

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50505
Summary Calendar

JOHN W. WESTFALL,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
TDC, ET AL.,

Respondents-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CA-987)

(December 21, 1994)

Before POLITZ, Chief Judge, DAVIS and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:*

John Wayne Westfall, convicted of aggravated robbery in Texas state court, appeals the denial of his petition for a writ of habeas corpus. We affirm.

Background

On April 17, 1990, while washing her car at a San Antonio car

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

wash, Olivia Sanchez was accosted by a knife-wielding assailant. After a brief struggle she managed to escape. Her car was stolen but was recovered six days later at an apartment complex where Alexander Alvarez, an acquaintance of Westfall, lived. Questioned at the scene by police, Alvarez made no mention of the fact that Westfall had delivered the vehicle to him so that he could remove both its engine and transmission.

In an unfortunate turn of events for Westfall, he went to Sanchez's place of employment on February 8, 1991 to look for a job. Sanchez immediately recognized him as her assailant and, with some assistance from her supervisor, got him to fill out an employment application. Westfall subsequently was arrested, indicted for aggravated robbery, found guilty by a jury, and sentenced to 45 years imprisonment.

Westfall appealed, claiming that the trial court had erred in refusing to allow his attorney to ask Alvarez on cross-examination about his "problems" with the law other than a previously-admitted burglary conviction.¹ The Texas Court of Appeals affirmed the conviction on direct appeal, noting that while the trial court erred in restricting the scope of the cross-examination, the error was harmless in light of the overwhelming evidence of guilt. Westfall did not file a petition for discretionary review with the Texas Court of Criminal Appeals.

¹The record reveals that Alvarez's criminal history involved convictions for driving under the influence and driving under a suspended driver's license, and arrests for various unadjudicated felonies.

Westfall sought state habeas relief, raising the same claim of error as urged in his direct appeal. Noting that the Court of Appeals had ruled adversely on the merits of that claim, the state trial court denied Westfall's petition, as did the Texas Court of Criminal Appeals.

Westfall then filed the instant habeas petition, alleging that the trial court's restriction of his cross-examination of Alvarez denied his sixth amendment right to confront Alvarez, either to establish bias, prejudice, interest, or motive, or to correct any false impressions about his credibility. Westfall also claimed that the exclusion of the above evidence made his trial fundamentally unfair. The district court found the confrontation claims procedurally barred and concluded that there was no due process violation in the exclusion of the impeachment evidence. Westfall timely appealed.

Analysis

Westfall reurges on appeal the claims made in the district court. The complaint about the restriction of the cross-examination of Alvarez is barred by procedural default. It is well settled that "[w]hen a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court,"² unless there is a demonstration of "cause"³ for the default and "prejudice

²**Ylst v. Nunnemaker**, 501 U.S. 797, 801 (1991).

³**Murray v. Carrier**, 477 U.S. 478, 485 (1986).

attributable thereto."⁴ The last reasoned decision of a Texas court ruling on this claim "clearly and expressly"⁵ stated that counsel for Westfall failed to make a contemporaneous objection on this ground and thus was barred from doing so on appeal. As Westfall made no adequate showing of cause for and prejudice resulting from the default,⁶ the district court correctly held that the claim was barred.

Westfall repeats his claim that the trial court vitiated his confrontation rights by refusing to allow an examination of Alvarez about the full extent of his criminal history. Although the district court found that this claim was also procedurally barred, the record reflects both that a contemporaneous objection was made on this basis at trial and that the last reasoned decision of the state appellate court in question considered this claim on the merits; thus, there was no procedural bar to the district court's consideration of this point of error.⁷

The district court ruled in the alternative, however, that any errors in the evidentiary ruling of the state trial court were harmless. We find the arguments to the contrary unpersuasive. At trial Alvarez admitted to lying to police officers concerning his

⁴**Id.**

⁵**Michigan v. Long**, 463 U.S. 1032, 1041 (1983).

⁶Westfall sets forth an ineffective assistance of counsel claim as the "cause" for the default but, as he did not raise this argument before the district court, we do not address it. See Varnado v. Lynaugh, 920 F.2d 320 (5th Cir. 1991).

⁷See Harris v. Reed, 489 U.S. 255 (1989).

involvement with Westfall and the stolen vehicle; he also admitted to being a convicted felon who knowingly associated with other criminal actors. In light of the obviously damaging effect of these statements on his perceived truthfulness, it is nigh impossible to say that the jury had a false positive impression about his credibility. Any additional evidence, therefore, about his criminal history would not likely have had any impact on the weight that the jury assigned to his testimony. It appears manifest that the trial court's error in refusing to admit the evidence was harmless.

Finally, Westfall claims that the failure of the trial court to allow his attorney to elicit evidence of Alvarez's prior convictions and arrests violated constitutional due process protections. To establish such a violation, Westfall must demonstrate that the erroneous evidentiary ruling rendered the trial fundamentally unfair by "substantially and injuriously influenc[ing] the state trial court's finding of guilt."⁸ To have such a detrimental effect, the questioned ruling must relate "to evidence that is crucial, critical, and highly significant."⁹ The ruling in question erroneously excluded cumulative impeachment evidence offered to discredit testimony that was not heavily relied upon by the state in its case-in-chief, and other evidence adduced

⁸**Shaw v. Collins**, 5 F.3d 128, 133 (5th Cir. 1993).

⁹**Pemberton v. Collins**, 991 F.2d 1218, 1227 (5th Cir. 1993).

at trial overwhelmingly demonstrated Westfall's guilt.¹⁰ Westfall has not demonstrated any reasonable probability that the verdict would have been different if the evidence had been allowed. We conclude that the district court was correct in holding that there was no due process violation. The remainder of Westfall's claims are without merit.

Accordingly, the judgment of the district court denying the petition for habeas relief is AFFIRMED.

¹⁰Other evidence of Westfall's guilt included the positive identification by the victim, the mileage on the odometer of the victim's car showed that it had been driven directly from the scene of the robbery to Alvarez's apartment complex, and the positive linkage of Westfall both to Alvarez and to the apartment complex where the vehicle was found.