UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-50708

WILLIAM ALEXANDER DWYER,

Petitioner-Appellant,

Versus

JERRY D. MILLSAPS, Director of
Community Supervision and Corrections
Department for Travis County, Texas, ET AL.,

Respondents-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(A-94-CA-011-JN)

(May 31, 1995)

Before LAY,[1] DUHÉ and DeMOSS, Circuit Judges.

PER CURIAM:[2]

William Alexander Dwyer was convicted by a jury of misapplying fiduciary property in violation of Tex. Penal Code Ann. § 32.45 (Vernon 1989) in the 171st District Court of El Paso County, Texas. He was sentenced to six years imprisonment, which the jury probated and fined $10,000. The Texas Court of Appeals affirmed his conviction on July 8, 1992. Dwyer's sole ground for appeal was his claim the evidence at trial was insufficient to convict him. Dwyer

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[1] Circuit Judge of the Eighth Circuit, sitting by designation.

[2]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 Pursuant to that rule, the Court has determined that this opinion should not be published.

thereafter filed a petition for discretionary review with the Texas Court of Criminal Appeals on the same ground and also alleged that the Texas statute he was convicted under is unconstitutionally vague. The Court of Criminal Appeals refused to review the case on February 3, 1993.

Subsequently Dwyer filed an application with the trial court for a state writ of habeas corpus relief under Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon 1977). In the application, Dwyer raised the same grounds as in his petition for discretionary review. He also added a third claim for ineffective assistance of counsel. The trial court found no controverted facts and transferred the application to the Texas Court of Criminal Appeals which dismissed the case for lack of jurisdiction on September 8, 1993. Before the Court of Criminal Appeals issued its dismissal, Dwyer filed a writ of habeas corpus in the federal court. That petition was dismissed for failure to exhaust state remedies due to the pending application in the Texas Court of Criminal Appeals on August 12, 1993. Petitioner filed an appeal to this court. We affirmed the dismissal on October 25, 1993.

On January 6, 1994, Dwyer filed a new habeas corpus petition in federal district court. He alleged three grounds for relief: (1) insufficiency of evidence; (2) the statute under which he was convicted was void for vagueness; and (3) ineffective assistance of both his appellate and trial counsel.

The Attorney General moved that Dwyer's petition be dismissed for failure to exhaust his state court remedies. The magistrate

judge denied the motion in an order issued June 9, 1994. On September 16, 1994, the magistrate judge submitted a report and recommendation to the district court. The court adopted the report and recommendations.

RULINGS OF THE DISTRICT COURT

We reviewed each of the claims Dwyer advanced in his petition. None of the claims have any merit and the court correctly dismissed Dwyer's petition.

(1) Sufficiency of the Evidence. The magistrate judge recognized a presumption of correctness, Farmer v. Caldwell, 476 F.2d 22, 24 (5th Cir.), cert. denied, 414 U.S. 868 (1973), applied to the El Paso Court of Appeals' holding that the state satisfied its burden of proving beyond a reasonable doubt that Dwyer violated the fiduciary statute. The court then reviewed the evidence and found there existed sufficient evidence for the trier of fact to find Dwyer did misapply fiduciary funds. We agree with these findings.

(2) Constitutionality of the Statute. As to petitioner's attack on section 32.45 of the Texas Penal Code, the magistrate judge found no language in the statute so vague or ambiguous as to support a constitutional challenge.[3] We agree and deem this

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[3]Tex. Penal Code Ann. § 32.45 (Vernon 1993) reads in pertinent part:

> Misapplication of Fiduciary Property or Property of Financial Institution
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> (a) For purposes of this section:
>
> (1) "Fiduciary" includes:

challenge frivolous.

(3) Ineffective Assistance. Petitioner's claim of ineffective assistance of counsel was fully reviewed by the magistrate judge and affirmed by the district court. We agree that none of the allegations made are sufficient to satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668 (1984) (holding habeas petitioner must show counsel's performance was seriously deficient and that deficiency prejudiced his defense).

EXHAUSTION OF STATE REMEDIES

In their letter brief, appellees raise the question of whether Dwyer exhausted his state remedies. For the reasons discussed below, exhaustion does not bar our examination of Dwyer's claims.

The magistrate judge, in denying the motion to dismiss for failure to exhaust, held the exhaustion requirement did not bar Dwyer's federal claims because "the state's review processes are so

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> (A) trustee, guardian, administrator, executor, conservator, and receiver;
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> (B) any other person acting in a fiduciary capacity, but not a commercial bailee; and
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> (C) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary.
>
> (2) "Misapply" means deal with property contrary to:
>
> (A) an agreement under which the fiduciary holds the property; . . .
>
> (b) A person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.

cumbersome, complex and confusing that they frustrate good faith attempts to comply with them," quoting Deters v. Collins, 985 F.2d 789, 796 n.16 (5th Cir. 1993) (quoting Carter v. Estelle, 677 F.2d 427, 446-47 (5th Cir. 1982), cert. denied, 460 U.S. 1056 (1983)). The primary dispute centers on the question whether Dwyer, who is on probation, took the wrong procedural path by filing under art. 11.07 and failing to present his application directly to the Court of Criminal Appeals. He instead filed in the trial court of his conviction. The state contends the Court of Criminal Appeals does not have jurisdiction under art. 11.07 to hear habeas petitions from people on probation because their convictions are not final. On completion of probation, the judgment of conviction is set aside. See Ex parte Renier, 734 S.W.2d 349, 351 (Tex. Crim. App. 1987) (en banc). The state contends case law makes it very clear that Dwyer should have filed in the trial court under art. 11.05.

It has long been settled that 28 U.S.C. § 2254 "does not erect insuperable or successive barriers to the invocation of federal habeas corpus." Wilwording v. Swenson, 404 U.S. 249, 249 (1971) (per curiam). We need not agree with the district court's appraisal of the Texas procedures to agree with the outright dismissal of Dwyer's petition on the merits.

First, the Director did not cross-appeal on this issue in his brief. See Arvie v. Broussard, 42 F.3d 249, 250 (5th Cir. 1994) (per curiam). Thus, the question is not before us.

Second, even if the Texas procedures were not technically followed, if it was obvious to either the trial court or the Court

of Criminal Appeals that Dwyer should have filed under art. 11.05, the logical approach, especially since he was filing pro se, would seem to have been to treat his petition as an 11.05 petition. After all, both art. 11.05 and art. 11.07 give the trial court jurisdiction to consider the petition. The difference between the two procedures is that under art. 11.05 if the trial court finds no merit, it dismisses the petition which the petitioner can then appeal to the Court of Criminal Appeals. Under art. 11.07, the petition automatically gets considered by the Court of Criminal Appeals after trial court determination of any controverted factual matters. Thus, it may be argued there was sufficient exhaustion to satisfy federal requirements under Wilwording.

Third, our review of the merits show that the two issues which Dwyer did not exhaust, his constitutional attack on the statute and his ineffective assistance claim, are both frivolous. Dwyer argues he needs an evidentiary hearing to substantiate his claims, but he fails to establish a federal claim for relief. 28 U.S.C. § 2254 Rule 2(c) imposes a heightened pleading requirement for habeas corpus petitions. See McFarland v. Scott, 114 S. Ct. 2568, 2572 (1994). The complaint as it stands fails to allege a substantial federal question. See Bell v. Hood, 327 U.S. 678, 682-83 (1946).

We affirm the district court's dismissal of Dwyer's petition.