IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50745
Summary Calendar

Cayetano Hernandez,

Petitioner/Appellant,

versus

Wayne Scott, Director, Texas Department of Criminal Justice and Dan Morales, Texas Attorney General

Respondents/Appellees.

Appeal from the United States District Court
For the Western District of Texas
(SA-93-CV-729)

(June 8, 1995)

Before JOHNSON, JONES and EMILIO M. GARZA, Circuit Judges.*

JOHNSON, Circuit Judge:

Petitioner seeks a writ of habeas corpus contending that his counsel was ineffective for failing to request an evidentiary hearing on his motion for shock probation. The district court denied relief and the petitioner appeals. We AFFIRM.

I. FACTS AND PROCEDURAL HISTORY

Cayetano Hernandez, the petitioner herein, was charged with one count of sexual assault of a child and one count of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

aggravated sexual assault. Pursuant to a plea agreement, he pled guilty to the non-aggravated count. Under that agreement, the state recommended that Hernandez' sentence not exceed ten years. Further, the state agreed to remain silent on a request for probation.

On April 5, 1990, the state district court conducted an evidentiary sentencing hearing that lasted approximately two hours and at which Hernandez called several character witnesses. At the hearing, Robert Rangel, Hernandez' trial counsel, requested probation for Hernandez. This motion was denied, though, and the district court sentenced Hernandez to a ten-year term of imprisonment. Rangel then filed and urged a motion for reconsideration of the denial of probation, but this motion was also denied. However, at the conclusion of the hearing, the district court raised the issue of shock probation and stated that he would consider Hernandez for shock probation after he had been incarcerated for sixty days.

After Hernandez had served in excess of sixty days in county jail, Rangel timely filed a motion for shock probation[1] requesting the court to suspend further execution of Hernandez' sentence and place him on probation. Rangel also discussed this motion with the district judge at that time and told the district judge that he intended to request a hearing. The district judge,

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[1] At the time that Rangel filed this motion, June 26, 1990, Hernandez was still serving his sentence in county jail. Hernandez was transferred to a state penal facility on or about September 14, 1990.

however, informed Rangel that a recent case from the Texas Court of Criminal Appeals[2] precluded "shocking" Hernandez from county jail (as opposed to a state penitentiary). Moreover, Rangel later testified that he could tell from the judge's tone and demeanor that the judge intended to deny the motion in any event. Accordingly, no hearing was ever held and the district court denied the motion in a formal written order on December 3, 1990.

Hernandez then filed for post-conviction relief in the Texas state courts. The state district court found that Hernandez had received ineffective assistance of counsel and recommended that Hernandez be granted a new punishment hearing. The Texas Court of Court of Criminal Appeals denied Hernandez' state application for habeas corpus relief without a written order, though.

Having exhausted his state remedies, Hernandez filed the instant federal habeas corpus proceeding pursuant to 28 U.S.C. § 2254 alleging, as his sole ground for relief, that he had received ineffective assistance of counsel because his attorney had failed to obtain a hearing on his motion for shock probation. After conducting an evidentiary hearing, the magistrate judge determined that Hernandez had failed to show prejudice and thus the magistrate judge recommended that Hernandez' petition be denied. The district court, after a *de novo* review, agreed with the magistrate judge, and, in addition, concluded that Hernandez had failed to show that his counsel's performance had been deficient. Hence, the district court denied relief. Hernandez

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[2] *Smith v. State*, 789 S.W.2d 590 (Tex.Crim.App. 1990).

now appeals.

II. DISCUSSION

Under Texas law, a motion for shock probation may be granted only after a hearing at which both the defense and the State are allowed the opportunity to present evidence. Tex. Code Crim. Proc. Ann. § 42.12(6)(c) (West Supp. 1995). As his attorney did not request a hearing, Hernandez contends that he lost his chance at receiving shock probation and thus his counsel was ineffective.

To succeed with a claim of ineffective assistance of counsel, Hernandez would have to show that 1) his trial counsel's performance was deficient, and 2) that the deficient performance prejudiced his rights. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). If proof of one element is lacking, we need not examine the other. *Kirkpatrick v. Blackburn*, 777 F.2d 272, 285 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 2907 (1986).

In order to show that his counsel's performance was constitutionally deficient, a convicted defendant must show that his counsel's representation "fell below an objective standard of reasonableness." *Darden v. Wainwright*, 477 U.S. 168, 184, 106 S.Ct. 2464, 2473 (1986). In evaluating such claims, this Court indulges 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), and the defendant must overcome the presumption that the

challenged action might be considered sound trial strategy. *Strickland*, 104 U.S. at 2065. Judicial scrutiny of counsel's performance must be highly deferential, and courts must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct from counsel's perspective at the time." *Id.*

The prejudice showing under *Strickland* normally requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 2068. However, in non-capital sentencing proceedings, this Court has recognized that the range of possible sentences and the discretion of the sentencing court is such that practically any error by counsel could lead to a different result, even if just slightly different. Thus, in order to avoid turning *Strickland* into a rule of automatic reversal in the non-capital sentencing context, this Court has determined that in order to show prejudice a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, his sentence would have been *significantly* less harsh. *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993).

In this case, we conclude that Hernandez has failed to demonstrate the requisite prejudice. The only way that Hernandez could show that his sentence would have been significantly less harsh is to demonstrate that had his counsel requested a hearing on the motion for shock probation, the motion would have been

granted. After reviewing the record, we conclude that this was unlikely.

Hernandez' main contention is that since Judge Barlow, the sentencing judge, initially broached the subject of shock probation, he must have intended to grant it after the requisite period of incarceration had passed. However, Judge Barlow himself, in a letter later provided, denied that such an intention could be read into his statements at the sentencing hearing. According to Judge Barlow, when he stated that he would consider shock probation, it meant just that and nothing more.

Moreover, none of the objective actions taken by Judge Barlow portray any spirit of lenity that would have prompted Judge Barlow to grant shock probation. Hernandez, a school bus driver, pled guilty to sexual assault of a child under fourteen years of age. Under the count of conviction, Judge Barlow could have sentenced Hernandez to as few as two years in prison. However, Judge Barlow was not nearly so charitable. Instead, he sentenced Hernandez to ten years--the maximum permissible under the plea arrangement. Moreover, Judge Barlow twice denied Hernandez' motion for probation despite the numerous character witnesses that testified on behalf of Hernandez. Finally, when the motion for shock probation was brought to Judge Barlow's attention, he reacted negatively causing Hernandez' counsel to conclude that the judge intended to deny the motion which Judge Barlow, in fact, thereafter did by written order.

These facts belie the contention that Judge Barlow was

inclined to grant the motion for shock probation. Instead, it seems clear from the record that, at least by the time that the motion was filed, Judge Barlow had already decided to deny the motion.[3] Moreover, Hernandez has pointed to no new evidence[4] that he would have presented in a hearing which convinces us that Judge Barlow would have changed that decision. Thus, Hernandez has failed to show that there is a reasonable probability that, but for counsel's failure to request a hearing on his motion for shock probation, his sentence would have been significantly less harsh. *Spriggs*, 993 F.2d at 88. Accordingly, Hernandez has not shown prejudice under the *Strickland* standard.

III. CONCLUSION

For the reasons stated above, the judgment of the district court is AFFIRMED.

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[3] Judge Barlow could do this without holding a hearing. Tex. Code Crim. Proc. Ann. § 42.12(6)(c) (West Supp. 1995).

[4] Hernandez basically advances more character witnesses and his favorable record while incarcerated.