

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50641

Summary Calendar

MICHAEL WILLIAMS,

Petitioner-Appellant,

v.

WAYNE SCOTT, Director,
Texas Department of Criminal
Justice-- Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(A 93 CA 315 SS)

March 20, 1995

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

Michael Williams, a Texas state prisoner proceeding pro se and in forma pauperis, appeals the district court's denial of his application for a writ of habeas corpus alleging ineffective assistance of counsel. We affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. FACTUAL AND PROCEDURAL BACKGROUND

In August 1987, Williams sexually assaulted a child. In February 1991, facing a possible 99-year sentence, Williams voluntarily entered a guilty plea and received a twenty-five year sentence. Williams did not file a direct appeal.

Williams filed a petition for a writ of habeas corpus in the Texas courts, asserting that his counsel was constitutionally ineffective. Specifically, Williams asserts that his attorney inaccurately apprised him of the amount of time he would be required to serve before being considered for parole. Williams asserts that his attorney informed him, prior to entering his guilty plea, that Williams would be eligible for parole after serving one-fourth of his sentence. William's attorney conceded in an affidavit that he informed Williams as such.

Williams claims that his counsel was ineffective because, under Texas parole law applicable to Williams, he is required to serve one-third, not one-fourth, of his sentence prior to being eligible for parole. The state law requiring prisoners to serve only one-fourth of their terms prior to being eligible for parole became effective on September 1, 1987, approximately one month after Williams committed his crime, but several years before Williams entered his guilty plea.

The Texas Court of Criminal Appeals denied Williams' petition without written order on December 9, 1992. Williams then filed his petition with the federal district court for the

Western District of Texas. The defendant filed a motion for summary judgment; the magistrate judge recommended that the motion be granted because Williams had not established that his counsel's alleged defective representation had prejudiced him.

After conducting a de novo review, the district court accepted the recommendation of the magistrate judge and denied Williams' petition on the merits. Specifically, the district court concluded that Williams had failed to establish either that his counsel's performance was deficient or that such performance, even if deficient, prejudiced Williams. See Strickland v. Washington, 466 U.S. 668 (1984). The district court granted a certificate of probable cause. 28 U.S.C. § 2253. Williams filed a timely appeal to this court, asserting two points of error: (1) the district court erred in determining that he had not satisfied either prong of the Strickland test for ineffective assistance of counsel; and (2) the district court erred in failing to conduct an evidentiary hearing regarding his ineffectiveness claim.

II. STANDARD OF REVIEW

All briefs and papers of pro se litigants are to be construed more permissively than those filed by counsel. Securities and Exch. Comm'n v. AMX Int'l, Inc., 7 F.3d 71, 75 (5th Cir. 1993). We review a grant of summary judgment de novo, applying the same criteria used by the district court in the first instance. Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th

Cir. 1994); Conkling v. Turner, 18 F.3d 1285, 1295 (5th Cir. 1994). First, we consult the applicable law to ascertain the material factual issues. King v. Chide, 974 F.2d 653, 655-56 (5th Cir. 1992). Next, we review the facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party. Lemelle v. Universal Mfg. Corp., 18 F.3d 1268, 1272 (5th Cir. 1994); FDIC v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993), cert. denied, 114 S. Ct. 2673 (1994). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

III. ANALYSIS

A. *Ineffective Assistance of Counsel.*

Williams argues that his guilty plea "was involuntary because it was based upon the erroneous legal advice of its attorney." Specifically, his brief states that "had [Williams] received correct legal advice from his attorney, [Williams] would have rejected the plea bargain offer and would have elected to go to trial."

In Hill v. Lockhart, 474 U.S. 52 (1985), the Supreme Court held that the two-pronged test announced in Strickland v. Washington, 466 U.S. 668 (1984), provides the appropriate framework for analyzing a challenges to a guilty plea based upon

ineffective assistance of counsel. Hill, 474 U.S. at 58. Strickland requires that, to prove ineffective assistance of counsel, the defendant must show: (1) that counsel's performance was deficient under an objective standard of reasonableness, 466 U.S. at 687-88; and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. When assessing whether an attorney's performance was deficient, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689; Andrews v. Collins, 21 F.3d 612, 621 (5th Cir. 1994), cert. denied, 115 S. Ct. 908 (1995). In the specific context of a challenge to a guilty plea, the second Strickland prong (i.e., prejudice)

focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the "prejudice" requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

Hill, 474 U.S. at 59 (emphasis added); accord Joseph v. Butler, 838 F.2d 786, 791 (5th Cir. 1988). If the petitioner makes an insufficient showing on either of the two prongs of the Strickland test, the court need not address the other. Strickland, 466 U.S. at 697.

The district court concluded that Williams had not borne his burden of proving that his trial counsel's actions fell below a standard of objective reasonableness. Specifically, the district

court stated that "the attorney's mistake was a result of ambiguity in the [Texas parole] law that was not resolved with certainty until one year after the plaintiff pleaded guilty." In other words, the district court concluded that because it was unclear, at the time that Williams pleaded guilty, whether the "new" one-fourth-of-sentence parole eligibility law would be applied retroactively, Williams' attorney did not provide objectively deficient legal advice by informing Williams that he fell under the new law.¹

In addition, the district court determined that, even assuming arguendo that Williams had proven the deficiency prong, he would not pass the prejudice prong. Specifically, the district court concluded that "[t]he plaintiff fails to allege any facts that could support the conclusion that he actually would have gone to trial had his attorney correctly calculated his time to serve before eligibility for parole." The court cited Williams' affidavit submitted in response to the defendant's motion for summary judgment, in which Williams stated that "had I known that I would end up having to serve one-third of my sentence rather than one-fourth, I would have declined the twenty-five year plea bargain offer and opted to go to trial." Although the district court conceded that Williams' affidavit "sufficiently allege[d] prejudice," it concluded that the

¹ The possibility of retroactive application of the Texas parole eligibility law in effect at the time of Williams' guilty plea, TEX. CODE CRIM. PROC. ANN. art. 42.18, was not resolved until 1992. See Ex parte Choice, 828 S.W.2d 5 (Tex. Crim. App. 1992).

prejudice alleged did not rise to the level of a constitutional violation because

a shortened term before parole eligibility would not alter the plaintiff's attorney's evaluation that the plaintiff's best prospect was to plead guilty. . . . Without evidence that the plaintiff would have received different advice from his attorney, the plaintiff cannot convincingly claim that he was prejudiced by the advice that he received. . . . Where there is no reasonable probability that the result of the plea process would have been different but for the erroneous information, *habeas* relief is not justified.

Williams argues that the district court's findings as to both the competence prong and the prejudice prong are in error. With regard to the competence prong, Williams asserts that his attorney "should have known that the date of the crime controls parole eligibility." Williams also avers that his attorney "affirmatively states and believes that he could have, and should have given accurate legal advice. . . . [My attorney's] letter, in this matter, shows he acknowledges his error"

The letter to which Williams refers is not appropriate summary judgment evidence because it is not a sworn document. See Martin v. John W. Stone Oil Distrib., Inc., 819 F.2d 547, 549 (5th Cir. 1987).² In addition, we note that the permissible summary judgment evidence does include a sworn affidavit from Williams' trial attorney in which he states that "I advised Mr.

² Even assuming, arguendo, that the letter was appropriate evidence (which it is clearly not), it would not alter our conclusion because Williams has mischaracterized its content. The attorney merely states that "[y]ou are absolutely correct in that I communicated to you that you would be eligible for parole after you served 1/4 of your sentence, instead of 1/3 of your sentence due to being under the "old law."

Williams prior to his plea of guilty that he would be eligible for parole after he had served one-fourth (1/4) of his twenty-five (25) year sentence." This statement does not indicate that Williams' attorney knew, *at the time he advised Williams about the guilty plea*, that his advice regarding parole eligibility was incorrect; rather, it indicates that, *in hindsight*, the attorney's advice turned out to be incorrect.

Based upon the summary judgment evidence, we agree with the district court that Williams has not overcome the "strong presumption" that his trial counsel's performance was objectively reasonable under the circumstances. Strickland, 466 U.S. at 689. Williams committed his offense in August 1987, but he did not plead guilty until February 1991. At the time Williams committed his offense, the parole eligibility period was one-third of sentence. However, at the time that Williams' attorney advised Williams regarding parole eligibility, the law on the books stated that a prisoner could qualify for parole after serving one-quarter of his sentence. It was not until April of 1992 that the Texas Court of Criminal Appeals determined that the legislature did not intend to apply the more lenient parole provisions retroactively. Ex Parte Choice, 828 S.W.2d 5, 8 (Tex. Crim. App. 1992). Under these circumstances, it was not objectively unreasonable for Williams' counsel to advise him that he would be eligible for parole after serving one-quarter of his sentence. In short, Williams has failed to bear his burden of proof with regard to the deficiency prong of Strickland, and we

need not address the prejudice prong. Accordingly, his ineffective assistance of counsel claim is without merit.

B. Failure to Hold an Evidentiary Hearing.

Williams' final contention is that the district court erred in not holding an evidentiary hearing on his habeas petition. Specifically, Williams contends that a hearing was necessary "to determine whether or not [Williams' attorney] would have pursued a different plea agreement" had the attorney known that Williams would not be eligible for parole until he had served one-third of his sentence. We disagree.

A hearing is not necessary if the record is adequate to dispose of the claim. Wiley v. Puckett, 969 F.2d 86, 98 (5th Cir. 1992). The burden of proving entitlement to an evidentiary hearing rests with the petitioner. Young v. Herring, 938 F.2d 543, 559 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1485 (1992).

In this case, the summary judgment evidence was adequate to dispose of Williams' ineffective assistance of counsel claim without the necessity of an evidentiary hearing. The summary judgment evidence included an affidavit from Williams' attorney, which stated that "[t]he actual length of time Mr. Williams would have to serve pursuant to parole laws was not a factor in my plea discussions with the Travis County District Attorney's office."

The affidavit unequivocally reveals that the attorney did not base his recommendation of a guilty plea upon the date of

Williams' parole eligibility. There was no evidence in the record at the time of summary judgment to indicate that Williams' attorney would have pursued a different strategy if he had known that the new parole eligibility law would not apply to his client. Thus, Williams' contention that an evidentiary hearing was needed in order to determine if his counsel would have pursued a different strategy was clearly contradicted by his counsel's affidavit; accordingly, the record was adequate to dispose of Williams' claim without an evidentiary hearing.

IV. CONCLUSION

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