

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

94-50286
(Summary Calendar)

ABDUL SHAHEED,

Plaintiff-Appellant,

versus

WAYNE SCOTT, Director,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(W-93-CV-155)

March 22, 1995

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Abdul Shaheed appeals the district court judgment denying his petition for a writ of habeas corpus. For the following reasons, the judgment of the district court is affirmed.

BACKGROUND

Abdul Shaheed is a prisoner of the State of Texas, serving an enhanced sentence of 35 years for the offense of robbery (repeat

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

offender). After exhausting state remedies, Shaheed filed a federal habeas corpus petition asserting the following errors: 1) the trial court failed to charge the jury on the lesser included offense of theft, 2) the trial court erroneously gave an instruction to the jury on the law of parties, 3) the indictment was defective because it failed to give notice of the charge against him, and 4) his counsel rendered ineffective assistance in several instances.

The respondent filed a motion for summary judgment, and the magistrate judge recommended that the district court grant the respondent's motion and deny relief. After considering Shaheed's objections to the magistrate judge's report, the district court denied relief and dismissed the action. The district court granted Shaheed's application for a certificate of probable cause (CPC) and denied his motion for appointment of counsel.

Shaheed seeks habeas corpus relief, contending that his federal rights have been violated. A habeas corpus petitioner to whom the district court has denied relief may proceed on appeal only upon a substantial showing of the denial of a federal right. Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394, 77 L.Ed.2d 1090 (1983). Because the district court issued a certificate of probable cause, we address the merits of Shaheed's petition. See id. at 893, 103 S.Ct. at 3395 (requiring review on the merits if CPC granted); see also 28 U.S.C. § 2253 (1988)(explaining certificate of probable cause procedure).

DISCUSSION

ISSUE 1:

Shaheed argues that the trial court violated his due process rights by failing to instruct the jury on the lesser included offense of theft. "In a non-capital . . . case, the failure to give an instruction on a lesser included offense does not raise a federal constitutional issue." Valles v. Lynaugh, 835 F.2d 126, 127 (5th Cir. 1988). There is no merit to this claim.

ISSUE 2:

Shaheed contends that it was appropriate to instruct the jury on the law of the parties.¹ In an argument related to issue 1, he argues for the first time on appeal that the charge to the jury should have included an instruction that the law of the parties was applicable to the lesser offense of theft as well. "[I]sues 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." Vernado v. Lynaugh, 920 320, 321 (5th Cir. 1991). Failure to consider the issue will not result in manifest injustice. An improper state-court instruction violates due process only when the "ailing instruction by itself so infect[s] the entire trial that the resulting conviction violates

¹Shaheed at times seems to argue that the state trial court's action in having him handcuffed and gagged for a few moments during the jury voir dire violated his rights. We note that such procedures are constitutional when the defendant has become disruptive, see Illinois v. Allen, 397 U.S. 337, 343, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970), and Shaheed had become disruptive at trial.

due process." Henderson v. Kibbe, 431 145, 154 (1977)(internal quotation and citation omitted). As we have already decided above, the failure to give an instruction on a lesser included offense does not raise a federal constitutional issue. See Valles, 835 F.2d at 127. Shaheed's claim in this regard is meritless.

ISSUE 3:

Shaheed contends that the indictment was insufficient because he was charged with the offense of robbery but the State presented evidence to support a charge of aggravated robbery. The sufficiency of a state indictment "is not a matter for federal habeas corpus relief unless it can be shown that the indictment is so defective that the convicting court had no jurisdiction." Millard v. Lynaugh, 810 F.2d 1403, 1407 (5th Cir.), cert. denied, 484 U.S. 838, 108 S.Ct, 122, 98 L.Ed.2d 81 (1987) (internal quotation and citations omitted). "[T]he question of whether a defective charging instrument deprived the state court of jurisdiction is foreclosed to a federal habeas court if the sufficiency of the [charging instrument] was squarely presented to the highest court of the state on appeal, and that court held that the trial court had jurisdiction over the case." Id. (internal quotation and citations omitted).

The sufficiency-of-the-indictment issue was presented to the trial court by application for writ of habeas corpus. The Texas Court of Criminal Appeals adopted the trial court's express findings that the indictment was sufficient and denied relief. Thus, the highest state court on appeal has held that the

indictment was sufficient for jurisdiction in state court. See Alexander v. McCotter, 775 F.2d 595, 599 (5th Cir. 1985). Shaheed is not entitled to habeas corpus relief on this claim. See Millard, 810 F.2d at 1407.

ISSUE 4:

Shaheed contends that he was deprived of the effective assistance of counsel in violation of the Sixth Amendment. He asserts that counsel failed to seek a bond reduction hearing, did not communicate with him to develop an understanding of the legal issues and to establish a defense strategy, failed to object when he was tried for aggravated robbery rather than the offense named in the indictment, effectively subjected him to hybrid representation by filing Shaheed's pro se motions, failed to object to the introduction of the "deadly weapon" into evidence, and did not seek a jury of Shaheed's peers because none of the jurors were African-Americans or members of the Islamic religion. Shaheed argues that he suffered prejudice because counsel's deficient performance placed "him in the culpable mental state of having no formal representation" and caused him to be convicted of an offense not charged in the indictment.

To support this claim, Shaheed must prove two components: 1) that counsel made errors that were so serious that they deprived him of his Sixth Amendment guarantee and 2) that the deficient performance prejudiced his defense. See 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. In order to show prejudice, the petitioner must demonstrate that counsel's errors are so serious as to deprive him of a trial whose result is fair or reliable. See Lockhart v. Fretwell, ___ U.S. ___, 113 S. Ct. 838, 844, 122 L.Ed.2d 180 (1993). When it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, "that course should be followed." Strickland, 466 U.S. at 697.

Shaheed's arguments concerning the introduction of the deadly weapon and the array of the jury need not be addressed because they are raised for the first time on appeal and are not purely legal questions. See Varnado, 920 F.2d at 321. As to Shaheed's argument that he was convicted of aggravated robbery, there is no factual basis for this contention in the record. The record indicates that he was convicted of robbery.

Shaheed's arguments that fall under the rubric that counsel failed to communicate with him concerning his defense and trial strategy also fail because Shaheed has not demonstrated deficient performance. Before the trial began, the trial court permitted Shaheed to be heard on the subject of his dissatisfaction with counsel's representation. Counsel informed the trial judge that he and Shaheed disagreed concerning the necessity of presenting a certain audio tape into evidence and that counsel felt that they were ready to go to trial. The trial court informed Shaheed that

he was represented by a very good lawyer who had his best interests at heart and recessed to permit Shaheed to conference with counsel. After the conference, Shaheed expressed that he still was not comfortable with the representation. He insisted that counsel advise the trial court that he would like a new attorney to counsel him concerning a defense. The trial judge examined the record and determined that counsel had filed a motion to appoint an investigator, which had been granted, and motions for discovery and inspection.

Further, Shaheed had received a formal arraignment and a hearing on his motions. Concluding that counsel had done a good job representing Shaheed, the trial judge denied Shaheed's request for new counsel. Shaheed did not identify any possible defense at trial or present facts that would have assisted counsel in formulating an appropriate defense. Even now on appeal, Shaheed does not identify such a defense; therefore, he has not demonstrated deficient performance because he has not "overcome the presumption that, under the circumstances, the challenged action `might be considered sound trial strategy.'" Strickland, 466 U.S. at 689.

As to the remaining issue, Shaheed has not alleged facts to establish how counsel's alleged failure to seek a bond reduction hearing or his conduct in filing Shaheed's pro se motions deprived him of a trial whose result is fair or reliable. Therefore, he has not demonstrated prejudice.

CONCLUSION

For the foregoing reasons, the judgment of the district court dismissing Shaheed's petition for a writ of habeas corpus is AFFIRMED.