

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-50033
Summary Calendar

TRISTAN A. RICHARDSON,

Petitioner-Appellant,

VERSUS

WAYNE SCOTT, Director, TDC
and DAN MORALES, Atty. General,

Respondents-Appellees.

Appeal from the United States District Court
For the Western District of Texas

(SA-93-CV-41)

(January 10, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Pursuant to a plea bargain agreement, Tristan Richardson pleaded guilty to first degree murder and was sentenced to a 35-year term of imprisonment. Richardson did not file a direct appeal

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of his conviction. He filed a state habeas corpus application. The Texas Court of Criminal Appeals denied his application without written order. Richardson then filed a federal habeas corpus petition. The magistrate judge issued a memorandum opinion, recommending that the petition be denied, and advising that the parties had ten days within which to file any objections to the proposed findings and recommendation. Richardson did not file written objections to the proposed findings and recommendation. The district court adopted the findings and recommendation of the magistrate judge, and denied the petition. Richardson filed a timely notice of appeal. The district court granted CPC.

OPINION

Richardson raised the same issues in both his state and federal habeas petitions. The state habeas court rejected his argument as conclusional and unsupported by his factual allegations; the Texas Court of Criminal Appeals denied his application without written order. The federal district court also denied his petition as unsupported by his factual allegations. On appeal, Richardson has supplemented his argument with additional factual allegations. In particular, Richardson refers to facts which were in the record that was before the state habeas court.¹

A state prisoner must normally exhaust all available state remedies before he can apply for federal habeas relief. 28 U.S.C. § 2254(b) & (c). See Vela v. Estelle, 708 F.2d 954, 957 (5th Cir.

¹ The affidavits attached to Richardson's appellate brief were not attached to his federal habeas petition, but were presented to the state habeas court.

1983), cert. denied, 464 U.S. 1053 (1984). To have exhausted his state remedies, a habeas petitioner must have fairly presented the substance of his claim to the state courts. It is not enough that he has merely been through the state courts. Id. at 958. Normally, the exhaustion requirement is not satisfied if a petitioner presents new legal theories or entirely new factual claims in his federal petition. Id. However, when a petitioner merely supplements the same legal arguments with references to facts that were contained in the record before the state habeas court, then the petitioner has exhausted his state remedies. Id. at 959-60. In Vela, the petitioner asserted the same ineffective assistance of counsel argument in both the state and federal courts, but in the federal court he supplemented his argument with additional allegations of error. This Court held that Vela had exhausted his state remedies because the state habeas court previously rejected his argument based upon a review of the record as a whole. Id.

Richardson's case is virtually identical to Vela. Richardson raised his ineffective assistance of counsel claim in both his state and federal habeas petitions. Both the state and federal courts rejected his claim as conclusional. On appeal, Richardson now supplements his argument with references to facts that he did not allege in either the state or federal court.² However, his

² In his state habeas application, Richardson alleged that his counsel was ineffective in failing to interview witnesses, and presented the affidavits of those potential witnesses. Richardson did not identify the witnesses or attach the affidavits to his federal habeas petition. However, the

factual allegations are not "new," but were included in the record that was before both the state and federal courts. Because Richardson is not raising new legal claims or factual allegations that were not before the state habeas court, he has exhausted his state remedies.

Richardson contends that he pleaded guilty based on the faulty advice of counsel. He maintains that he would have insisted on going to trial if his counsel had provided effective assistance by interviewing certain critical witnesses, filing pretrial discovery motions and reviewing the state's file, and advising Richardson that the state's case was weak because many of the witnesses could not be located to testify.

Richardson also raises as issues in his original petition: (1) that the evidence was insufficient to sustain his conviction; and (2) that his guilty plea was involuntary. However, Richardson has abandoned these issues because he did not raise or brief them on appeal. Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993). Whether counsel rendered effective assistance is a mixed question of law and fact which should be reviewed de novo. Vela, 708 F.2d at 961.

Once a guilty plea has been entered, all non-jurisdictional defects in the proceedings against a defendant are waived. Smith v. Estelle, 711 F.2d 677, 682 (5th Cir. 1983), cert. denied, 466 U.S. 906 (1984). A defendant may not subsequently attack the

affidavits were part of the state habeas record reviewed by the federal district court. Richardson did attach the witnesses' affidavits to his appellate brief filed in this Court.

ineffectiveness of his counsel in any respects other than as the alleged ineffectiveness bears upon counsel's faulty advice that coerced a guilty plea. Id.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 689-94, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show Strickland prejudice, a defendant must demonstrate that his counsel's errors were so serious as to "render[] the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, ___ U.S. ___, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180 (1993). "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." Id. at 844. In evaluating such claims, the court indulges in "a strong presumption" that counsel's representation fell "within the wide range of reasonable professional competence, or that, under the circumstances, the challenged action `might be considered sound trial strategy.'" Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988) (citation omitted). A failure to establish either deficient performance or prejudice defeats the claim. Strickland, 466 U.S. at 697.

The two-part Strickland v. Washington test governs challenges to guilty pleas based upon ineffective assistance of counsel. Hill

v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). In the context of guilty pleas, the first part of the test is the same standard as set forth in Strickland. Id. To satisfy the second 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." Id. The "prejudice" inquiry will require the court to consider whether the counsel would have changed his recommendation as to the plea if he had not made the alleged error. Id. This assessment, in turn, will depend upon whether the proposed action or potential affirmative defense likely would have resulted in a favorable outcome at the trial. Id. See also Armstead v. Scott, 37 F.3d 202, 210 (5th Cir. 1994). "[T]hese predictions of the outcome of a possible trial, where necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" Id. at 60 (citation omitted).

Because Richardson did not make specific factual allegations to support his ineffective assistance of counsel claim, the district court rejected his claim as conclusional. The district court's judgment will be affirmed because Richardson has not established that he was prejudiced by his counsel's alleged errors.

The state habeas record contains substantial evidence against Richardson, consisting of: (1) the police report, which includes a statement by Richardson admitting an initial encounter but not the shooting, (2) the autopsy, and (3) numerous witnesses' statements. Although the evidence was primarily circumstantial, it

was fairly strong: Richardson gave the victim a \$20 "rock" of crack cocaine; the victim drove away without paying for the cocaine; Richardson pursued the victim in a high speed chase for several blocks; shots were heard shortly after Richardson drove away; Richardson returned to the scene of the drug sale and bragged to several witnesses that he had shot at the victim, but was not sure if he hit the victim; and Richardson had a gun in his car next to the driver's seat shortly after the incident. Richardson's car was searched and impounded, but no gun was found.

Richardson contends that his attorney was ineffective because he failed to conduct discovery and review the state's file; this argument is without merit. According to Richardson's own representations, his attorney had a complete grasp of the evidence against him. Further, Richardson's attorney correctly advised him that the testimony of the allegedly "critical witnesses" would not have affected the outcome of a trial of the instant murder charge because the witnesses' affidavits referred to unrelated burglary and attempted murder charges. Richardson's only possible argument is that his attorney failed to have the unrelated burglary and attempted murder charges dropped earlier, and as a result the charges were used as bargaining tools in the plea negotiations. However, he has not established that he was prejudiced in the instant murder case by his attorney's alleged errors.

Richardson's next argument, that his attorney was ineffective because he failed to advise him that the state's case was weak, also lacks merit. Richardson made statements admitting the offense

to several witnesses, at least one of whom was subpoenaed and available to testify against him. Thus, the fact that some other witnesses could not be located for trial is irrelevant. In fact, most of the witnesses who were unavailable had never been located by investigators and had never given statements to the police.

Richardson's statements to the witnesses would be admissible at a trial as either admissions by a party or statements against interest under Tex. R. Crim. Evid. 801(e)(2)(A) or 803(24). See Cruz v. State, 877 S.W.2d 863, 866 (Tex. Ct. App. 1994) (statements made by defendant regarding his involvement in murder were admissible under Rule 801(e)(2)(A)). In order for a statement to be admissible under Tex. R. Crim. P. 803(24), the statement must be against the declarant's penal interest, and corroborating circumstances must indicate the trustworthiness of the statement. Green v. State, 840 S.W.2d 394, 411-12 (Tex. Crim. App. 1992), cert. denied, 113 S. Ct. 1819 (1993). Admissions against interest by a party are not subject to the corroboration requirement of the hearsay exception for statements against interest. Cunningham v. State, 846 S.W.2d 147, 151-52 (Tex. Ct. App. 1993), aff'd, 877 S.W.2d 310 (Tex. Crim. App. 1994). Richardson's statement would be admissible under either Rule 801(e)(2)(A) or 803(24) because the statement was against his penal interest and the witnesses' affidavits provide corroborating evidence which indicates the trustworthiness of Richardson's statement.

Given the evidence against him, Richardson has not established that there is a reasonable probability that, but for counsel's

allegedly erroneous advice, he would not have pleaded guilty and would have insisted on going to trial. Richardson has also failed to show that the guilty plea process was unreliable or fundamentally unfair. Therefore, the district court's judgment rejecting Richardson's ineffective assistance of counsel claim is AFFIRMED.