

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-30603  
Summary Calendar

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SHELIA MILLS,

Petitioner-Appellant,

versus

JOHNNY JONES, Warden,  
Louisiana Correctional Institute for Women,  
and RICHARD P. IEYOUB,  
Attorney General, State of Louisiana,

Respondents-Appellees.

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Appeal from the United States District Court for the  
Eastern District of Louisiana  
(CA-94-1625-E)

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(July 13, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:\*

This appeal concerns the district court's denial of a state prisoner's petition for federal habeas relief pursuant to 28 U.S.C. § 2254. Finding no reversible error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

## FACTS AND PROCEDURAL HISTORY

On May 4, 1987, faced with charges of armed robbery and first-degree murder, Shelia Mills ("Mills") pleaded guilty to armed robbery in Louisiana state court.<sup>1</sup> Mills later moved the court to allow her to withdraw her guilty plea on the ground that Mills was unaware that she could have raised the defense of intoxication at trial. The motion was denied. Mills was sentenced to 30 years at hard labor without the benefit of probation, parole, or suspension of sentence. Mills attacked her sentence on direct appeal and was unsuccessful. See State v. Mills, 552 So. 2d 1064 (La. Ct. App. 1989), *writ denied*, 558 So. 2d 569 (La. 1990). Mills then unsuccessfully pursued post-conviction relief in the trial court. The Court of Appeal for the Fifth Circuit of Louisiana denied Mills's petition for a writ of review. Mills's subsequent petition for supervisory writs was also denied. See Mills v. Jones, 629 So. 2d 384 (La. 1993), *reconsideration denied*, 631 So. 2d 1155 (La. 1994).

Mills filed a petition for federal habeas relief, arguing that her guilty plea conviction and sentence were unconstitutional because (1) there was no factual basis for the plea; (2) the plea was coerced and based on misinformation regarding the sentence she would receive; (3) she was sentenced on inaccurate information which she was not allowed to rebut; and (4) she received ineffective assistance from counsel at her guilty plea hearing,

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<sup>1</sup> A summary of the facts surrounding Mills's conviction is set out in State v. Tassin, 536 So. 2d 402, 404-05 (La. 1988), *cert. denied*, 493 U.S. 874 (1989).

during sentencing, and on appeal.<sup>2</sup> Mills requested an evidentiary hearing on her claims. The State conceded that Mills had exhausted her state remedies and urged the court to deny Mills's petition. The magistrate judge recommended that Mills's petition be denied. The district court denied the petition without an evidentiary hearing and granted Mills a certificate of probable cause to appeal.

#### I. The Plea and Counsel's Effectiveness

On appeal, Mills argues that her plea was neither knowing nor voluntary nor entered with the effective assistance of counsel. Mills bears the burden of establishing that her guilty plea was invalid. Bonvillain v. Blackburn, 780 F.2d 1248, 1251 (5th Cir.), *cert. denied*, 476 U.S. 1143 (1986). A federal habeas court will uphold a guilty plea if it was knowing, voluntary, and intelligent. Hobbs v. Blackburn, 752 F.2d 1079, 1081 (5th Cir.), *cert. denied*, 474 U.S. 838 (1985). Before accepting a guilty plea, a trial court must ascertain that the defendant "has a full understanding of what the plea connotes and of its consequence." Boykin v. Alabama, 395 U.S. 238, 244 (1969).

At her guilty plea hearing, Mills stated that she knew of no mental or physical reason why she might be unable to enter a plea of guilty, that she knew how to read and write, and that she was

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<sup>2</sup> Although referring to the issue in her reply brief, Mills does not mention effectiveness of appellate counsel in her brief. She has waived the issue. Chrysler Credit Corp. v. Whitney National Bank, 51 F.3d 553, 556 n.1 (5th Cir. 1995).

faced with charges of first-degree murder<sup>3</sup> and armed robbery. Defense counsel stated that Mills was entering a plea pursuant to North Carolina v. Alford, 400 U.S. 25, 37-38 (1970). Mills signed a "Boykin" form which stated that she was pleading guilty to armed robbery because it was in her best interests to do so. See id. (no constitutional error by trial court accepting a guilty plea, despite the defendant's expression of innocence, when the judge has a basis to evaluate the knowingness and voluntariness of the plea and there is a strong factual basis for the guilty plea).

Before accepting her plea, the convicting court informed Mills of the elements of armed robbery and that the penalty for armed robbery was between five and 99 years of imprisonment. Mills stated that she understood the potential penalty and that she had not been promised a specific sentence. Mills was informed of her rights: to a trial by jury, to remain silent, to confront and cross-examine witnesses, and to have appointed counsel. She was also informed of the "beyond a reasonable doubt" burden of proof; her presumption of innocence; and her rights to assert defects such as illegal confession, illegal identification, illegal arrest, and illegal search and seizure. Mills stated that she entered her plea without coercion. Mills acknowledged that she was pleading guilty because she had, in fact, committed the crime of armed robbery.

The following factual resume was entered:

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<sup>3</sup> At the time that she entered her plea, the punishment for first-degree murder was "death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence." **La. Rev. Stat. Ann.** 14:30(C) (West 1986). Mills concedes that counsel warned her of the possibility of the death penalty.

The State has alleged and is prepared to prove that on November 6th, 1986, in the Parish of Jefferson, more specifically, near the corner of Destrahan Avenue and Lapalco, [Mills] was a principal and did in-- did in fact help the co-defendant, Robert Tassin, arm rob the victim, Edward Martin. The State was prepared to show this defendant, Mrs. Mills, had a conversation with Mr. Tassin before this occurred, and that while driving a car near the area of Destrahan and Lapalco, the car was pulled off to the side of the road, at which time Mr. Tassin pulled a gun on Mr. Martin and eventually shot Mr. Martin, but had done that with the intention of armed rob-- committing an armed robbery against him. We would submit that Mrs. Mills was aware of this and spoke to Mr. Tassin about this. We would also represent to the Court that we are prepared to prove that it was Ms. Mills who brought to [sic] Mr. Martin, as well as another gentleman, a Mr. Stagner, to Mr. Tassin's house and made Mr. Tassin aware that these gentlemen had money and had recently been paid, as they had gotten off of a boat.

Mills objected when the prosecutor read the factual resume, stating that she did not have a conversation with Tassin about robbing anyone--although she "knew it was going to happen." The court found that there was a factual basis for Mills to plead guilty and accepted the plea.

In order for Mills's Alford plea to be constitutionally valid, there must have been a factual basis for the plea. See United States v. Briggs, 939 F.2d 222, 228 n.18 (5th Cir. 1991), cert. denied, 113 S. Ct. 1016 (1993); Willett v. Georgia, 608 F.2d 538, 540 (5th Cir. 1979). Mills's statement that she was aware that the robbery was going to happen and her admission that she brought Martin and Stagner to Tassin's house and told Tassin that they had just been paid are sufficient to establish guilt and accordingly

provides a factual basis for her plea.

The colloquy otherwise demonstrates that Mills understood the nature of the constitutional protections that she was waiving and that she understood the charges she was facing. See Henderson v. Morgan, 426 U.S. 637, 645 n.13 (1976); see also Taylor v. Whitley, 933 F.2d 325, 329 (5th Cir. 1991), *cert. denied*, 503 U.S. 988 (1992). Mills has not shown the plea was invalid. Quite the contrary, the record reveals a knowing and voluntary plea was accepted by the convicting court.

Mills's attack on the effectiveness of counsel also fails. In order to demonstrate ineffectiveness of counsel, Mills must establish that counsel's performance fell below an objective standard of reasonable competence and that she was prejudiced by her counsel's deficient performance. Lockhart v. Fretwell, 113 S. Ct. 838, 842-44 (1993). Judicial scrutiny of counsel's performance is highly deferential, and courts indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 687-89 (1984).

The petitioner must affirmatively plead the actual resulting prejudice. Hill v. Lockhart, 474 U.S. 52, 60 (1985). Mills must demonstrate that counsel's errors were so prejudicial that they rendered the proceedings unfair or the result unreliable. Fretwell, 113 S. Ct. at 844. In the context of a guilty plea, the petitioner must show that, but for counsel's errors, she would not have pleaded guilty and would have insisted on going to trial.

Joseph v. Butler, 838 F.2d 786, 791 (5th Cir. 1988).

The transcript of Mills's guilty plea hearing shows that, before she entered her plea, the court informed her that she faced a sentence of imprisonment for "not less than five years and for not more than ninety-nine years." Mills stated that she had had extensive conversations with counsel regarding the charges against her and that she was satisfied with counsel's representation. Mills stated that she tendered her plea to avoid a trial for first-degree murder and that she pleaded guilty because it was in her best interest to do so.

Mills has not shown that counsel's bargain with the state, which enabled her to avoid the possibility of the death penalty, was not a sound strategy. Mills argues that counsel was deficient in informing her that she would be subject to the death penalty if went to trial on a first degree murder charge. Mills argues that there is no evidence in the record at all to suggest that she had the specific intent to kill or inflict great bodily harm needed to sustain a first degree murder conviction. **La. Rev. Stat. Ann.** 14:30(A)(1) (West 1986). However, Mills does not prove that her counsel's performance was deficient, as she only alleges that her counsel informed her that she may receive the death penalty if she went to trial. This is not an incorrect statement, as Mills would have been exposed to the risk of the death penalty tried on a first-degree murder theory regardless of whether or not she believes that evidence for a conviction is lacking. It is very reasonable for an individual to actively avoid the risk of the

death penalty even though he believes that the evidence is in his favor because of the possibility that a jury may discredit his testimony.<sup>4</sup>

Mills next argues that counsel was deficient in not discussing the defense of intoxication with her. She contends that, had she known of the defense, she would not have entered her guilty plea. The fact that a defense exists, however, does not mean that a jury would believe the defense theory and acquit the defendant. Thus, Mills must do more than prove that a defense exists in order to show that the strategy of avoiding the risk of the death penalty with a jury trial was not a sound one and that she would have chosen such a risk instead of pleading guilty. Moreover, the defense of intoxication is not available for the armed robbery charge, as "[i]t is well settled that voluntary intoxication can only be considered as a defense where specific intent is an essential element of the crime. . . . Armed robbery is a general intent crime, and thus the defense of intoxication [i]s not available." State v. Sheppard, 646 So. 2d 1130, 1133 (La. Ct. App. 1994). Even assuming that Mills's counsel did not inform her of the intoxication defense, because intoxication is not a defense to armed robbery, the crime to which Mills pleaded guilty, we do not find a deficiency in her counsel's performance.

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<sup>4</sup> Mills also argues that her counsel incorrectly informed her that, if she chose to go to trial, she would be convicted and that counsel improperly instructed her on the law of principals. But these complaints were not alleged in her Petition for Writ of Habeas Corpus. We will not address them for the first time on appeal.



## II. Evidentiary Hearing

Mills argues that the district court abused its discretion by not holding an evidentiary hearing on her petition. An evidentiary hearing is not necessary because the record before the court is adequate for the disposition of Mills's case. Joseph, 838 F.2d at 788.

### CONCLUSION

For the foregoing reasons, the district court's denial of Mills's petition for federal habeas relief is AFFIRMED.