

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-60314
Summary Calendar

PERNELL BRANSON, Petitioner-Appellant,
versus
EDWARD M. HARGETT, Superintendent,
Mississippi State Penitentiary, Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi
(CA-3:92-629)

(December 30, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM¹:

Petitioner-Appellant Pernell Branson ("Branson") was indicted for aggravated assault by a grand jury in Hinds County, Mississippi in September 1986. While being represented by Hermel Johnson ("Johnson"), he waived arraignment and entered a plea of not guilty. In March 1988, Branson, who was then being represented by Eddie Tucker ("Tucker"), withdrew his plea and entered an open plea of guilty. In Mississippi, an open plea is one made without a

¹ 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 Pursuant to that Rule, the Court has determined that his opinion should not be published.

sentencing recommendation by the state.² He was subsequently sentenced to eighteen years in prison.

In February 1991, Branson sought post-conviction relief in state court on the ground of ineffective assistance of counsel. He alleged that Tucker failed to discuss a possible defense with him, coerced him and incompetently advised him to plead guilty. Branson also alleged that he was denied counsel at a critical stage of the proceedings because Johnson, who represented him at the arraignment, had been disbarred three weeks before the arraignment. The trial court dismissed the motion for post-conviction relief. Branson appealed to the Mississippi Supreme Court, which affirmed without written reasons.

Branson petitioned for federal *habeas* relief alleging that his guilty plea was invalid because Tucker gave his case little attention and gave him poor advice, and that he was denied counsel at a critical stage of the proceedings. The magistrate judge recommended that relief be denied. When Branson failed to file his objections, the district court adopted the magistrate judge's report and dismissed the petition. After dismissal, Branson filed his objections and a motion for reconsideration. Noting that Branson's petition was dismissed two weeks after the expiration of his second extended deadline for filing objections, the district court refused to consider the objections. The court also stated that even if the objections were considered, they failed to present any argument justifying reconsideration.

² See *Washington v. State*, 620 So.2d 966, 968 (Miss. 1993).

Branson argues that his guilty plea was invalid because Tucker was ineffective for not investigating his case and for not discussing the case or a defense with him. He does not argue that he was denied counsel at a critical stage. Accordingly, that issue is abandoned.³

Federal *habeas* relief requires that the petitioner show a federal constitutional violation and prejudice.⁴ To demonstrate ineffectiveness of counsel, Branson must establish that his counsel's performance fell below an objective standard of reasonable competence, and that he was prejudiced by his counsel's deficient performance.⁵ Judicial scrutiny of a counsel's performance is highly deferential, and courts must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.⁶

The petitioner must affirmatively plead the actual resulting prejudice.⁷ Branson must demonstrate prejudice by showing that his counsel's errors were so serious that they rendered the proceedings

³ See *Hobbs v. Blackburn*, 752 F.2d 1079, 1083 (5th Cir.), *cert. denied*, 474 U.S. 838, 106 S.Ct. 117, 88 L.Ed.2d 95 (1985).

⁴ 28 U.S.C. § 2254(a); *Carter v. Lynaugh*, 826 F.2d 408, 409 (5th Cir. 1987), *cert. denied*, 485 U.S. 938, 108 S.Ct. 1117, 99 L.Ed.2d 277 (1988).

⁵ *Lockhart v. Fretwell*, ___ U.S. ___, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993).

⁶ *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

⁷ *Hill v. Lockhart*, 474 U.S. 52, 60, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

unfair or the result unreliable.⁸ In the context of a guilty plea, the petitioner must show that but for his counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.⁹ The United States Supreme Court provides that, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."¹⁰

Before accepting a guilty plea, a trial court must ascertain that the defendant "has a full understanding of what the plea connotes and of its consequence."¹¹ The court considering a federal *habeas* claim will uphold a guilty plea if it was knowing, voluntary, and intelligent.¹² A guilty plea is invalid if the defendant does not understand the nature of the constitutional protections that he is waiving, or if he has such an incomplete understanding of the charges against him that his plea cannot stand as an intelligent admission of guilt.¹³ To enter a voluntary plea, a defendant must have "real notice of the true nature of the charge

⁸ *Fretwell*, 113 S.Ct. at 844.

⁹ *Joseph v. Butler*, 838 F.2d 786, 791 (5th Cir. 1988).

¹⁰ *Strickland*, 466 U.S. at 697.

¹¹ *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

¹² *Hobbs*, 752 F.2d at 1081.

¹³ *Henderson v. Morgan*, 426 U.S. 637, 645 n.13, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976).

against him."¹⁴ The critical issue in determining if a plea was voluntary and intelligent is "whether the defendant understood the nature and substance of the charges against him, and not necessarily whether he understood their technical legal effect."¹⁵ If the record shows that the defendant "understood the charge and its consequences," we will uphold a guilty plea as voluntary even if the trial judge failed to explain the offense.¹⁶

A defendant's solemn declarations in court carry a strong presumption of truth.¹⁷ "Federal courts in habeas proceedings are required to grant a presumption of correctness to a state court's explicit and implicit findings of fact if supported by the record. 28 U.S.C. § 2254(d)."¹⁸ A *habeas* petitioner's conclusional allegations on a critical issue are insufficient to raise a constitutional issue.¹⁹

Our review of the transcript from Branson's guilty plea hearing shows that Branson told the state trial court he understood that he was charged with aggravated assault and that he had not read the petition to enter a guilty plea before signing it, but

¹⁴ *Davis v. Butler*, 825 F.2d 892, 893 (5th Cir. 1987) (internal quotations and citations omitted).

¹⁵ *Taylor v. Whitley*, 933 F.2d 325, 329 (5th Cir. 1991), *cert. denied*, ___U.S.____, 112 S.Ct. 1678, 118 L.Ed.2d 395 (1992).

¹⁶ *Davis*, 825 F.2d at 893.

¹⁷ *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

¹⁸ *Loyd v. Smith*, 899 F.2d 1416, 1425 (5th Cir. 1990), *cert. denied*, ___U.S.____, 113 S.Ct. 2343, 124 L.Ed.2d 253 (1993).

¹⁹ *Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir. 1990).

that Tucker had read it to him and that he understood its contents.

The state trial court explained to Branson that he was entitled to plead "not guilty" and go to trial to see if the state could convince a jury of his guilt beyond a reasonable doubt. The court also explained that Branson would have the right to counsel, to be present at trial, to cross examine adverse witnesses, to call favorable witnesses, to compulsory process, to remain silent and to the presumption of innocence. In addition, he was told that the state would have the burden to prove his guilt, and that all twelve jurors would have to agree as to his guilt in order to be convicted. Finally, Branson was told that he would have the right to appeal and to be represented by counsel on appeal. The court explained that by entering a guilty plea he would waive all of those rights.

The state trial court admonished Branson that he, and not his lawyer, was to make the decision on the plea. A guilty plea would be an admission that Branson actually committed the charged offense. Branson stated that he understood all of the foregoing and still intended to plead guilty. He also stated that no promises or threats were made to induce the plea and that Tucker had reviewed the facts of the case with him. When the court asked Branson if he was satisfied with the services of his lawyer, Branson responded, "Of course, Your Honor."

The state trial court stated the maximum sentence to be twenty years. The court also explained the sentencing options, from no time in prison to 20 years imprisonment, along with eligibility for

parole. Branson stated that Tucker had made no prediction about a sentence.

Branson said that he was guilty as charged and, upon questioning by the state trial court, described the factual background of the crime. The court explained the elements of the offense, and told Branson that if a trial was held the state would have to prove each of those elements. Branson stated that he understood. The court found the plea to be knowing, voluntary and intelligent and found Branson guilty.

In the instant appeal, Branson criticizes Tucker for not investigating unspecified facts, circumstances and possible defenses. Branson claims that Tucker did not investigate the waiver of arraignment and the entry of the "not guilty" plea made on the advice of the disbarred attorney. He also accuses Tucker of not discussing unspecified criminal charges brought by the victim of the assault and of not requesting production of the warrant for his arrest. Although he now alleges, without support, that Tucker had not discussed the case with him, the record shows that he stated in the plea colloquy that Tucker had reviewed the case with him.

In light of the plea colloquy and his admissions therein, Branson's conclusional allegations at this stage about Tucker's performance are inadequate to establish ineffectiveness of counsel. Branson's solemn declarations in court are presumed true, and he has adequately identified neither prejudice nor deficient performance. Therefore, the district court's dismissal of the

habeas petition is AFFIRMED.