

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60197

Summary Calendar

JOHN M. PARKER,

Petitioner-Appellant,

v.

EDWARD M. HARGETT,

Respondent-Appellee.

JOHN MACK PARKER,

Petitioner-Appellant,

v.

EDWARD M. HARGETT and
STATE OF MISSISSIPPI,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(92 CV 796 & 92 CV 797)

(November 11, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

A Mississippi jury found John M. Parker ("Parker") guilty of capital murder, and Parker pleaded guilty to another separate murder; he received two life sentences. Nine years later, Parker sought to have his conviction vacated in the Mississippi court system. The Mississippi courts dismissed the action as time-barred. Parker then filed for federal habeas corpus relief, and the district court dismissed his petition with prejudice. Parker appeals. We affirm.

I. FACTS AND PROCEDURAL HISTORY

A Mississippi jury found Parker guilty of the capital murder of Ray McWilliams. On December 3, 1982, he was sentenced to a term of life imprisonment. Also, on that date, Parker pleaded guilty to the capital murder of Nell McWilliams. Under the plea agreement, Parker agreed, among other things, not to appeal his conviction for Ray McWilliams, and in return the state recommended the imposition of concurrent life sentences. On January 21, 1983, Parker received a life sentence in for the murder of Nell McWilliams to run concurrently to the sentence imposed for Ray McWilliams's murder.

Under the Mississippi Uniform Post-Conviction Collateral Relief Act, MISS. CODE ANN. § 99-39-5 (1994), individuals convicted before April 17, 1984 had until three years after that date to file a motion for collateral relief. See Patterson v. State, 594 So.2d 606, 607-08 (Miss. 1992). However, Parker did not seek such relief until April 10, 1991, when he filed a motion to vacate and set aside both of his convictions in the Circuit Court

of the First Judicial District of Hinds County, Mississippi. That motion was dismissed because it "was not filed within the statutory limits set out in Section 99-39-5(2) . . . and does not fall within one of the exceptions contained therein."¹ Parker appealed, arguing, among other things, that Grady v. Corbin, 495 U.S. 508 (1990), is an "intervening decision" within the meaning of the Mississippi statute that justifies relief from the three-year limitations period. On December 10, 1992, the Mississippi Supreme Court affirmed the dismissal of Parker's motion for postconviction relief.

On December 18, 1992, Parker filed two 28 U.S.C. § 2254 petitions, which were consolidated by the district court, raising various challenges to the two capital murder convictions. The respondents moved to dismiss on the ground of procedural bar. The magistrate judge determined that Parker had procedurally defaulted without establishing cause. The magistrate further determined that a fundamental miscarriage of justice would not result if Parker's claims were not reviewed. Parker objected that the magistrate's report and recommendation failed to address

¹ The Act sets forth several exceptions, including the following:

Excepted from this three-year statute of limitations are those cases in which the prisoner can demonstrate . . . that there has been an intervening decision of the supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence . . .

MISS. CODE ANN. § 99-39-5(2) (1994).

his argument that Grady is an intervening decision which would have adversely affected the outcome of his cases. The district court, determining that it need not address this issue because Grady had been overruled by United States v. Dixon, 113 S. Ct. 2849, 2860 (1993), dismissed the petition with prejudice. The district court also granted Parker's certificate for probable cause.

Parker contends that he is not time-barred under the Mississippi Uniform Post-Conviction Collateral Relief Act because Grady is an intervening decision justifying relief from the limitations period under that Act. Relying on the double jeopardy analysis in Grady, Parker argues that he could not have been prosecuted for the murder of Nell McWilliams because a conviction for that murder would have relied on proof of conduct for which he had already been prosecuted, namely the murder of Ray McWilliams. Thus, he asserts that had Grady been the law in 1982, he would not have entered a guilty plea to the murder of Nell McWilliams and would not have waived his right to appeal his conviction for the murder of Ray McWilliams.

II. STANDARD OF REVIEW

Federal habeas review is not available "to correct simple misapplications of state criminal procedure." Lavernia v. Lynaugh, 845 F.2d 493, 496 (5th Cir. 1988). We "may intervene only to correct wrongs of [federal] constitutional dimension." Id. (citations omitted). When a federal court is presented with a habeas petition alleging a violation of state criminal

procedure, the only inquiry is "whether there has been a constitutional infraction of the defendant's due process rights which would render the [proceeding] as a whole `fundamentally unfair.'" Id. (citations omitted).

III. DISCUSSION

Parker has failed to demonstrate the existence of any error, much less an error of federal constitutional magnitude, for two reasons. First, his claim fails under Grady. In Grady, the Supreme Court held that a subsequent prosecution violates double jeopardy if, "to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 495 U.S. at 510. However, the Court disclaimed any intention of adopting a "same evidence" test, observing that "[t]he critical inquiry was what conduct the state will prove, not the evidence the state will use to prove that conduct." Id. at 521. Although both prosecutions arose from the same scheme in this case, they did not involve the "same conduct" for double jeopardy purposes because each charged murder involved a different victim. In other words, the government did not have to prove that Parker murdered Ray McWilliams to prove that he murdered Nell McWilliams. Second, the Supreme Court overruled Grady in Dixon. Dixon, 113 S. Ct. at 2860. Parker can no longer claim Grady is an "intervening decision" because Grady is no longer the law.

Because Grady would not have "actually adversely affected the outcome of his decision," and because Grady is no longer the law, it is not an "intervening decision" under Mississippi Code § 99-39-5(2). Therefore, the district court properly concluded that Parker is time-barred from post-conviction collateral relief.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.