

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-50070  
Summary Calendar

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JUAN JORGE SANCHEZ,

Plaintiff-Appellant,

VERSUS

WAYNE SCOTT,  
Director, Texas Department of Criminal Justice,  
Institutional Division, et al.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Texas  
(SA-93-CV-546)

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(December 22, 1994)

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

PER CURIAM:\*

Juan Sanchez appeals the denial of his state prisoner's habeas corpus petition filed pursuant to 28 U.S.C. § 2254. Finding no error, we affirm.

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\* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

A state jury found Sanchez guilty of murder. After exhausting state remedies, Sanchez filed a pro se federal habeas petition alleging five grounds of relief: (1) There was a fatal variance between allegations in the indictment and the proof; (2) improper procedure was used in investigating the crime scene; (3) the charge to the jury was fundamentally defective; (4) counsel rendered ineffective assistance, and (5) the prosecutor engaged in misconduct in interviewing witnesses two days prior to trial.

The state conceded exhaustion and filed a motion for summary judgment, and the magistrate judge recommended that the district court deny habeas relief. The district court, after conducting an independent review of the record in light of Sanchez's objections to the magistrate judge's report and recommendation, denied Sanchez's petition.

II.

A.

Sanchez contends that there was a fatal variance between the indictment and the proof at trial. He argues that the district court erred in holding that he was procedurally barred from presenting this claim in a federal habeas petition. We need not address this issue, however, as Sanchez's underlying claim has no merit.

Sanchez contends that there was a variance between the evidence at trial concerning the weapon used to commit the offense

and the cause of death described in the indictment. The indictment charged that Sanchez caused the death of Rosa Sanchez by stabbing her "with an object unknown to the grand jury." He argues that the state was required to prove beyond a reasonable doubt that the grand jury used reasonable diligence to ascertain the unknown fact.

In § 2254 proceedings, a claim of fatal variance between indictment and proof is construed as an attack on the sufficiency of the indictment. See Williams v. Collins, 16 F.3d 626, 637 (5th Cir.), cert. denied, 115 S. Ct. 92 (1994). "In a federal court, habeas corpus can be invoked with respect to indictments only where they are 'so fatally defective' that under no circumstances could a valid conviction result from facts provable under the indictment." Johnson v. Estelle, 704 F.2d 232, 236 (5th Cir. 1983) (citation omitted), cert. denied, 465 U.S. 1009 (1984). "State law dictates whether a state indictment is sufficient to confer a court with jurisdiction." Williams, 16 F.3d at 637.

Applying the Williams analysis is awkward, because the state appellate court reasoned that the "fatal variance" issue was a challenge to the sufficiency of the evidence, not to the sufficiency of the indictment. Therefore, the Williams reliance on the state law determination of the sufficiency of the indictment is inapplicable. The issue was presented on direct appeal as a challenge to the sufficiency of the evidence; the issue was raised in Sanchez's federal habeas petition as a "fatal variance," insufficiency-of-the-evidence claim. Therefore, we will discuss the issue as a challenge to the sufficiency of the evidence.

"In a habeas action alleging insufficient evidence, [this Court] review[s] the evidence in the light most favorable to the government to determine whether any rational jury could have found the essential elements of the crime beyond a reasonable doubt." Peters v. Whitley, 942 F.2d 937, 941 (5th Cir. 1991) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)), cert. denied, 112 S. Ct. 1220 (1992). We apply the Jackson standard with reference to the substantive elements of the offense as defined by state law. See Foy v. Donnelly, 959 F.2d 1307, 1313-14 (5th Cir. 1992). Additionally, the state court's determination on this issue is given great weight. Id. at 1314.

Under Texas law, when the indictment alleges facts that are "unknown," the state has the burden of proving that the grand jury exercised reasonable diligence to ascertain the information, but only if it becomes an issue. See Polk v. State, 749 S.W.2d 813, 816-17 (Tex. Crim. App. 1988).

The state court of appeals held that "the grand jury used due diligence to ascertain the type of weapon used" and that there was no material variance between the allegations in the indictment and the proof. Based upon the testimony of witnesses at trial, the court made the following findings of fact:

While the grand jury might have concluded that a knife "most likely" was the instrument used, the indictment required a precise allegation unless the manner and means was unknown to the grand jury. The precise manner and means of causing death could not be determined by the grand jury after their investigation of the police reports, the medical examiner's reports, and district attorney's investigative reports, including the witness statement of the daughter. There is no evidence that the grand jury was wanting in diligence.

The foreman of the grand jury testified that the grand jury tried but was unable to ascertain the cause of death. It examined autopsy reports, investigation reports, and witness reports and questioned the district attorney presenting the case. Viewing the evidence in the light most favorable to the prosecution, we conclude that the petit jury could have found beyond a reasonable doubt that the grand jury had used reasonable diligence.

B.

In a conclusionary manner, Sanchez asserts the following: (1) The investigative procedures were inadequate and caused the suppression of critical evidence favorable to his defense; (2) the jury charge was fundamentally defective; (3) trial counsel rendered ineffective assistance; and (4) the prosecutor's misconduct in interviewing witnesses two days before trial deprived him of a fair trial. We need not address these issues, as Sanchez presents no cogent appellate arguments regarding these claims or references to the district court's analysis in his brief. He refers us to the arguments in his state application for habeas corpus and implicitly requests that we incorporate them in his appeal brief. "Although we liberally construe the briefs of pro se appellants, we also require that arguments must be briefed to be preserved." Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988). Generally, claims not argued in the body of the brief are abandoned on appeal, even if the appellant is proceeding pro se. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993).

C.

Sanchez's remaining arguments challenge actions taken by the district court. Sanchez first contends that the district court erred in declining to hold an evidentiary hearing on the issues of burden of proof with regard to the evidence, the indictment, and the jury instructions. "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, 112 S. Ct. 252 (1991). Sanchez does not allege any disputed facts that would have necessitated a hearing; therefore, his argument fails.

Sanchez contends that the district court erred in denying his motion for inspection of grand jury transcripts and the medical examiner's report and his motion to dismiss the indictment. The district court denied Sanchez's requests for examination of grand jury transcripts and the medical examiner's reports because the materials were not "essential to a resolution of the grounds for relief set forth in petitioner's federal habeas corpus petition." Sanchez has not demonstrated that the court abused its discretion. See rule 6(a) of the Rules Governing Section 2254 Cases. As to his motion to dismiss the indictment, Sanchez asserts that he mailed it on November 30, 1993. No such motion is filed in the record.

Sanchez asserts that the district court failed to exercise jurisdiction over his habeas petition and argues that a controversy exists. The argument has no basis in fact and is facially absurd.

Sanchez argues that the district court abused its discretion

in adopting the findings and recommendations in the magistrate judge's report. He contends that the issues raised in his brief are not procedurally barred and that the cause and prejudice standard does not apply.

The magistrate judge determined that the "fatal variance" issue was procedurally barred but went on to discuss the merits of Sanchez's argument, concluding that there was no variance between the indictment and the evidence at trial and, alternatively, that any defect did not have a "substantial and injurious effect or influence in determining the jury's verdict." As discussed in issue 1, we also have addressed the merits of Sanchez's claim. His argument is meritless.

AFFIRMED.