

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-41336  
(Summary Calendar)

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JOHN WESLEY WRIGHT,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,  
TDCJ-Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court  
For the Eastern District of Texas  
(6:93-CV-710)

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(May 23, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:\*

Petitioner-Appellant John Wesley Wright, a state prisoner, appeals from the district court's denial of habeas relief under 28 U.S.C. § 2254. He claims deprivation of his Sixth Amendment

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

right to effective assistance of counsel, specifically that counsel was ineffective in failing to locate and obtain testimony of alibi witnesses. For the reasons set forth below, we affirm the ruling of the district court.

I

FACTS AND PROCEEDINGS

A state jury in Texas convicted Wright of theft of property valued at more than \$20,000 and sentenced him to a term of imprisonment of 60 years and a \$10,000 fine. According to findings of the state court, Wright, along with Joseph Carl Carroll, went to the Cangelose Ranch in Smith County, Texas, and stole 44 head of black Angus cattle, which they then sold at the stockyards in Oklahoma City. Wright was represented by retained counsel--Robert A. Stewart prior to trial, and Stewart and Robert Lively at trial.

Wright was unsuccessful in a motion for a new trial and a motion to reconsider the motion for a new trial. Attached to the motion to reconsider were affidavits from two individuals who would testify that Wright could not have been in Oklahoma City selling the cattle at the time in question. Wright appealed, and the state appellate court affirmed the judgment of the trial court.

After exhausting state remedies, Wright filed a pro se, in forma pauperis (IFP), petition for writ of habeas corpus in federal court. He asserted that he was denied effective assistance of counsel in violation of the Sixth Amendment by virtue of counsel's failure to contact, interview, or subpoena alibi witnesses James Greathouse and Duane Bishop. The magistrate judge determined that

Bishop's affidavit did not show that he would have been a favorable alibi witness; and that counsel exhibited sound trial strategy by not calling Greathouse as a witness because his affidavit was readily impeachable. The magistrate judge recommended that the district court deny relief.

After Wright filed objections to the magistrate judge's report, the district court conducted a de novo review and adopted the report and recommendations of the magistrate judge, dismissing Wright's application for habeas corpus relief with prejudice. The district court certified that there was probable cause for an appeal (CPC) and granted leave for Wright to proceed IFP on appeal.

## II

### ANALYSIS

In asserting that he was deprived of effective assistance of counsel at trial, Wright contends that Stewart failed to investigate or contact Bishop and Greathouse prior to trial. At the commencement of trial, Wright advised Lively that the witnesses were not in the courtroom, learning then that the alibi witnesses had not been interviewed or subpoenaed. The state was granted a continuance because two witnesses from Oklahoma needed for the prosecution were not available to testify at that time. Wright states that Lively still did not contact Wright's alibi witnesses, even though there was still ample time to do so by virtue of the continuance. Wright posits that his alibi witnesses were necessary to refute testimony of the state's witnesses that he was in Oklahoma City on May 29, 1990. Wright insists that Bishop, a

Deputy Sheriff of Kaufman County, Texas, would have testified that he spoke with Wright at the Kaufman County Courthouse on May 29th about purchasing hay that Wright was cutting; and that Greathouse would have testified that on May 29th he was hired by Wright to cut hay in Van Zant County.

To prevail, Wright must prove two components: (1) that his counsel made errors that were so serious that they deprived him of his Sixth Amendment guarantee, and (2) that the deficient performance prejudiced Wright's defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). "Judicial scrutiny of counsel's performance must be highly deferential." Id. at 689. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. To show prejudice, the defendant must demonstrate that counsel's errors are so serious that they deprive him of a trial the results of which are fair or reliable. Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993).

On federal habeas review, complaints of ineffective assistance based upon a failure to call witnesses are not favored, as allegations concerning what the witnesses might have testified about are largely speculative. Lockhart v. McCotter. 782 F.2d 1275, 1282 (5th Cir. 1986), cert. denied, 479 U.S. 1030 (1987). To demonstrate the requisite prejudice, Wright must name the witnesses and show that the alleged testimony not only would have been favorable, but also that the witness would have been available to testify at trial. Alexander v. McCotter, 775 F.2d 595, 602

(5th Cir. 1985).

Bishop

In the "Motion to Reconsider Motion for New Trial," Lively attached an affidavit of Deputy Bishop to show that Wright was not in Oklahoma selling stolen cattle as stated at trial by the accomplice witness. Bishop averred that when he was transporting prisoners from the county jail to the county courthouse on May 29, 1990, between 11:15 a.m. and 11:45 a.m., he saw Wright and talked to him at the courthouse square; that he (Bishop) had no doubt about the date because it was the day after Memorial Day; and that the conversation concerned hay that Wright was supposed to cut that week.

The state opposed Wright's motion and presented a second sworn statement of Deputy Bishop in which he recanted the statement given to Lively. In so doing, Bishop averred that he had checked previously unavailable jail records and discovered that he could not have been in contact with Wright on May 29th; that in fact he was not certain of the actual date on which the subject conversation had occurred.

Wright has not shown that, if Bishop had been available to testify at trial, he would have given favorable testimony. Consequently, he has also failed to show that, even if we were to assume that counsel erred in not calling Bishop, such error would be so serious as to deprive Wright of a fair or reliable trial result.

Greathouse

Also attached to the motion to reconsider was the affidavit of Greathouse, in which he averred that he was in a fertilizer store in Canton, Texas, on May 29th when Wright came in between 8:00 a.m. and 8:30 a.m. According to Greathouse, he was hired by Wright to help cut hay on a farm near Kaufman on May 30th and 31st; that Wright had dropped Greathouse off at the house of Greathouse's brother so that Wright would know where to pick up Greathouse the next day; that Greathouse never saw Wright again until they met in jail,<sup>1</sup> and that Wright told Greathouse that Lively would talk to him.

At the hearing on the motion for a new trial, Greathouse testified on cross-examination that the weather was hot and that it had not been raining from the 28th until the 30th of May. When asked if he would be surprised to know that it had been raining for four days during that time period, Greathouse stated that he did not remember. He also stated, contrary to his affidavit, that he had been hired just to haul the hay, not to cut it.

Assuming arguendo that counsel's failure to investigate and interview the alibi witnesses was inconsistent with reasonable professional conduct,<sup>2</sup> the question is whether Wright has satisfied

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<sup>1</sup> It appears that Greathouse met Wright in jail after the trial on October 3, 1990. The new evidence is not mentioned in the motion for a new trial filed on November 1, 1990. Counsel argued for the first time in the motion to reconsider, filed on December 13, 1990, that there were two alibi witnesses.

<sup>2</sup> The record does not support Wright's assertion that counsel was aware of the witnesses prior to trial. The "Motion to Reconsider Motion for New Trial" explicitly states "that these two

the second, or prejudice, prong of the Strickland test. See Bryant v. Scott, 28 F.3d 1411, 1418-19 (5th Cir. 1994). As the evidence of guilt at trial was overwhelming, it is clear that he has not. See Williams v. Collins, 16 F.3d 626, 634 (5th Cir.), cert. denied, 115 S. Ct. (1994).

Carroll, the accomplice, stated that he and Wright drove to Tyler, Texas, on May 28, 1990, and rented a motel room approximately three miles from the Cangelose Ranch. Deborah Sneider, the manager of the Econo Lodge, testified that Wright rented a room for two people on May 29th.

Carroll stated that he drove a white truck with a beige trailer, and Wright drove a black truck and trailer. After dark, Carroll and Wright went to a vacant house next to the Cangelose Ranch, walked to where the cattle were grazing, and drove the cattle to a pasture where they could readily be picked up. Carroll also stated that he and Wright tried to get into the barn to get a tractor to pull their trailers through the pasture, but they could not because the barn was padlocked. Deputy Rutilo Quezada and Detective Dale Geddie of the Smith County Sheriff's Department testified that there were signs that someone had tampered with the lock on the barn in an apparent attempt to cut it.

According to Carroll, he and Wright then decided that the only access was through the driveway of the vacant house, so they

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witness[es] were not known of prior to the time of trial and this information was not obtained until Defendant Wright was transferred to the Kaufman County Jail, and Defendant saw and talked to both witnesses and obtained new evidence."

returned to the motel to get their trailers. The plan was to take the cattle to Oklahoma City to be sold. After loading the cattle, Wright drove Carroll's truck and trailer out of the gate for him, hitting the left gate post with Carroll's beige trailer in the process. Geddie testified that he found paint on the post that was similar in color to that of Carroll's trailer.

Wright arrived at the stockyard ahead of Carroll and unloaded 22 head of cattle. Wright's load of cattle sold right away, and the Oklahoma Commission Company issued a check for roughly eight or nine thousand dollars. As Carroll's load would not be sold until the next day, he joined Wright at a Holiday Inn. Stacy Milner, an employee of the motel, identified Wright as the person who registered for a room on May 29, 1990.

Carroll further testified that the two men divided the first check, that Wright returned to Texas, and that he (Carroll) returned to the stockyards for the second check. Carroll stated that when he got back to Texas, he called Wright and they met to divide the proceeds of the second check.

Given the foregoing evidence, Wright has not shown that counsel's alleged errors in failing to investigate and interview the alibi witnesses--if error at all--were so serious as to deprive Wright of a trial with fair or reliable results. See Lockhart, 113 S. Ct. at 844. Accordingly, the judgment of the district court denying federal habeas corpus relief is  
AFFIRMED.