IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50462
Summary Calendar

ELLIOTT WILLIAMS,

Petitioner-Appellant,

VERSUS

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

Respondents-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(A-91-CA509)

(May 3, 1995)

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

PER CURIAM:[*]

Elliott Williams appeals the denial of his state prisoner's petition for writ of habeas corpus 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

On April 11, 1988, Williams pleaded guilty to three separate indictments charging him with aggravated robbery and to a fourth indictment charging him with escape from a penal institution. The Texas trial court sentenced him to 60 years' imprisonment on the robbery charges and to 10 years' imprisonment on the escape charge. On August 7, 1991, Williams petitioned the federal district court for writ of habeas corpus. The court granted Williams's petition as to the three robbery convictions based upon defects in the indictments. We reversed and dismissed the petition. McKay v. Collins, 12 F.3d 66, 70 (5th Cir.), cert. denied, 115 S. Ct. 157 (1994). We determined that the state courts' implicit findings that the indictments were not defective precluded federal habeas review of a challenge to their sufficiency.

On petition for rehearing, we remanded for the limited purpose of addressing Williams's claim that he had received ineffective assistance of counsel))an issue that Williams had raised in his § 2254 petition and which the district court did not address after determining that the indictments were defective. Williams v. Collins, 12 F.3d 70 (5th Cir. 1994). On June 16, 1994, the district court determined that Williams had not established an ineffectiveness claim and denied his petition.

II.

Although we remanded for a determination on what we stated was the one remaining issue, Williams actually had raised three

interlinked issues in his original § 2254 petition: (1) defective indictments; (2) ineffective assistance of counsel; and (3) voluntariness of the guilty pleas. On remand, the district court combined the two remaining issues and held that Williams did not receive ineffective assistance of counsel, because his guilty pleas were voluntary.[1] In effect, the court determined that, because this court had ruled that the indictments were not invalid, there was no valid ineffectiveness claim, as that claim was premised on counsel's failure to challenge the indictments. Because counsel was not ineffective, the plea, based upon counsel's advice and decision not to challenge the indictments, was not involuntary. Williams essentially argues the two issues separately on appeal.

III.

Williams contends that he received ineffective assistance because his attorney did not file a motion to quash the robbery indictments and because he allowed Williams to plead guilty even though the indictments did not include the element that a defendant "intentionally or knowingly" threaten another person in order to be found guilty of aggravated robbery. To prevail on a claim of ineffective assistance, Williams must show (1) that counsel's performance was deficient in that it fell below an objective

[1] In his response to the state's motion for summary judgment on his original § 2254 petition, Williams argued that his guilty pleas were not knowing and voluntary because of his attorney's failure to object to the robbery indictments. In this appeal, his argument differs in that he contends that his pleas were involuntary because of the indictments' deficiencies.

standard of reasonableness and (2) that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687-94 (1984). In evaluating such claims, we indulged in "a strong presumption" that counsel's representation fell "within the wide range of reasonable professional competence." Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988). A failure to establish either deficient performance or prejudice defeats the claim. Washington, 466 U.S. at 697.

In ruling that Williams failed to satisfy the requirements of Washington, the district court determined that he did not establish the required prejudice because the record showed that his plea was knowing and voluntary. Williams must demonstrate prejudice by showing that counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993); see Armstead v. Scott, 37 F.3d 202, 206 (5th Cir. 1994), cert. denied, No. 94-8219, 1995 U.S. App. LEXIS 2740 (Apr. 17, 1995) (applying Fretwell to ineffectiveness at guilty plea).

In the context of a guilty plea, a petitioner may show prejudice only if he establishes that, but for counsel's ineffectiveness, he would not have pleaded guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). A petitioner must "affirmatively prove" prejudice. Washington, 466 U.S. at 693. The mere allegation of prejudice is insufficient to satisfy Washington's prejudice requirement. Armstead, 37 F.3d at 206.

Whether his attorney's alleged errors were objectively reasonable or not, Williams has not established that but for the alleged errors, he would not have pleaded guilty. See Fretwell, 113 S. Ct. at 844. He argues that absent his attorney's errors, there is a "reasonable probability" that the trial court would have had reasonable doubt about his guilt. Specifically, Williams contends that had his attorney objected to the invalid indictment, he would have gone to trial and would have been found not guilty because the factfinder could not have found the "necessary mental state" for criminal liability because of the absence of pleading or proof of that state.

We specifically determined, however, that the understood definition of the word "threaten" necessarily included intent. McKay, 12 F.3d at 69. We stated that the wording of the indictments was sufficient to provide Williams with notice of the essential elements of the charges against him, including intent. Accordingly, Williams was not prejudiced by his attorney's failure to object to the indictments. Williams's ineffectiveness claim is without merit.

IV.

Williams also argues that he did not knowingly and voluntarily plead guilty to the three robbery charges.[2] He contends that even

[2] Williams also argues that the district court erred by not confirming that the pleas were entered knowingly and voluntarily pursuant to Boykin v. Alabama, 395 U.S. 238, 243-44 (1969). Williams raises this issue for the first time on appeal. This court does not consider issues not raised in the (continued...)

though we stated that "the common definition of the word 'threaten' necessarily includes intent and substitution of 'threaten' for 'intentionally or knowingly' provides adequate notice of the charges," McKay, 12 F.3d at 69, the record does not "affirmatively establish that petitioner understood those charges and knowingly plead [sic] guilty to the necessary elements of the offense." Because this court previously determined that the indictments were sufficient to give Williams notice of the charges against him, his contention is without merit. See id.

AFFIRMED.

(...continued)
district court. "[I]ssues 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). Accordingly, Williams's contention is not subject to review.