IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50347
Summary Calendar

FLOYD GARNER, JR.,

Petitioner-Appellant,

v.

WAYNE SCOTT,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(W 93 CV 429)

June 21, 1995

Before KING, JOLLY, and DEMOSS, Circuit Judges.

PER CURIAM:[*]

Floyd Garner, Jr. appeals from the denial of his petition for a writ of habeas corpus. Finding no merit in his claims, we affirm the judgment of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1983, Garner accused three Hillsboro, Texas police officers of participating in criminal activity, and, following an

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

investigation, the three officers were terminated. Robert McGregor and his firm represented the fired officers during the investigation.

In 1991, Garner was charged with five counts of theft-related offenses. McGregor was appointed to represent Garner. After Garner unsuccessfully moved for a change of venue, he pleaded guilty to the five counts and was sentenced to five concurrent terms of fifty-five years imprisonment. Garner filed five state applications for writs of habeas corpus, but they were all denied by the Texas Court of Criminal Appeals on June 23, 1993.

On December 15, 1993, Garner filed a federal petition for a writ of habeas corpus, in which he raised the following four grounds: 1) the trial court erred in not granting a change of venue; 2) the trial court erred in not recusing itself; 3) Garner's lawyer should have recused himself; 4) Garner's lawyer provided ineffective assistance; and 5) Garner's guilty pleas were involuntary. The district court denied relief on all grounds, but the court issued a certificate of probable cause. Garner appeals from the determination of the district court.

II. ANALYSIS AND DISCUSSION

On appeal, Garner raises four issues: 1) he was denied due process of law because his guilty pleas were involuntary; 2) his trial counsel should have recused himself; 3) the trial judge should have recused himself; and 4) the trial court abused its

discretion in denying Garner's motion for change of venue. We address each of these arguments in turn.[1]

A. The Guilty Pleas

According to Garner, his pleas of guilt were "coerced psychologically -- his trial counsel was an enemy of longstanding e[nm]ity; the Trial Court was married to the City Attorney whom Appellant had embarrassed in a previous proceeding; and Appellant's reputation was such that he truly believed he could not get a fair trial on any of the charges against him." In addition, Garner alleges coercion because, after his motion to change venue was denied, he believed that conviction and life sentences were imminent if he went to trial.

A habeas petitioner has the burden of demonstrating that he is entitled to relief. See Bonvillain v. Blackburn, 780 F.2d 1248, 1251 (5th Cir. 1986). Even assuming that Garner's allegations are true, he has failed to meet this burden. First of all, the guilty plea forms that were signed by Garner are prima facie proof of the validity of his guilty plea. See Theriot v. Whitley, 18 F.3d 311, 314 (5th Cir. 1994). For each count, Garner waived his right to a jury trial, stipulated to the evidence, and admitted his guilt. Second, Garner did not even allege his innocence in the district court or on appeal; thus, nothing in the record suggests that

[1] Garner's attempt to incorporate the arguments that he made to the district court is unavailing because he does not brief the arguments on appeal. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993) ("Although we liberally construe the briefs of pro se appellants, we also require that arguments must be briefed to be preserved." (internal quotation omitted)).

Garner's admissions of guilt were inaccurate or unreliable. See Brady v. United States, 397 U.S. 742, 758 (1970) ("[T]here is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged. In the case before us, nothing in the record impeaches the defendant's plea or suggests that his admissions in open court were anything but the truth.").

Moreover, a plea is not involuntary solely because a defendant pleads guilty to limit his possible penalty. See Brady, 397 U.S. at 749-55 ("[A] plea of guilty is not invalid merely because [it was] entered to avoid the possibility of a death penalty."); Jones v. Estelle, 584 F.2d 687, 690 (5th Cir. 1978). To establish coercion, Garner must show that the fear of a greater penalty destroyed his ability to weigh rationally, with aid of counsel, the advantages of proceeding to trial against those of pleading guilty, see Jones, 584 F.2d at 690, but Garner has made no such showing. Instead, Garner faced the possibility of five life sentences, and the record suggests that he pled guilty to receive a more favorable sentence of five concurrent fifty-five year terms of imprisonment. The record does not suggest that Garner pled guilty involuntarily or for some improperly coercive reason. Cf. Uresti v. Lynaugh, 821 F.2d 1099, 1101-02 (5th Cir. 1987) (concluding that a guilty plea was not involuntary even though the defendant's attorney threatened to withdraw as counsel if the defendant did not accept the agreement).

B. Recusal of Garner's Attorney

Garner alleges that he was denied effective assistance of counsel because his attorney, Robert McGregor, was operating under a conflict of interest. According to Garner, McGregor had an actual conflict of interest because McGregor's firm represented the police officers in the 1983 investigation. Moreover, as Garner explains, "[b]ecause of the defamatory statements [during the 1983 investigation] made by both trial counsel and his father, plus the fact that counsel's father is a prior District Attorney who prosecuted Appellant previously and sent him to prison . . . it is Appellant's position that trial counsel should have recognized the conflict of interest and should have voluntarily moved to recuse himself . . . ."

A conflict exists "when defense counsel places himself in a position conducive to divided loyalties." United States v. Vaquero, 997 F.2d 78, 89 (5th Cir. 1993) (internal quotation omitted) (citation omitted). To demonstrate ineffective assistance of counsel based upon a conflict of interest, a defendant must demonstrate "`an actual conflict of interest [that] adversely affected his lawyer's performance.'" Russell v. Lynaugh, 892 F.2d 1205, 1213 (5th Cir. 1989) (quoting Cuyler v. Sullivan, 446 U.S. 335, 348-50 (1980)).

Even if we assume that an actual conflict of interest existed, Garner has not shown that the presumed conflict "adversely affected" McGregor's performance. In United States v. Roldan, No. 93-8382 (5th Cir. Feb. 17, 1994) (unpublished opinion), Roldan alleged a conflict of interest based upon his counsel's dual

representation of Roldan and a co-defendant. See id. at 2, 4. We assumed a conflict of interest, but we determined that Roldan was unable to demonstrate that any conflict "adversely affected" his counsel's performance because Roldan's counsel negotiated a plea agreement with a lesser sentence than the possible guideline sentence that Roldan faced at trial. See id. at 5. Similarly, in Todd v. Wall, No. 93-3617 (5th Cir. June 30, 1994) (unpublished opinion), Todd challenged the constitutional effectiveness of a public defender, Wells, in a state habeas proceeding. See id. at 6. Pawlus, also of the public defender's office, then advised Todd to plead guilty, which Todd did. See id. In his federal habeas petition, Todd alleged an actual conflict of interest because he had challenged Wells's competency, yet Wells and the public defender's office continued to represent him. See id. at 6. We assumed arguendo that a conflict of interest existed during the course of Wells's representation, but we concluded that there was no adverse effect because "Todd substantially benefited from accepting the plea agreement rather than proceeding to trial." Id. at 7.

The analysis in these cases is applicable to Garner's situation as well. Assuming arguendo that an actual conflict of interest existed, Garner cannot demonstrate that the conflict adversely affected McGregor's performance. Garner faced the possibility of five life sentences, and McGregor negotiated a more favorable plea agreement in which Garner received five concurrent fifty-five year terms of imprisonment. Garner substantially

benefitted from accepting the plea agreement, and no adverse effect resulted.

C. Recusal of the Trial Judge

Garner argues that the trial judge should have recused himself on the grounds of bias because: 1) the judge had issued a temporary restraining order in 1983 blocking the firing of the police officers; and 2) the judge is married to the Hillsboro city attorney who was directly involved in the officers' termination.

A defendant is entitled to an impartial tribunal. See Nethery v. Collins, 993 F.2d 1154, 1157 (5th Cir. 1993). To obtain relief as a result of alleged judicial bias, Garner must establish that the trial judge "was influenced by interests apart from the administration of justice and this bias or prejudice resulted in rulings based on other than facts developed [during the proceedings]." Id.

We believe that Garner has failed to allege sufficient judicial bias to be entitled to habeas relief. In United States v. Gaudet, No. 93-3606 (5th Cir. Apr. 6, 1994) (unpublished opinion), the federal recusal statute was at issue, but the case is instructive because the underlying factual basis of the alleged judicial bias is similar to Garner's allegations. Gaudet was convicted of embezzling from a union employee benefit plan. See id. at 2. He argued that the sentencing judge, Judge Livaudais, should have recused himself because Judge Livaudais's daughter worked for the law firm that represented the union from which Gaudet embezzled money. In addition, Ms. Livaudais, as a member of

the firm, also represented Gaudet in a lawsuit by a casino where Gaudet spent most of the embezzled funds. See id. at 5-6. We determined that Judge Livaudais was not required to disqualify himself because his daughter was not a participant in the transactions that formed the basis of Gaudet's embezzling indictment at issue. See id. at 6. In addition, we concluded that Gaudet's allegations of Ms. Livaudais's interest in the proceedings were speculative at best. See id. at 7.

This Gaudet analysis is instructive in Garner's case. Garner does not allege that the trial judge's wife was involved in the events surrounding Garner's five 1991 indictments for various offenses. Indeed, there is no evidence that the trial judge's wife had ***any*** involvement in the 1991 offenses, and her only relation to Garner is her involvement in the officers' termination eight years earlier. Garner provides no evidence or allegations of how the involvement of the trial judge's wife in a much-earlier and wholly unrelated proceeding improperly influenced the trial judge and caused him to rule with bias and prejudice. In addition, the trial judge's issuance of a temporary restraining order in the officers' case eight years earlier, standing alone, does not present a valid basis for challenging the trial judge's impartiality. See Liteky v. United States, 114 S. Ct. 1147, 1157 (1994) ("[J]udicial rulings alone almost never constitute [a] valid basis for a bias or partiality motion."). Finally, the Supreme Court has noted that "not all questions of judicial qualification . . . involve constitutional validity. Thus matters of kinship, personal bias,

state policy, [and] remoteness of interest would seem generally to be matters merely of legislative discretion." Aetna Life Ins. v. LaVoie, 475 U.S. 813, 820 (1986) (internal quotation omitted). Simply put, Garner's allegations of judicial bias do not entitle him to habeas relief.

D. Motion for Change of Venue

Because of the extensive publicity surrounding the 1983 investigation and termination of the three officers, Garner claims that a change in venue was necessary to provide him with a fair trial. According to Garner, "there was widespread dissemination of derogatory information about the Appellant," and therefore, Garner contends that the failure to grant the motion was an unconstitutional error.

By pleading guilty to an offense, "a criminal defendant waives all non-jurisdictional defects preceding the plea." See United States v. Owens, 996 F.2d 59, 60 (5th Cir. 1993). Whether an alleged defect in a state criminal proceeding is jurisdictional is a question of state law, see Lyon v. Scott, No. 93-5539, slip op. at 3-4 (5th Cir. Jan. 31, 1995) (unpublished opinion), and the Texas courts have not found venue to be a jurisdictional issue. See, e.g., Boyle v. State, 820 S.W.2d 122, 139 (Tex. Crim. App. 1989) ("[T]he fact [that] a particular district court in this State does not have venue is irrelevant as to whether that court has jurisdiction."); Fairfield v. State, 610 S.W.2d 771, 779 (Tex. Crim. App. 1981) ("Nor does `venue,' proper or not, affect the ***power*** of a district court to hear and determine a felony case;

`jurisdiction' is comprised not of the `place' of the prosecution, but of the power of the court over the `subject matter' of the case . . . . Concomitantly, improper venue may be waived by the defendant's failure to raise it as an issue in the trial court . . . ." (citations omitted)); Etchieson v. State, 574 S.W.2d 753, 759 (Tex. Crim. App. 1978) ("There is a distinct difference between jurisdiction and venue. Jurisdiction concerns the authority or power of a court to try a case. Practically all, if not all, district courts have the authority to try felony cases. Venue has to do with the place or county where a case may be tried."). As mentioned, we conclude that Garner's guilty pleas are valid; thus, Garner has waived his claim of a non-jurisdictional venue defect. In addition, absent a jury trial, Garner could not have been prejudiced by the community's alleged knowledge of his criminal record.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.[2]

[2] Appellee's motion to dismiss the certificate of probable cause is denied.