

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50697

Summary Calendar

UNITED STATES of AMERICA,

Plaintiff-Appellee,

versus

RONNIE THOMAS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-92-CA-1127(SA-89-CR-111-2))

(April 20, 1995)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

On December 4, 1992, Ronnie Thomas filed a motion to vacate and set aside his conviction and sentence pursuant to 28 U.S.C. § 2255. Following an evidentiary hearing, the district court dismissed Thomas's motion. We find no reversible error and 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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.

On May 4, 1989, Patrice O'Neal and Ronnie Thomas rented a room at a motel. The following day, while both Thomas and O'Neal were absent from the room, the maid discovered a brown bag containing what appeared to be "Mexican candy," a scale, and a large amount of cash. The maid gave the bag to her supervisor, who in turn gave it to the hotel's general manager, Glenda Stevens. Stevens examined the contents of the bag and took a small piece of the candy-like substance. After reviewing the guest records and discovering that O'Neal and Thomas had not checked out, Stevens returned the bag and its contents to the room. Stevens then called the police.

Later that day, O'Neal and Thomas returned to the room. Thomas received a beep on his pager, made some phone calls, removed some of the substance from the bag, and left the room. Sometime after midnight that night, Thomas returned to the room, woke up O'Neal, received another page, retrieved some more of the substance, and again left the room.

The next day, Drug Enforcement Administration agents tested the sample that Stevens had taken from the bag and found that it was cocaine base. The agents then obtained a search warrant. When they opened the door to the motel room, the agents found O'Neal alone in the room. The agents seized the brown bag, which still contained the cocaine base. The agents also noticed residue on the dresser in the room, which later testing revealed to be cocaine base.

The agents arrested O'Neal. Shortly thereafter, Thomas arrived at the motel and was arrested. A search incident to his arrest revealed \$1,800 in cash and an operational pager. The agents also found a loaded gun in Thomas's car.

On August 30, 1989, Thomas and O'Neal were indicted for conspiring to possess cocaine base with the intent to distribute and possession of cocaine base with the intent to distribute. In exchange for a guilty plea to a lesser offense, O'Neal agreed to testify against Thomas. A jury convicted Thomas on the possession charge.

Thomas appealed his conviction, and this court affirmed. See United States v. Thomas, No. 90-5571 (5th Cir. Apr. 4, 1991). On December 4, 1992, Thomas filed a motion to vacate and set aside his conviction and sentence pursuant to 28 U.S.C. § 2255. On August 30, 1993, an evidentiary hearing was held, and on December 6, 1993, the magistrate judge recommended that Thomas's motion be denied. Thomas filed objections to the magistrate judge's report. The district court considered the recommendations of the magistrate judge, reviewed Thomas's objections, and accepted and approved the report's factual findings and legal conclusions. Thomas filed a timely notice of appeal.

II.

Thomas contends that his conviction should be vacated because his trial counsel rendered ineffective assistance, he was denied the right to testify, the court made improper contact with the

jury, and the district court failed to review the magistrate judge's report de novo. Each of Thomas's contentions are without merit.

Thomas's trial counsel, John Pinckney, testified at the evidentiary hearing. The record reflects that Pinckney consulted extensively with Thomas before the trial. Pinckney also filed motions to suppress evidence and motions in limine. He was successful in getting much of the potentially damaging evidence excluded. Thomas disputes many of the contentions made by his lawyer; however, the magistrate judge chose to credit Pinckney's testimony over Thomas's. A lower court's credibility determinations are entitled to deference. See United States v. Samples, 897 F.2d 193, 198 (5th Cir. 1990).

Thomas also claims that his counsel rendered ineffective assistance by failing to call certain defense witnesses who could testify as to his whereabouts the night before his arrest and who could explain why he had \$1,800 when he was arrested. Cathy Bolden testified at the evidentiary hearing that she saw Thomas at a nightclub from approximately 10:30 p.m. to 2:00 a.m. on the night before his arrest. She also testified that Thomas's lawyer did not contact her about testifying. Steven Zauft, an attorney who handled a personal injury claim for Thomas, testified at the evidentiary hearing that nine months before Thomas was arrested, Thomas received a \$6,500 settlement check. Zauft testified that Thomas contacted him to obtain additional copies of documents concerning the settlement, but that Thomas's lawyer did not contact

him concerning testifying at Thomas's trial. Finally, Thomas's wife, Annetta, testified at the evidentiary hearing that she received a \$1,500 income tax refund in May 1989 and that she gave the money to Thomas to buy a car.

Pinckney testified that Thomas never gave him a list of potential defense witnesses. He also testified that he investigated and interviewed the government's witnesses from the hotel. He stated that he and Thomas discussed the possibility of calling only his wife and other family members to testify at the trial and that Thomas participated in the decision not to call the witnesses.

The district court did not err in finding that while Zauft, Bolden, and Annetta's testimony may have had some influence on the jury, it would not have affected the outcome of the trial. The testimony of the potential witnesses concerning the money that Thomas possessed and his whereabouts on the night before his arrest was not relevant to the issue of whether Thomas possessed cocaine with the intent to distribute.

Thomas next contends that he was denied his constitutional right to testify. Pinckney admits that he recommended that Thomas not testify, but that he told Thomas that he had a right to testify and that it was Thomas's decision. Thomas disputes this claim and points to the closing argument where his lawyer told the jury that they should not read anything negative into Thomas's failure to take the stand because that was a decision made by the lawyer and not by Thomas.

The district court found that Pinckney's comments to the jury reflected "an attempt . . . to discourage the jury from equating [Thomas's] failure to testify with guilt." In addition, the magistrate judge believed Pinckney's claim that he advised his client of his constitutional right to testify and did not threaten to withdraw from the representation if Thomas did take the stand. We will not disturb this credibility determination on appeal. See Samples, 897 F.2d at 198. Finally, the district court correctly noted that Pinckney's advice against testifying was a plausible trial strategy employed to prevent Thomas from inadvertently opening the door to admission of evidence previously excluded by motions in limine.

Thomas next complains that the trial court erred in re-reading the reasonable doubt jury instruction at the request of the jury, during deliberations, off the record, and outside of Thomas's presence. This claim is without merit. Before re-reading the instruction, the trial judge obtained the permission of all of the parties. Moreover, Thomas's lawyer stood outside the door of the jury room and listened while the judge read verbatim the reasonable doubt instruction to the jury.

Finally, Thomas contends that the district court failed to conduct a de novo review of the evidence presented at the evidentiary hearing. This claim lacks merit. The district court's order accepting the magistrate judge's memorandum and recommendation indicates that the district court thoroughly reviewed the magistrate judge's factual findings and legal

conclusions, the record, and Thomas's objections. The district court analyzed each of Thomas's objections in view of the evidence in the record and determined that the objections lacked merit. The language of the order indicates that the district court conducted a de novo review of the evidence in compliance with 28 U.S.C. § 636(b)(1). See Longmire v. Guste, 921 F.2d 620, 623 (5th Cir. 1991).

AFFIRMED.