

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30654
Summary Calendar

LEONARD E. MONTEGUT,

Petitioner-Appellant,

VERSUS

JOHN P. WHITLEY, Warden
Louisiana State Penitentiary, and
THE STATE OF LOUISIANA,

Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 94 1742 D 6)

July 31, 1995

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Leonard Montegut appeals the denial of his state prisoner's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Montegut was convicted after a jury trial in Louisiana state court of possession with intent to distribute heroin. He was sentenced to life imprisonment. The state court of appeal affirmed. Montegut then filed a petition for state habeas relief.

The state trial court conducted an evidentiary hearing, at which Montegut introduced the testimony of Dr. Larry Barker, who was qualified as an expert in the fields of listening comprehension and communication theory. The court granted Montegut a new direct appeal, determining that he had received ineffective assistance of appellate counsel, but denied habeas relief on the remaining claims.

On the new direct appeal, the court of appeal found that the state trial court's jury instructions were not defective and that Montegut had not received ineffective assistance of counsel. The the Louisiana Supreme Court denied his petition for a supervisory writ.

In the instant habeas petition, Montegut alleged that the jury that convicted him for possession of heroin with the intent to distribute had been improperly instructed regarding the elements of the lesser-included offenses of possession and attempted possession of heroin and that he had received ineffective assistance of counsel. The magistrate judge determined that a reasonable person of ordinary intelligence could have understood the court's instructions, noting that the jury never asked for additional instructions nor indicated that it did not understand the charge,

and that Montegut had not received ineffective assistance of counsel. The magistrate judge thus recommended that the habeas petition be denied. The district court adopted the findings of the magistrate judge.

II.

A.

Montegut argues that his due process rights were violated because the instructions regarding the lesser-included offenses of possession and attempted possession were not capable of being understood by a reasonable juror of average intelligence. He relies upon Barker's testimony to the effect that the probability that a reasonable person of average intelligence would understand the court's jury charge was "low."

The state trial court instructed the jury as follows:

The essential elements of possession of heroin with the intent to distribute are, first of all, the defendant must possess the substance. Possession may either be actual or constructive possession or the combination of both. Actual possession connotes the idea of having on one's person or within one's hands, such as the keys to my car are in my pocket now. I'm actually possession the keys to the car. Constructive possession connotes the idea of having possession over or in one's control. My automobile is parked in the basement. I am constructively possession the car. The keys I'm actually possessing. That's my car, I put it there and I can go get it. That's constructively possession

Now, the second element in this charge is that the substance must be a controlled dangerous substance known as heroin.

Third element, the possession must be knowing or intentional. This element has two parts. It must be proved to your satisfaction that the defendant knew he had the substance and that the defendant knew the

substance was, in fact, heroin. A person may have actual or constructive possession of a drug but not know about it

Fourth element is the defendant must intend to distribute the substance. That must be proved to your satisfaction beyond a reasonable doubt. Now, to distribute means to deliver to somebody else Any transfer of ownership or possession is distribution.

Now, the defendant in this case is not charged, however, with distribution of heroin, but with possession with the intent to distribute it. If you find that the defendant knowingly and intentionally possessed heroin, then you're to decide what he intended to do with it. Did he intend to use it for him or did he intend to distribute it? . . . If you find that the State has proven each of these four elements to your satisfaction and beyond a reasonable doubt, then you should return a verdict of guilty

One of the possible responsive verdicts in this case, and there are five, is guilty of mere possession of heroin. The essential elements of mere possession of heroin are the same as the first three, possession with the intent to distribute. One, knowingly and intentionally possess, must be either actual or constructive or the combination of both, and it must be heroin.

The next possible responsive verdict in the case are what we call attempted possession of heroin with the intent to distribute it, and number four is mere attempt possession of heroin . . . [W]hether the State can prove or whether evidence revealed to you beyond a reasonable doubt that a person had an intent to do a crime and did some overt act towards the accomplishment of that crime, that is an attempted crime.

In a habeas proceeding, the question is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (internal quotation and citation omitted). "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater

than the showing required to establish plain error on direct appeal." Id. "[T]he instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." Estelle v. McGuire, 502 U.S. 62, 72 (1991) (internal quotations and citation omitted).

Montegut does not contend that the state failed to prove any of the elements of the offense. Further, the district court found that the evidence was sufficient to support his conviction for possession with intent to distribute heroin. Moreover, a reading of the charge reveals that the court adequately set forth the elements of possession and attempted possession of heroin, the lesser-included offenses. The court instructed that to find Montegut guilty of possession of heroin, the jury must find that he knowingly and intentionally possessed, either actually or constructively, heroin. To find Montegut guilty of attempted possession, the jury was instructed that it must find that he "had an intent to do [the] crime" and that he "did some overt act towards the accomplishment of [the] crime." Finally, although Montegut contends that the court's instructions were "incomprehensible," the jury never asked the trial court for additional instructions and never indicated that it did not understand the charge. Even assuming that the court's instruction regarding lesser-included offenses was erroneous, Montegut has failed to show that the instruction so infected the entire trial that his resulting conviction violates due process. See Kibbe, 431 U.S. at 154.

Additionally, Montegut argues that Barker's conclusions have

never been rebutted or undermined by the state in any court. The state court of appeal, however, rejected Barker's testimony, determining that when taken as a whole, the instructions were abundantly clear and capable of being understood by a person of ordinary intelligence. The court acknowledged that Baker had read the entire jury charge, but it concluded that he had "focused" only upon the contested charges. The court of appeal was free to reject Barker's testimony; Montegut is incorrect that the court relied upon a "mistaken reading of the record." Accordingly, the district court did not err by denying habeas relief.

B.

Montegut does not mention his ineffective assistance claim in his appellate brief. The issue is thus deemed abandoned. See Yohey v. Collins, 985 F.2d 222, 225 (5th Cir. 1993).

AFFIRMED.