IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30672

Summary Calendar

CLARENCE JASON,

Petitioner-Appellant,

versus

BURL CAIN, Acting 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-94-1642-B)

(May 19, 1995)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:[*]

Petitioner Clarence Jason appeals the district court's dismissal of his second application for a writ of habeas corpus. We affirm.

In his habeas petition, Jason argues that the government knowingly used perjured testimony against him. The police report

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

recording the on-the-scene statement of Herbert McFarland, one of the prosecution's witnesses, conflicts with McFarland's in-court testimony, he alleges. He also argues that because his trial counsel failed to request an in camera inspection of that police report, he received ineffective assistance of counsel.

However, because Jason failed to raise these arguments in his prior habeas petition, and because he can demonstrate neither cause nor prejudice, we need not review his contentions. See McCleskey v. Zant, 111 S. Ct. 1454 (1991).

As cause, Jason states that he has only recently acquired the police report. Yet Jason appreciated the importance of the police report years before he filed his first habeas petition. His unsuccessful 1985 motion in state court for production of the police report states that he believed it would help him highlight discrepancies between McFarland's in-court testimony and the police report. He does not explain why he did not further pursue production of the police report until "mid of 1989," months after his first habeas petition was denied.

Jason could easily have procured the police report before he filed his first petition. When he filed his first petition in 1988, police reports were public records under Louisiana law and subject to discovery. La. Rev. Stat. Ann. § 44:3A(4)(a) (Supp. 1995). See Hudson v. Whitley, 979 F.2d 1058, 1061 (5th Cir. 1992) (per curiam) (Although a legislative act temporarily suspended § 44:3A(4), the suspension was terminated on August 31, 1986); State v. McDaniel, 504 So.2d 160, 161-62 (La. Ct. App. 1987)

(same). With reasonable diligence, Jason could have acquired the police report in time to incorporate its impeaching evidence in his first habeas petition. Instead, he chose to wait over five years. He has not explained why. Because he had not demonstrated cause, we need not examine whether he could demonstrate prejudice.

Nor do we find that actual innocence compels us to review his contentions here. The district court found, and we agree, that even if the jury had considered the contents of the police report, it would not have entertained a reasonable doubt of his guilt. We are not convinced that the discrepancies between McFarland's testimony and his account of the crime as recorded in the police report fatally undermine his credibility or substantially corroborate Jason's own account of what happened. The two accounts do vary in some details. For example, the police report records that Herbert McFarland told Officer Wood at the scene of the crime that as he was walking down the street, he saw three males walking along, one of them pushing a bicycle. He saw the one pushing the bicycle drop the bicycle and grab one of the other two by the jacket. He heard a gunshot and saw the man in the jacket fall. He said he saw the man who had grabbed the fallen man by the jacket pick up the bicycle and ride toward him. As he rode past him, McFarland "got a good look" at him and recognized him as Jason. In his trial testimony, McFarland stated that Jason biked away from him, not towards him, and that he recognized Jason as the assailant from a distance.

However, McFarland never adopted the police report's narrative as his own, and on the stand he denied having made the statements recorded in it. Because police reports are generally not "verbatim accounts of pretrial statements, . . . the fact that a specific piece of trial testimony is not included in [the police report] is not necessarily a reflection on the credibility of witness, but instead may be the result of an [officer's] transcription techniques. . . . If a witness has not made as his own the investigator's summary, it is unfair for the defense to use the language or interpretations of someone else for impeachment." Lucas v. Whitley, No. 90-3232, slip op. at 6-7 (5th Cir. Jan. 2, 1991), cert. denied, 112 S. Ct. 104 (1991) (citations omitted). In any event, the discrepancies between McFarland's testimony and the police report at best erode some of the credibility of either McFarland or Officer Wood; they do not establish that Jason is factually innocent. Finally, Jason also argues that the police report's account of what McFarland said about the crime on the scene corroborates his exculpatory story. Yet nothing in the police report confirms Jason's story that the victim hit him first and that the gun discharged by accident.

Finally, we dispose of motions pending in this case. Jason moved to file a supplemental brief after he filed his original brief in support of this second habeas petition. The state objected, arguing that his supplemental brief raised issues not addressed below. Conceding that point, Jason requested permission to withdraw his motion and to replace his original brief and his

reply brief with one "corrected" brief. We GRANT that request. We DENY his second habeas petition as advanced in his corrected brief.