

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-30274
Summary Calendar

DAVID SCOTT JOHNSON,

Petitioner-Appellant,

VERSUS

JOHN P. WHITLEY,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-93-2562-H)

(January 24, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:¹

David Scott Johnson, a Louisiana inmate, challenges the district court's denial of his § 2254 habeas corpus petition. We find no error and affirm.

I.

In 1975, Johnson was convicted of armed robbery in Louisiana state court. The trial court sentenced Johnson to 150 years

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

imprisonment as a habitual offender based on a 1969 conviction for aggravated burglary. Following the denial of his state habeas corpus petition, Johnson filed the present habeas corpus petition in federal district court pursuant to 28 **U.S.C.** S 2254. Johnson's habeas petition raises six grounds for relief: 1) that the Louisiana Supreme Court, his counsel, and state court officials conspired to frustrate his right to judicial review; 2) that the state trial court admitted his confession into evidence even though Johnson alleges that the confession was not voluntarily; 3) that the government knowingly used perjured testimony during a suppression hearing; 4) that the trial court erroneously instructed the jury on the definition of reasonable doubt; 5) that he was not represented by counsel when he pled guilty to the 1969 aggravated burglary charge that the trial court used to enhance his sentence; 6) that he received ineffective assistance of counsel at trial; and 7). that the district court erred by not holding an evidentiary hearing on his claims. The district court dismissed the first claim at Johnson's request after the government questioned whether the claim had been exhausted in state court. The district court subsequently denied Johnson's petition and granted Johnson a certificate of probable cause to appeal. Johnson timely appeals the district court's denial of his habeas petition. Johnson also filed motions with this court for appointment of counsel and for appointment of a qualified hypnotist.

II.

A.

Johnson first argues that the district court erred in dismissing his claim that the Louisiana Supreme Court, state court officials, and his counsel conspired to frustrate his right to judicial review. Johnson's contention that the district court erred in dismissing his first claim is without merit. In response to the government's contention that he did not exhaust his conspiracy claim in state court, Johnson moved to dismiss the conspiracy claim in order to avoid dismissal of his entire habeas petition pursuant to **Rose v. Lundy**, 455 U.S. 509 (1982). Therefore, the district court's dismissal of the conspiracy claim was precisely the relief Johnson requested in order to preserve the remaining claims in his habeas petition. Moreover, to the extent that Johnson seeks to present the merits of his conspiracy claim for the first time on appeal, we need not address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this [C]ourt unless they involve purely legal questions and failure to consider them would result in manifest injustice." **Varnado v. Lynaugh**, 920 F.2d 320, 321 (5th Cir. 1991).

B.

Johnson asserts next that the state trial court erred by failing to exclude a confession that he alleges was procured through coercion in violation of the Fifth, Sixth, and Fourteenth Amendments. Johnson contends he was not given his **Miranda**

warnings by either Detective John Graham or Detective Robert Walker, the officers that arrested and interrogated him. Johnson further alleges that Detective Graham induced him to sign the confession through false promises of leniency and that, at one point, Detective Walker threatened him at gunpoint. Finally, Johnson complains that Graham and Walker ignored his requests for a "mental doctor" during the interrogation. After a hearing, the state trial court denied Johnson's motion to suppress the confession.

While the ultimate question of whether a confession was voluntary is subject to independent federal review, a state court's subsidiary findings of fact are afforded "a presumption of correctness" under 28 **U.S.C.** § 2254(d) if they are fairly supported by the record. **Hawkins v. Lynaugh**, 844 F.2d 1132, 1137 (5th Cir.), **cert. denied**, 488 U.S. 900 (1988). While the trial court in this case did not make express findings, "it is appropriate to reconstruct the trial court's findings by reviewing the record in the light of the court's opinion where the record of the state court is orderly and intelligible." **Reddix v. Thigpen**, 805 F.2d 506, 513 (5th Cir. 1986). Accordingly, we now turn to the evidence presented during the suppression hearing.

During the suppression hearing, Detective Graham testified that Johnson was advised of his rights when he was arrested. Graham testified that Johnson was also informed of his rights twice before he signed his confession. In support of Graham's

testimony, the government introduced a document signed by Johnson stating that he was given his **Miranda** warnings and that he fully understood his rights. Graham testified that Johnson signed this document in his presence before signing his confession. Graham also testified that neither he nor Walker physically threatened Johnson or promised him lenient treatment in exchange for the confession. Finally, Graham testified that Johnson did not ask for a doctor until after he signed the confession. Nothing in Johnson's written confession contradicts Graham's testimony.

It is clear from the denial of the motion to suppress that the state trial court believed Graham's testimony that Johnson was given his **Miranda** warnings and that neither Graham nor Walker physically threatened Johnson or promised him lenient treatment in exchange for the confession. The district court concluded that the state court's decision to adopt Graham's account of the interrogation was fairly supported by the record and was thus entitled to a presumption of correctness. After our review of the record, we agree that the state trial court's findings are fairly supported by the record. We also agree with the district court's ultimate conclusion that Johnson's confession was voluntary.

C.

Johnson argues next that the state prosecutor violated his due process rights by knowingly using perjured testimony during the suppression hearing. According to Johnson, Detective Graham committed perjury when he testified that Johnson was never

physically threatened or promised lenient treatment in exchange for his confession. Johnson contends that the government knew that his confession was involuntary, but made no attempt to elicit the truth from Detective Graham during the suppression hearing.

The record does not support Johnson's claim that the government used perjured testimony during the suppression hearing.

To constitute constitutional error, the prosecution must have knowingly used perjured testimony to obtain a conviction.

Hawkins, 844 F.2d at 1141. As discussed above, Johnson's written confession does not contradict Graham's testimony concerning the interrogation. Because Johnson fails to point to any other evidence that Graham's testimony was perjured, we conclude that his claim must fail.

D.

Johnson complains next that the state trial court incorrectly instructed the jury on the definition of reasonable doubt in light of the Supreme Court's subsequent decision in **Cage v. Louisiana**, 498 U.S. 39 (1990). However, in **Skelton v. Whitley**, 950 F.2d 1037, 1046 (5th Cir.), **cert. denied**, 113 S. Ct. 102 (1992), we held that **Cage** is not available in a federal habeas petition attacking a judgment final before **Skelton**. Johnson concedes this point, but suggests that we reconsider **Skelton** because **Cage** did not "break new ground." This panel is bound by **Skelton** until that decision is overruled by this court

en banc or by the Supreme Court. **Pruitt v. Levi Strauss & Co.**, 932 F.2d 458, 465 (5th Cir. 1991). Accordingly, **Skelton** is dispositive of Johnson's **Cage** claim. To the extent that Johnson seeks an en banc rehearing of our decision in this case, he must comply with the procedural requirements for en banc consideration set forth in 5th Cir. Rule 35.

E.

Johnson contends next that the state trial court's use of his 1969 aggravated burglary conviction to enhance his sentence was improper because he was not represented by counsel when he pleaded guilty to that charge. In support of his claim, Johnson contends that the state court clerk could not locate the name of the counsel appointed to represent him in 1969. Johnson further argues that the state trial court erred in allowing his trial counsel to stipulate that he was the same person convicted of aggravated burglary in 1969 without determining whether Johnson knowingly and voluntarily agreed to the stipulation. According to Johnson, the stipulation was equivalent to a plea of guilty.

Johnson's contention that he was not represented by counsel during the 1969 proceedings is not supported by the record. A minute entry in the record of the 1969 proceedings indicates that the trial court appointed Legal Aid to represent Johnson. The record shows that Johnson changed his plea to guilty shortly thereafter. Moreover, Johnson cites no authority to support his contention that the stipulation entered by his counsel is the equivalent of a guilty plea. Johnson was represented by counsel

during sentencing. He does not argue that he did not understand the significance of the stipulation, nor does he contend that he is not the same person convicted in 1969. We conclude, therefore, that the state trial court did not violate Johnson's due process rights by using the 1969 conviction to enhance his sentence.

F.

Johnson next complains that his trial counsel provided ineffective assistance of counsel in violation of the Sixth Amendment. To succeed on this claim, Johnson must first prove that his trial counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." **Strickland v. Washington**, 466 U.S. 668, 687 (1984). Johnson must show that his counsel's performance "fell below an objective standard of reasonableness" to satisfy this first requirement. **Id.** at 688. Second, Johnson must prove that his counsel's deficient performance prejudiced his defense. **Id.** In order to show prejudice, Johnson must demonstrate that counsel's errors were so serious as to render the trial unfair or its result unreliable. **Id.**

Johnson first contends that his trial counsel failed to adequately present the circumstances of his confession during the suppression hearing. According to Johnson, his trial counsel advised him not to testify during the suppression hearing because counsel did not believe that the trial court would find Johnson's testimony credible. Johnson also alleges that his counsel failed

to procure the testimony of Detective Riker even though, according to Johnson, Riker could testify that Detective Graham improperly induced Johnson to sign his confession by promising lenient treatment.

Based on our review of the record, we conclude that Johnson has not met his burden of showing that his counsel's performance during the suppression hearing was constitutionally deficient. Counsel are "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." **Strickland**, 466 U.S. at 690. An attorney's decision to advise a client not to testify does not constitute ineffective assistance when it is reasonable to conclude that the client's testimony would be more damaging than beneficial. **Hollenbeck v. Estelle**, 672 F.2d 451, 453-54 (5th Cir.), **cert. denied**, 459 U.S. 1019 (1982). Given Detective Graham's testimony refuting Johnson's portrayal of the interrogation, we cannot say that counsel's decision not to call Johnson as a witness was unreasonable. Johnson also fails to show that his counsel's failure to call Detective Riker as a witness was unreasonable. According to Johnson's own brief, Riker had no personal knowledge of what occurred during the interrogation. In sum, we conclude that Johnson has not overcome the presumption that his counsel exercised reasonable professional judgment during the suppression hearing.²

² Johnson does not separately assert that he was denied his fundamental right to testify. **See Hollenbeck**, 672 F.2d at 452-54.

Johnson further argues that his counsel failed to adequately investigate and prepare his insanity defense. Specifically, he asserts that his counsel failed to call his former psychiatrists as witnesses at trial and did not obtain copies of his medical records from the Southwest Louisiana State Hospital. Johnson also contends that his counsel did not fully explain the consequences of pleading insanity and failed to explore alternative defenses.

Our review of the record persuades us that Johnson has not proven that his counsel's performance in investigating and preparing his insanity defense was constitutionally deficient. Johnson's counsel subpoenaed Johnson's parents, neighbors, and examining psychiatrists. Johnson's counsel also thoroughly cross-examined Dr. Kenneth Ritter, a psychiatrist appointed by the trial court to examine Johnson. Dr. Ritter testified that he found no evidence of any form of psychosis or neurotic character. Johnson also fails to elaborate on his conclusory statements that his counsel did not adequately explain the insanity defense or investigate alternative defenses. Accordingly, we conclude that Johnson has not overcome the presumption that his counsel exercised reasonable professional judgment in investigating and preparing his insanity defense.³

³ Johnson also contends that counsel failed to investigate the 1969 conviction used to enhance his sentence or to inquire if Johnson was represented by counsel before stipulating that he was the same person named in the conviction. We need not consider this claim, however, because Johnson presents it for the first time on appeal. **Varnado**, 920 F.2d at 321.

G.

Johnson contends finally that the district court erred in failing to hold an evidentiary hearing on the merits of his claims. However, an evidentiary hearing "[is not] required when the record is complete or the petitioner raises only legal claims that can be resolved without the taking of additional evidence." **Lavernia v. Lynaugh**, 845 F.2d 493, 501 (5th Cir. 1988). The district court concluded that the state trial court record was sufficient to address Johnson's claims without the need for an evidentiary hearing. Our review of the record leads us to agree. The trial court record is complete and contains the evidence necessary to decide the merits of Johnson's claims. Moreover, "to receive a federal evidentiary hearing, the burden is on the habeas corpus petitioner to allege facts which, if proved, would entitle him to relief." **Ellis v. Lynaugh**, 873 F.2d 830, 840 (5th Cir.), **cert. denied**, 493 U.S. 970 (1989). Our discussion of the merits of Johnson's claims shows that Johnson has not met this burden.

III.

For the reasons stated above, the judgment of the district court denying habeas corpus relief is AFFIRMED. Johnson's motions for appointment of counsel and appointment of a qualified hypnotist are DENIED.⁴

⁴ We may appoint counsel to § 2254 petitioners where "the interests of justice" so require. **Schwander v. Blackburn**, 750 F.2d 494, 502 (5th Cir. 1985). In light of today's disposition, we conclude that Johnson has failed to demonstrate that the interests of justice require the appointment of counsel to present the merits of his habeas petition. We also deny Johnson's request for a "qualified hypnotist."

AFFIRMED. Motions denied.