

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-40783
Summary Calendar

LARRY ROBERSON,

Petitioner-Appellant,

VERSUS

WAYNE SCOTT, Director, Texas Department
of Criminal Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas
(9:93-CV-140)

(July 25, 1995)

Before THORNBERRY, DAVIS AND SMITH, Circuit Judges.

PER CURIAM:*

Larry Roberson appeals the district court's denial of his petition for writ of habeas corpus. Roberson was convicted of murder and was sentenced by the trial court to confinement for ninety-nine years. The conviction was affirmed. Roberson v. State, No. 12-85-0178-CR (Tex. App. -- Tyler 1987, no pet.)

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(unpublished). Roberson then filed a state habeas corpus application, which was denied without written order by the Texas Court of Criminal Appeals. Ex Parte Roberson, Writ No. 14,880-03. After exhausting state remedies Roberson filed the instant petition pursuant to the requisites of 28 U.S.C. § 2254. We affirm the district court's denial of relief.

I. BACKGROUND

Roberson was prosecuted for the murder of Bobby Joe Pierce, who was found on June 7, 1981, tied to a tree in rural Nacogdoches County, Texas, and shot several times with a shotgun. Around the same time Pierce was reported missing, a dump truck was reported stolen from the Southern Pacific Railroad's yard in Garrison. The truck was later found to have been involved in a collision with Pierce's car. Officers, suspecting that the theft might be linked to Pierce's murder but not possessing sufficient evidence to charge Roberson with the offense, nevertheless obtained a warrant for his arrest for theft of the truck. The warrant was lost, but its accompanying affidavit alleged in pertinent part:

[O]n or about the 8 day of June A.D. 1981, . . . Larry Wayne Roberson did then and there unlawfully commit the offense of: Theft. I checked footprints from where the dump truck was found, that had been stolen from Garrison. I found the same type track in Garrison where truck was stolen. I also found a glove that I think belong [sic] to a railroad employee as it had a creosote smell to it and this subject did not show up for work the following day.

Roberson was arrested pursuant to the warrant on Monday, June 8, 1981, and was questioned about the theft by officers that

evening and again the following morning. He was thereafter identified at a lineup, although the record does not reflect whether the identification was in connection with the theft or the murder. On Tuesday evening he was questioned about the murder, and denied any involvement in that offense. Wednesday he agreed to submit to a polygraph examination and was taken that morning to Waco where the test was administered. After flunking the polygraph Roberson confessed and gave two written statements admitting that he had killed Pierce. Originally charged with capital murder, pursuant to a plea agreement, he pled guilty to murder. On appeal he raised challenges to the lawfulness of his arrest and the voluntariness of his extra-judicial confessions.¹

Roberson raised three complaints in this habeas corpus petition: that his confession was the result of an unlawful arrest; that he was denied an attorney after invoking his right to counsel during the taking of the statements, and; without the illegally obtained confession there was insufficient evidence to support the conviction.² Neither the magistrate judge nor the district court found merit in any of these contentions.

¹ The Tyler Court of Appeals originally handed down an opinion holding admissibility of the statements was irrelevant because Roberson had judicially confessed to the offense during the plea proceeding. Roberson v. State, No. 12-81-0197-CR (Tex. App. -- Tyler 1983, no pet.) (unpublished). Roberson later obtained relief in the form of an out-of-time appeal. Ex Parte Roberson, Writ No. 14,880-01 (Tex.Crim.App. 1985).

² Since Roberson has not briefed the issue of sufficiency of evidence on appeal except to state this claim was rejected by the district court, the claim is deemed abandoned. Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993).

II. ANALYSIS

A. Confessions Following Illegal Arrest

Roberson contends that his confessions were involuntary and should have been suppressed because there was no probable cause for his arrest. The legality of an arrest implicates the Fourth Amendment, and as such, this claim of itself is not cognizable on an application for habeas corpus relief. Stone v. Powell, 428 U.S. 465, 494, 96 S.Ct. 3037, 3052, 49 L.Ed.2d 1067 (1976). An illegal arrest followed closely by a defendant's confession raises Fifth Amendment concerns and requires a reviewing court to determine whether the statement was sufficiently an act of free will so as to purge the primary taint. Brown v. Illinois, 422 U.S. 590, 602, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1975).³

On collateral attack a state court's determination regarding voluntariness is not entitled to the presumption of correctness articulated in 28 U.S.C § 2254(d); rather, the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination. Miller v. Fenton, 474 U.S. 104, 112, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985). However, subsidiary factual questions resolved by a coequal state court, such as whether police

³ Factors to be considered in determining whether the confession has been obtained by exploitation of an unlawful arrest are: (1) whether Miranda warnings were given; (2) the temporal proximity of the arrest and the confession; (3) the presence of intervening circumstances, and; (4) the purpose and flagrancy of the official misconduct. Brown, 422 U.S. at 603-04, 95 S.Ct. at 2261-62.

engaged in the tactics alleged by the defendant, are entitled to the § 2254(d) presumption of correctness. Id., U.S. at 112, S.Ct. at 450. State court findings on such factual matters are conclusive on the federal habeas court if fairly supported by the record and if the other circumstances enumerated in § 2254(d) are applicable. Id., U.S. at 117, S.Ct. at 453. Once the underlying factual questions have been resolved leaving the habeas court to determine whether the confession was rendered voluntarily under the totality of circumstances, the state court judge is generally in no better position than the federal habeas judge to make that determination. Ibid.

The Tyler Court of Appeals held that Roberson's arrest was illegal because the facts asserted in the warrant affidavit were too vague and inconclusive to constitute probable cause and did not support issuance of the warrant. Also, the circumstances would not have justified a warrantless arrest pursuant to Chapter 14 of the Texas Code of Criminal Procedure. Roberson, No. 12-85-0178-CR, slip op. at 3. The appellate court, however, held the taint of the unlawful arrest had been sufficiently attenuated so as to render the statements voluntary. Id., slip op. at 5. We will now examine the record independently to determine whether the court's factual determinations are fairly supported by the record. Miller, 474 U.S. at 117, 106 S.Ct. at 453.

The Tyler Court, utilizing the Brown factors, noted that officers had given Roberson appropriate Miranda warnings at each critical stage during the period between the arrest and the

confessions. The record from the pretrial hearing on the motion to suppress the confessions reflects that Miranda warnings were administered by Justice of the Peace Harold Bogue at Roberson's arraignment. Roberson was read his rights by Texas Ranger William Walk before a thirty-five to forty minute interrogation session on the night of the arrest in which Walk questioned him about the theft charge, by Detective Johnson prior to a two-hour interview earlier that afternoon, by Walk and Johnson separately following the polygraph examination on Wednesday, and again by Johnson after the trip back from Waco. In addition Miranda warnings were included on the polygraph intake sheet, which Roberson signed.

As to temporal proximity of the arrest and the confession, the Tyler court noted that Roberson was arrested on Monday, June 8, 1981, and was continuously incarcerated until he first gave the statement on Wednesday, June 10, 1981. The record reflects that Roberson had been in custody for only about forty-eight hours when he confessed to the murder. However, as the appellate court correctly noted, the following intervening circumstances occurred during this time: Roberson, after his arrest on Monday, had been arraigned by a magistrate who also set his bond; had been identified at a lineup on Tuesday, and; had voluntarily submitted to a polygraph examination on Wednesday.⁴ Additionally, there was

⁴ In a different context, the Supreme Court has opined that the act of bringing a defendant before a committing magistrate to advise him of his rights and set bail was sufficient to purge of its primary taint evidence gained pursuant to an illegal arrest. See Johnson v. Louisiana, 404 U.S. 356, 365, 92 S.Ct. 1620, 1626, 32 L.Ed.2d 152 (1972) (identification at lineup conducted after
(continued...)

nothing in the record to indicate Roberson had been physically abused or subjected to prolonged or oppressive interrogation sessions. The record supports the court's conclusion that these two factors tended to attenuate the effect of the illegal arrest.

Finally, the appellate court held that, although officers admitted they did not have probable cause to arrest Roberson, their actions in connection with the arrest were not made in bad faith, nor were they so flagrant and purely investigatory in nature as to outweigh the other factors having an attenuating effect. Supporting this conclusion is the testimony of Bogue, who said he relied on two additional pieces of information known to him but not included in the affidavit: the missing dump truck was leased to Southern Pacific Railroad in Garrison, and Roberson worked at that yard. Walk testified that investigators were trying to tie the theft of the truck to the murder at the time Roberson was arrested. Roberson was not questioned about the murder until Tuesday night, and consented to take the polygraph examination on Wednesday. Our independent examination of the record supports the Tyler Court's conclusion that, based on the Brown factors, officers did not obtain Roberson's confessions by exploitation of the unlawful arrest.

In addition to the court of appeals' Brown analysis, other factors exist which are useful in our totality of the circumstances analysis. Roberson's bond was set on Monday and he would have been

⁴(...continued)
magistrate warned defendant and set bail was not tainted by exploitation of illegal arrest).

released from custody, had he made bond, at any time up until he had made the inculpatory statements. We also note that, upon learning he was wanted by police, Roberson voluntarily surrendered to Deputy Mutt Cranford while waiting for the other deputies to arrive with the arrest warrant. Circumstances surrounding the arrest itself thus appeared to have been less intimidating and oppressive than might otherwise have been expected. Roberson himself testified that he was not questioned about the murder until Tuesday night, and that he was informed at that time that the offense may involve the death penalty. He also stated that no one forced him to submit to the polygraph examination, but that he wanted to take it to prove his innocence. Roberson testified that he was not physically abused, nor subjected to oppressive interrogation techniques.⁵ He had a high school education, could read and write, and said he read "most of" the statements before signing them.

We hold the record fairly supports the state court's finding that Roberson was advised about, and understood, his rights prior to giving the two statements, and that he freely and voluntarily chose not to exercise them. The totality of the circumstances demonstrates that Roberson's statements were voluntary and obtained

⁵ Roberson did say that officers told him that if he confessed he would be charged with murder instead of capital murder, and so would avoid the death penalty. Specifically, he says officers told him "they had enough evidence to convict me and they would get a Statement because there was only so much punishment my body could stand." However, Roberson's testimony regarding these matters was refuted by each of the deputies who questioned him, and the trial court found that Roberson was not threatened, abused in any way, or promised anything.

in a manner compatible with the requirements of the Constitution. Miller, 474 U.S. at 112, 106 S.Ct. at 450.⁶

B. Denial of Right to Counsel

As his other ground for relief Roberson contends he was denied counsel during the interrogation sessions, lineup, and polygraph examination, after he had repeatedly requested the presence of an attorney. Despite his request, he states counsel was not provided until after he had confessed.

There is no question that Roberson's Sixth Amendment right to counsel had attached prior to his confessions. Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). If Roberson had requested an attorney after his arraignment, and police had initiated interrogation thereafter, any subsequent waiver of counsel would have been invalid, and in violation of the Sixth Amendment. Id., U.S. at 636, S.Ct. at 1411.

⁶ We see no reason why an illegal arrest should not be considered as a factor in the totality of circumstances inquiry into the voluntariness of a confession. In Self v. Collins, 973 F.2d 1198 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1613, 123 L.Ed 2d 173 (1993), because the defendant failed to question the validity of the arrest in any state court proceeding, we declined to consider that factor in determining whether the confession was given voluntarily. In the instant case, in contrast, the issue of the unlawful arrest and its effect on Roberson's statements was fully litigated by the state courts and decided adversely to Roberson. Since the record fairly supports the Tyler Court's conclusion that the taint of the unlawful arrest had been attenuated, this Court need not engage in any independent factual determination as to whether the arrest had an impact on Roberson's confessions.

The Tyler Court abated the appeal in order for the trial judge to make findings of fact as to the voluntariness of the confession. The trial court made the following relevant findings:

2. The Defendant did not request an attorney before nor during the giving of the confession nor at any time before signing the same.

3. The Defendant was not denied an attorney by any Peace Officer nor any other person.

Based upon the trial court's findings, the court of appeals held Roberson was not denied his right to counsel. We must examine the record to determine whether it supports the state court's findings.

Roberson does not say that police failed to advise him of his right to counsel, or that he did not understand the court was required to appoint an attorney if he could not afford to retain one. Instead, Roberson testified at the suppression hearing that he asked Deputy Billy Johnson and Ranger Walk for an attorney when he was first questioned regarding the murder on Tuesday night. He also claims that he requested counsel on "the Monday and Tuesday and the Wednesday morning," and that questioning had continued after these repeated requests.

In direct contradiction state officials testified that, even though advised a number of times of his right to an attorney, Roberson never invoked his right to counsel. Bogue stated that he told Roberson at the arraignment that he had the right to consult with an attorney and that one could be provided free of charge. Calvin Jerry Collins, the polygraph operator, stated that Roberson never asked for an attorney, and the waiver he executed prior to taking the examination set forth his right to have counsel present

while he was being questioned. Deputies McDaniel, Copeland and Johnson all testified that Roberson did not ask for an attorney after being advised of his rights. The trial court's findings of fact are supported by the record, and as such, are entitled to the 28 U.S.C. § 2254(d) presumption of correctness. Miller, 474 U.S. at 117, 106 S.Ct. at 445. Therefore the district court did not err in denying this claim.

III. CONCLUSION

The record supports the state court's conclusions that Roberson's confessions were not involuntary, and that he was not denied his right to counsel. The judgment of the district court is therefore

AFFIRMED.