

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60171

Summary Calendar

RAY ALEXANDER GILBERT,

Petitioner-Appellant,

versus

EDWARD HARGETT, Superintendent,
Mississippi State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(3:93-CV-525)

(April 27, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge:*

Ray Alexander Gilbert, a Mississippi state prisoner, appeals the dismissal of his petition for habeas corpus. Gilbert claims that his guilty plea was involuntary and that counsel rendered ineffective assistance. Finding that an evidentiary hearing is necessary on this issue of counsel's effectiveness, we vacate and remand.

I. FACTS AND PROCEDURAL HISTORY

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

On December 1, 1989, Ray Alexander Gilbert pleaded guilty to manslaughter in Mississippi state court and was sentenced to 20 years imprisonment. In August 1993, he filed a petition for federal habeas relief, alleging inter alia, that his guilty plea was involuntary and that his trial counsel rendered ineffective assistance.

The state conceded that Gilbert had exhausted his state remedies but maintained that Gilbert was not entitled to federal habeas relief. Gilbert filed a traverse to the state's answer, alleging that the prosecutor violated his Sixth Amendment right to a speedy trial and that counsel was ineffective in failing to raise a speedy trial defense. Gilbert attached a copy of a warrant indicating that he was held in Michigan on September 29, 1988, in relation to the charges pending against him in Mississippi. Gilbert asserted in his traverse that the speedy trial clock began ticking at the time of this arrest. Gilbert pleaded guilty to manslaughter on December 1, 1989.

The magistrate judge found that Gilbert's plea was knowingly and voluntarily entered, that the entry of the plea waived Gilbert's right to raise the speedy trial issue, and that counsel was not ineffective. The district court overruled Gilbert's objections, adopted the findings of the magistrate judge, dismissed Gilbert's petition with prejudice, and denied Gilbert's request for a certificate of probable cause (CPC) to appeal. This Court granted Gilbert a CPC and directed the parties to brief whether, in

the light of Gilbert's assertion of a speedy trial claim, Gilbert's counsel was ineffective.

II. ANALYSIS

Gilbert contends that counsel failed to protect "his speedy trial rights and that this was deficient performance and that this performance prejudiced Gilbert to plead guilty to the crime of manslaughter."¹ To prevail on this issue, Gilbert must prove that counsel's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2064 (1984). "In the context of guilty pleas, [the petitioner] may establish the requisite prejudice only by demonstrating a reasonable probability that, but for his attorney's errors, he would not have pleaded guilty and would have insisted upon going to trial." Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993) (citing Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370 (1985)).

Gilbert argues that his guilty plea was not knowing and voluntary because trial counsel failed to pursue a viable speedy trial claim. He argues that under Nelson v. Hargett, 989 F.2d at 850-54, he is entitled to habeas relief or an evidentiary hearing in the district court.

In Nelson, this court was faced with a state prisoner's claims of an involuntary guilty plea and ineffective assistance of counsel. Id. at 850. The district court found that Nelson's speedy trial claim had been waived by his plea of guilty. See id.

¹ Gilbert argues that his plea was involuntary for several other reasons. We, however, find his remaining claims either waived by the entry of the guilty plea or without merit.

at 850. We found that (although a valid plea waives all non-jurisdictional defects, including a speedy trial claim) an ineffective-assistance claim based on counsel's failure to assert the speedy trial claim may form the basis for habeas relief. Id. at 850. The case was remanded for an evidentiary hearing to explore whether counsel had investigated possible defenses and to shed light on the 37-month interval between the arrest and the guilty plea. Id. at 854.

The district court in the case sub judice dismissed Gilbert's speedy trial claim, finding that it was waived by the guilty plea. The district court did not address Gilbert's speedy trial claim in the context of an ineffective-assistance challenge.

A document attached to Gilbert's state habeas petition indicates that on or about September 29, 1988, Gilbert was arrested and held in Michigan pending extradition for the manslaughter offense to which he later pleaded guilty. Another document attached to that pleading indicates that the prosecutor declined to extradite Gilbert and that Gilbert was released from custody on October 5, 1988. During his opportunity for elocution at the December 1, 1989 guilty plea for manslaughter, Gilbert stated that he had been arrested in Michigan and held for six days until the Mississippi authorities were contacted.

Gilbert argues that because the murder charge was pending in May 1988 and the state had the opportunity to proceed in late September/early October 1988 but chose not to, counsel was ineffective in failing to protect his speedy trial rights. The

state acknowledges that "[i]t is possible that a speedy trial argument could be made in this case." Nevertheless, the state asserts that counsel's recommendation to accept the offer rather than pursuing the speedy trial claim and thereby risking the possibility of life in prison did not constitute ineffective assistance. Specifically, the state explains that Gilbert pleaded guilty to manslaughter rather than murder, received 20 years instead of a possible life sentence, and that only 5 years of his previous 20-year suspended sentence for armed robbery was revoked (which was to be served concurrently with the manslaughter sentence). This strategy was reasonable professional judgment, the state argues, in light of the facts surrounding the plea agreement. Cf. Rutledge v. Wainwright, 625 F.2d 1200, 1203 (5th Cir. 1980) ("if Rutledge's trial counsel merely erred strategically, his advice [regarding the speedy trial claim] was nonetheless competent and Rutledge's plea a calculated but voluntary risk."), cert. denied, 450 U.S. 1033, 101 S.Ct. 1746 (1981). However, before we can determine whether the advice was reasonable, we must be able to evaluate the merits of the speedy trial claim.

In evaluating a speedy trial claim, the following factors are balanced: the length of the delay between arrest and trial, the reasons for the delay, the defendant's assertion of his speedy trial rights, and the prejudice to the defendant resulting from the delay. Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972). The time between May 1988 (the time of the killing) and September 1988 (Gilbert's arrest in Michigan) is not counted on the

speedy trial clock because the delay was caused by Gilbert becoming a fugitive from justice. See Nelson, 989 F.2d at 852. In any event, a 14-month delay is presumptively prejudicial. See id. at 851-52. The presumptively prejudicial delay in Gilbert's prosecution mandates examination of the other factors. See Millard v. Lynaugh, 810 F.2d 1403, 1406 & n.1 (5th Cir.), cert. denied, 484 U.S. 838, 108 S.Ct. 122 (1987).

The state has offered no evidence to explain the 14-month interval between Gilbert's arrest in Michigan and his guilty plea. The reasons for the delay are unclear and should be examined at an evidentiary hearing. In regard to the third factor, there appears to be no indication that Gilbert ever asserted his right to a speedy trial prior to pleading guilty to manslaughter on December 1, 1989.

In regard to the fourth and final factor, prejudice is assessed in the light of the interests of defendants which the speedy trial right was designed to protect. The Supreme Court "has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Barker, 407 U.S. at 532, 92 S.Ct. at 2193 (footnote omitted). The third interest is the most important because the inability of a defendant adequately to prepare his case impugns the fairness of the criminal justice system. Id.

In Nelson, we opined that the facts of the case made it difficult "to view [counsel]'s failure to pursue the speedy trial

claim as the product of a reasonable litigation strategy." Id. at 850. In the case at bar, we find that an evidentiary hearing is necessary to discern counsel's reasons for not pursuing the speedy trial claim, the reasons for the 14-month delay, and the prejudice, if any, to Gilbert resulting from the delay. On remand the district court should consider appointing counsel to represent Gilbert.

CONCLUSION

For the above stated reasons, this cause is **VACATED** and **REMANDED** for further proceedings.