a witness wants to take the witness stand, but at the time Ms. Johnson was not in a position physically or mentally to get on a witness stand. As I stated, we had Mr. Johnson up here and there wasn't much we could do about Patricia Johnson. I don't know what her testimony was

> before that Grand Jury frankly, and I assume possibly that the State may have brought her forward as a State's witness. I don't know.

Isom's defense counsel also indicated:

> . . . according to the records here Patricia Johnson has a very extensive criminal record and that this person, as I believe, has some connection to Lewis Johnson and I believe that she is a fairly biased witness against the Defense. Her record is quite extensive and . . . according to my information, she would not be a witness for the Defense . . . .

Neither lawyer testified as a witness; they were representing Clayton and Isom at the hearing. These reasons represent sound trial strategy for not calling Johnson. Clayton has not shown that his counsel's performance was deficient.

Failure to Request Reasonable Doubt Instruction

Clayton also asserts that Dolan was ineffective because Dolan did not request a reasonable doubt instruction and the court failed to instruct the jury that Clayton must be given "the benefit of every reasonable doubt arising from the evidence or lack of evidence in the case" as required by La.C.Cr.P. Article 804(A).

In effect, Clayton contends that the trial court's instruction was not adequate to instruct the jury on the concept of reasonable doubt. "[D]efendant was prejudiced by the fact that the jury was not told that they could find defendant not guilty if they had a reasonable doubt arising out of the lack of the evidence in the case."

The Court's inquiry "is not whether there was prejudice to the defendant, or whether state law was violated, but whether there was prejudice of constitutional magnitude." Sullivan v. Blackburn, 804

F.2d 885, 887 (5th Cir. 1986), cert. denied, 481 U.S. 1019 (1987). "`The question in a collateral proceeding is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process . . . , not merely whether the instruction is undesirable, erroneous, or even universally condemned.'" Id. (quoting Henderson v. Kibbe, 431 U.S. 145, 156, 97 S. Ct. 1730, 52 L.Ed.2d 203 (1977) (internal citation and quotations omitted)).

The trial court instructed the jury that:

> Where there's more than one party charged with an offense, you are to consider the guilt or the innocence of the parties on trial. It is incumbent upon the State to prove to your satisfaction and beyond a reasonable doubt whether or not the defendants directly committed the act constituting the offense . . . If the State so proves to your satisfaction beyond a reasonable doubt, then you are required to return a verdict of guilty. If not, I charge you, you are advised to return a verdict of not guilty.

The trial court described the possible verdicts the jury could reach as second degree murder, manslaughter, or not guilty. The court informed the jury that both second degree murder and manslaughter had to be proven beyond a reasonable doubt. The full instructions do not appear to be part of the record. It is, however, evident in light of the evidence of Clayton's guilt at the time of the trial and the trial court's repeated instructions to the jury that they must find Clayton guilty beyond a reasonable before convicting him, that Clayton was not denied due process. Therefore, failure to request this instruction did not amount to ineffective assistance of counsel.

District Court's Failure to Conduct Evidentiary Hearing

Clayton finally argues that the district court erred by not conducting an evidentiary hearing. Clayton had requested an evidentiary hearing as an alternative ground of relief.

A petitioner who has failed to develop evidence in state court is entitled to a federal evidentiary hearing only "if he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure or if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." Burnett v. Collins, 982 F.2d 922, 929 (5th Cir. 1993) (citation omitted). An evidentiary hearing is not necessary if the record is adequate to resolve the claim, as it is in this case. Wiley v. Puckett, 969 F.2d 86, 98 (5th Cir. 1992). Clayton failed to demonstrate that a fundamental miscarriage of justice occurred when the district court did not convene an evidentiary hearing. Because the district court did not abuse its discretion, the court's judgment is AFFIRMED.