

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-50046
Summary Calendar

DON RAY WHITE,

Petitioner-Appellant,

VERSUS

WAYNE SCOTT, Director,
TDC, and DAN MORALES, Attorney General,

Respondents-Appellees.

Appeal from the United States District Court
For the Western District of Texas
(SA-93-CV-112)

(March 7, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Don Ray White is a prisoner of the State of Texas, serving a life sentence for the murder of his wife on June 25, 1988. On direct appeal, White challenged the propriety of the prosecutor's

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

remarks during closing argument and the effectiveness of his counsel. The Court of Appeals for the Fourth District of Texas affirmed the judgment.

After the Court of Criminal Appeals refused White's petition for discretionary review, White filed a petition for a writ of habeas corpus in the trial court asserting (1) that the state trial court did not grant him a speedy trial, (2) the indictment and the evidence were insufficient, and (3) his counsel was ineffective because he did not submit supplemental instructions, object to the Allen¹ charge, object to the trial court's noncompliance with Tex. Code Crim. Proc. Ann. art. 36.27 (West 1981), request a mistrial, challenge the sufficiency of the evidence, object to the trial court's noncompliance with Tex. Code Crim. Proc. Ann. art. 38.22 (West 1979), and request a charge on voluntary manslaughter. On October 31, 1991, the habeas trial court denied relief. The Texas Court of Criminal Appeals affirmed.

On February 9, 1993, White filed a § 2254 petition in the district court arguing that the evidence was insufficient to support the verdict, the prosecutor's jury argument was manifestly improper, and he was denied his right to a speedy trial. White also contended that his counsel was ineffective because he (1) did not file supplemental Allen instructions or object to the state court's Allen charge, (2) did not request a jury instruction on voluntary manslaughter, (3) advised White not to testify at trial,

¹Allen v. United States, 164 U.S. 492 (1896).

and (4) did not object to the sufficiency of the indictment. The respondent waived exhaustion of state remedies. See Fitzpatrick v. Procunier, 750 F.2d 473, 475 (5th Cir. 1985).

The magistrate judge recommended denying relief. The district court adopted the recommendation. White noticed his appeal, and the district court granted a certificate of probable cause (CPC). Ineffective Assistance of Counsel

White argues that his counsel was ineffective because he did not (1) object to the prosecutor's alleged misconduct, (2) request a jury charge on voluntary manslaughter, (3) object to the trial court's Allen charge, and (4) object to the trial court's failure to comply with Tex. Code Crim. Proc. Ann. art. 36.27 (West 1981). Because White did not raise his arguments that his lawyer was ineffective for not objecting to the prosecutor's alleged misconduct and the trial court's failure to comply with Article 36.27 before the district court, this court will not address either argument. "Issues 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) (internal quotation and citation omitted). A claim of ineffective assistance of counsel involves a mixed determination of law and fact, see Loyd v. Smith, 899 F.2d 1416, 1423 (5th Cir. 1990), and therefore this court does not address such claims initially on appeal. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993).

To obtain habeas corpus relief based on ineffective assistance

of counsel, a petitioner must show not only that his attorney's performance was deficient but that the deficiencies prejudiced the defense. United States v. Smith, 915 F.2d 959, 963 (5th Cir. 1990). Judicial scrutiny of counsel's performance must be highly deferential, and courts must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish "prejudice," the petitioner is required to show that counsel's deficient performance rendered the result of the trial "unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993). If an insufficient showing on one of the components of the inquiry is made, the court need not address the other. Strickland, 466 U.S. at 697.

Because White has not demonstrated that his attorney's performance was deficient, this court need not consider prejudice. White asserts that his lawyer should have requested a jury charge on voluntary manslaughter. Texas law required a charge on a lesser included offense only when there was some evidence that the defendant was guilty only of the lesser offense. See Rouster v. State, 622 S.W.2d 442, 446 (Tex. Cr. App. 1981) (en banc). Tex. Penal Code Ann. § 19.04 (West 1989) (repealed 1993) defined voluntary manslaughter as the commission of murder under the "immediate influence of sudden passion arising from adequate cause." Texas law did not allow a defendant to use an assault or threat which he provoked to reduce his state of mind to voluntary

manslaughter. De La Rosa v. Lynaugh, 817 F.2d 259, 267 (5th Cir. 1987). In his statement to police, White admitted that he beat Bishop earlier in the day, that he drew the gun during a later argument because he wanted to stop her from following through on her threat to call her brother, and that he told her "I would shoot her rather than him shooting me." White also suggested that the gun discharged accidentally because his "fingers did not pull the trigger." Because White admits (1) that Bishop's threat to call her brother was the reason he shot her and (2) that he provoked the threat earlier in the day by beating her, he was not entitled to an instruction on voluntary manslaughter. Moreover, his assertion that the gun discharged accidentally is inconsistent with a voluntary-manslaughter charge for which White would have to concede that he shot Bishop under the "immediate influence of sudden passion arising from adequate cause." See Tex. Penal Code Ann. § 19.04. Accordingly, the failure to request a voluntary-manslaughter instruction was a legitimate strategic choice which does not constitute deficient performance. See Yohey v. Collins, 985 F.2d at 228; see also Mendiola v. Estelle, 635 F.2d 487, 491 (5th Cir. 1991).

White also asserts that his lawyer should have objected to the state court's Allen charge. Even if White were able to demonstrate that his lawyer should have objected, he has made no showing that the absence of the supplemental Allen charge, rendered the proceedings unfair or the result unreliable. Lockhart v. Fretwell, 113 S. Ct. at 844. He is not entitled to habeas relief on this

issue.

Prosecutorial Misconduct

White asserts that the prosecutor's characterization of the shooting as an "execution" was misconduct which rendered his trial fundamentally unfair. "[I]mproper jury argument by the state does not present a claim of constitutional magnitude in a federal habeas action unless it is so prejudicial that the state court trial was rendered fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment." Jones v. Butler, 864 F.2d 348, 356 (5th Cir. 1988), cert. denied, 490 U.S. 1075 (1989). "To establish that a prosecutor's remarks are so inflammatory, the petitioner must demonstrate that the misconduct is persistent and pronounced or that the evidence of guilt was so insubstantial that the conviction would not have occurred but for the improper remarks." Id. "[A] prosecutor's remarks must be more than undesirable or even universally condemnable before reversal is warranted. Instead, the prosecutor's remarks must infect the trial with such unfairness as to make the resulting conviction a denial of due process." Bell v. Lynaugh, 828 F.2d 1085, 1095 (5th Cir.), cert. denied, 484 U.S. 933 (1987). A prosecutor's argument, by itself, is a constitutional violation in only the most egregious cases. Ortega v. McCotter, 808 F.2d 406, 410 (5th Cir. 1987).

White has not demonstrated that the prosecutor's remark, even if construed as constituting misconduct, was either persistent or pronounced, or that the evidence was so insubstantial that, absent the remark, the conviction probably would not have occurred. In a

statement given to police and introduced at trial, White admitted beating his pregnant wife, Yvonne Bishop, earlier in the day. He also admitted that when she threatened to call her brother, White got a gun, pointed it at her face, and cocked it. He denied pulling the trigger, stated that he merely wanted to "to bluff her so she wouldn't call her brother," and maintained that when she attempted to push the gun away, it went off.

Bishop's four-year old son testified, however, that he observed White and Bishop arguing; White slapping Bishop; and White getting a gun, pressing it to his mother's head, and pulling the trigger. On cross-examination, he testified that he was standing in the hall outside the bedroom where his mother was shot, that he did not hear a gunshot, and that he could not explain how he knew that White pulled the trigger.

The state's firearm expert opined that the gun was touching Bishop's head with some pressure at the time it was fired. The state's forensics expert testified that in addition to the gunshot wound, Bishop's body displayed signs of bruising around both eyes and cheeks, and scrapes on the neck. Even if the remark were construed as improper, because there was substantial evidence of White's guilt, the remark would not be so egregious as to infect the trial with such unfairness as to make the resulting conviction a denial of due process.

White also asserts that prosecutorial misconduct occurred when the prosecutor gave the jury a copy of White's statement with portions of the statement "whited-out," and expressed the belief

that the state believed that the "whited-out" portions were untrue. White's argument is unavailing because the jury had the full text of White's statement from defense counsel, the evidence of guilt was substantial, and the prosecutor's remarks, even if construed as constituting misconduct, were not so persistent or pronounced as to render the trial fundamentally unfair.

White has also presented several motions to the court: "Motion Seeking Relief From an Affirmative Finding of a Deadly Weapon," which essentially asks the court to consider issues raised for the first time on appeal, "Motion to the Objection of Magistrate Judge Memorandum and Recommendation," and "Motion Oppose Any Certificate of Conference or Any Such Motion." Because nothing in the motions would change the recommended disposition of White's application for habeas relief, the motions are denied.

AFFIRMED.