UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

NO. 94-40867

JOHNNY A. HUNTER,
Plaintiff-Appellant,

versus

WAYNE SCOTT,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(4:93-CV-120)

(April 25, 1995)

Before SMITH, EMILIO M. GARZA, PARKER, Circuit Judges.

PER CURIAM:[*]

Johnny A. Hunter appeals the district courts denial of his petition for habeas corpus relief under 28 U.S.C. § 2254. We affirm.

I. FACTS

Johnny A. Hunter pled guilty to one count of burglary with intent to commit theft in a Texas state court in 1991. Hunter also pled "true" to an enhancement paragraph alleging that he had committed burglary of a vehicle in 1987. Hunter was sentenced to a 30-year term of imprisonment.

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

Hunter filed a petition in the district court for federal habeas corpus relief. The respondent waived exhaustion of state-law remedies. The magistrate judge recommended that the district court deny Hunter habeas relief. The district court adopted the magistrate judge's report and recommendations and denied Hunter relief. The court granted Hunter a certificate of probable cause for an appeal.

II. DISCUSSION

Having granted Hunter's motion to file his reply brief out of time, we have considered all of the arguments presented by the parties.

First, Hunter contends that his 1991 state-court attorney, Donald McDermitt, was ineffective because he failed to prepare for trial; failed to investigate possible insanity and voluntary intoxication defenses; failed to file various motions Hunter had prepared; failed to investigate the validity of Hunter's 1987 conviction and relied on the district attorney's averment that the conviction was valid; failed to investigate various unnamed prosecution witnesses; failed to discover that Hunter did not have 10 prior convictions; and forced Hunter to plead guilty by telling him on the day scheduled for trial of the state court's denial of McDermitt's motion for a continuance and his (McDermitt's) inability to prepare for trial, and recommending that Hunter plead guilty and accept a 30-year prison sentence rather than exposing himself to a much longer prison sentence. Hunter also contends that his 1987 conviction was invalid; that his 1987 guilty plea was

involuntary due to ineffective assistance of counsel; and that his 1991 "true" plea was involuntary.

Hunter did not contend in his district-court pleadings that McDermitt had been ineffective because he had failed to discover that Hunter did not have 10 prior convictions. This court need not address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this court 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). Determination of whether McDermitt investigated all of Hunter's previous convictions would require this court to make factual findings. This court therefore need not consider Hunter's contention that McDermitt had failed to discover that he had not been convicted 10 times. Hunter raised in the district court all of the other issues he wishes this court to consider.

A voluntary guilty plea waives all nonjurisdictional defects in the proceedings against the defendant. "This includes all claims of ineffective assistance of counsel, *except* insofar as the alleged ineffectiveness relates to the voluntariness of the giving of the guilty plea[.]" *Smith v. Estelle*, 711 F.2d 677, 682 (5th Cir. 1983)(internal and concluding citations omitted), *cert. denied*, 466 U.S. 906 (1984). A "prisoner's plea of `true' to the charge that he had been duly and legally convicted, if voluntarily and knowingly entered, forecloses his attack on the prior conviction." *Long v. McCotter*, 792 F.2d 1338, 1339 (5th Cir.

1986).

To prevail on an ineffective-assistance-of-counsel claim, a movant must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove deficient performance, the movant must show that counsel's actions "fell below an objective standard of reasonableness." *Id*. at 688.

To prove prejudice, the movant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id*. at 694, and that "counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, ___ U.S. ___, 113 S. Ct. 838, 844 (1993). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Strickland*, 466 U.S. at 694. To prove unreliability or unfairness, the movant must show the deprivation of a "substantive or procedural right to which the law entitles him." *Fretwell*, 113 S. Ct. at 844. Additionally, "the defendant must overcome the presumption that, under the circumstances, the challenged action `might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted). In the context of a guilty plea, "to satisfy the `prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

In his appellate brief, Hunter states that "the overwhelming evidence of Petitioner's guilt is beside the point on this appeal." He also states that "a life sentence was at stake" in his case. Hunter's indictment alleged two previous felonies. Had Hunter been found guilty by the jury and the State proved both prior convictions, Hunter would have been exposed to a prison term of between 25 and 99 years. TEX. PENAL CODE ANN. § 12.42(d) (West supp. 1994). Had the State proved only one of his convictions, he would have been exposed to a prison term of between five and 99 years. TEX. PENAL CODE ANN. §§ 12.32(a)(West supp. 1994), 12.42(b)(West 1974). Had the State proved none of his convictions, he would have been exposed to a prison term of between two and 20 years. TEX. PENAL CODE ANN. §§ 12.33(a)(West 1974), 30.02(c)(West 1989).

Hunter does not allege that the second enhancement paragraph would have been dismissed had he pled not guilty and gone to trial. Nor does he contend that the conviction alleged in that paragraph is invalid. It is unlikely that a defendant who believes the evidence of his guilt is overwhelming, and who believes that he might face a term of imprisonment significantly longer than he would receive by pleading guilty would insist on pleading not guilty, proceeding to trial, and challenging two enhancement charges, rather than pleading guilty, admitting one enhancement charge, and accepting a sentence agreed upon in advance. Indeed, as is discussed above, Texas law provided for a maximum penalty of 99 years for a recidivist defendant in Hunter's position.

Additionally, Hunter's contention that counsel should have

investigated the defenses of insanity and voluntary intoxication is unavailing. The state-court record indicates that Hunter was hospitalized in 1975 and diagnosed with an anti-social personality disorder, alcoholism, and borderline mental retardation. Hunter was committed in 1976 and determined to be legally incompetent. The record does not indicate the reason for Hunter's commitment.

Hunter alleges that McDermitt knew about his hospital stays in the 1970s, the diagnosis during Hunter's 1975 hospital stay, and of his intoxication on the night of his 1991 offense. Hunter contends that McDermitt was incompetent because he failed to obtain a psychiatric evaluation of Hunter. He also alleges that McDermitt failed to interview various, unnamed individuals who could have testified that all of Hunter's brushes with the law were attributable to drug and alcohol abuse.

"It must be a very rare circumstance indeed where a decision not to investigate would be `reasonable' after counsel has notice of the client's history of mental problems." *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990). Assuming, arguendo, that counsel should have investigated Hunter's psychological status, Hunter has failed to show prejudice resulting from counsel's dereliction.

A mental defect that is "manifested only by repeated criminal or otherwise antisocial conduct[]" is no defense against criminal liability in Texas. TEX. PENAL CODE ANN. § 8.01(b)(West 1974). Hunter does not allege that he suffered from any mental defect other than one that manifested itself in antisocial behavior. The

record of his 1975 hospitalization indicates that he suffered from just such a defect. Hunter could not have used that defect as a defense against criminal liability. Moreover, Hunter's hospital stays in the 1970s are temporally remote from his conviction for an act that occurred in 1991. Additionally, voluntary intoxication is no defense against criminal liability, though it can be considered by the jury in mitigation of the defendant's sentence. TEX. PENAL CODE ANN. § 8.04(a),(b)(West 1974).

Hunter has not demonstrated that he would have pled not guilty and proceeded to trial had McDermitt prepared for trial and conducted the defense as Hunter would have liked. Nor has he demonstrated that he would not have pled "true" and would have challenged both of the enhancement charges had counsel investigated the convictions alleged in the indictment. Because Hunter has not shown prejudice resulting from McDermitt's alleged shortcomings, he has not shown that his guilty plea or his "true" plea were involuntary. *See United States v. Fuller*, 769 F.2d 1095, 1097 (5th Cir. 1985)(a court may dispose of an ineffective-assistance contention without consideration of deficient performance if the petitioner does not show prejudice). Hunter has waived any contentions not related to the voluntariness of those pleas. *Long*, 792 F.2d at 1339; *Smith*, 711 F.2d at 682.

Hunter also contends that the district court should have held an evidentiary hearing on his petition. "To be entitled to an evidentiary hearing, a habeas petitioner must allege facts which, if proven, would entitle him to relief." *Johnson v. Puckett*, 930

F.2d 445, 449-50 (5th Cir.), *cert. denied*, 502 U.S. 890 (1991). As already noted, Hunter failed to allege such facts.

III. CONCLUSION

For the reasons given above, the judgment of the district court denying the appellant's petition for habeas corpus relief is AFFIRMED.