UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60468
Summary Calendar

LARRY WEST,

Petitioner-Appellant,

versus

GLENN L. HOWELL,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
(92-CV-201)

(January 18, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Larry West, a state prisoner in Mississippi proceeding *pro se* and *in forma pauperis*, appeals the denial of habeas relief. We **AFFIRM**.

I.

West was convicted of burglary in Mississippi in 1989, and sentenced, as a habitual offender, to seven years imprisonment, without the benefit of parole or probation. His conviction was affirmed on direct appeal, ***West v. State***, 573 So. 2d 791, 791

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

(Miss. 1991); and in June 1992, the Mississippi Supreme Court denied his application for post-conviction relief.

Later in 1992, West sought habeas relief under 28 U.S.C. § 2254. The magistrate judge recommended that relief be denied on the merits. Over West's objection, the district court adopted the magistrate judge's recommendation and dismissed West's habeas petition with prejudice. This court granted a certificate of probable cause.

II.

West contends that he received ineffective assistance of counsel at trial and on appeal, that his right to a speedy trial was violated, that he was subjected to an unconstitutional search and seizure, and that the evidence is insufficient to sustain his conviction.

A.

To demonstrate ineffective assistance of counsel, West must show that his lawyer's performance was deficient (*i.e.*, "that counsel made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment", ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)), and that the deficient performance prejudiced him (*i.e.*, that errors by counsel "actually had an adverse effect on the defense", ***id***. at 693). In assessing performance, ***Strickland*** authorizes only "highly deferential" judicial scrutiny, requiring the defendant to "overcome the presumption that, under the circumstances, the challenged action `might be considered sound trial strategy'". ***Id***.

at 689 (quoting ***Michel v. Louisiana***, 350 U.S. 91, 101 (1955)). To demonstrate prejudice, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding", ***id***. at 693; rather, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". ***Id***. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id***. Obviously, a failure to demonstrate prejudice negates the need to consider the alleged deficiencies in counsel's performance. ***Czere v. Butler***, 833 F.2d 59, 63 (5th Cir. 1987); *see also* ***Strickland***, 466 U.S. at 700.

1.

West asserts that his court-appointed trial counsel rendered ineffective assistance by attempting to induce him to plead guilty, by failing to object to insufficient evidence, and by refusing to allow him to testify at trial; but, he has failed to demonstrate prejudice. Even assuming that counsel attempted to induce him to plead guilty, the attempt was unsuccessful; there is no basis for concluding that it affected the outcome of the trial. Because, as we explain in part II.D., *infra*, the evidence was sufficient to sustain his conviction, West was not prejudiced by counsel's failure to object to its sufficiency. And, finally, West has not described what the substance of his testimony would have been, or how it could have affected the outcome of the trial.

2.

West contends also that counsel rendered ineffective assistance by failing to challenge the sufficiency of the evidence on direct appeal. Appellate "counsel is not ineffective merely because counsel fails to raise issues requested by defendant." ***Sharp v. Puckett***, 930 F.2d 450, 452 (5th Cir. 1991). To establish prejudice, West must demonstrate that counsel failed to present issues upon which West was likely to prevail on appeal. ***Ellis v. Lynaugh***, 873 F.2d 830, 840 (5th Cir.), *cert. denied*, 493 U.S. 970 (1989). As we explain in part II.D., *infra*, it is unlikely that West's challenge to the sufficiency of the evidence would have been successful on direct appeal. Accordingly, he has not demonstrated prejudice.

B.

As for West's search and seizure claim, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." ***Stone v. Powell***, 428 U.S. 465, 494 (1976). West received a full and fair hearing on his motion to suppress.

C.

West contends next that he was denied his right to a speedy trial, claiming that he was arrested on June 24, 1987, but was not brought to trial until approximately 630 days later.

> The constitutional right to a speedy trial attaches only when a criminal prosecution has begun

> and extends only to those persons who have been accused in the course of that prosecution. A defendant's speedy trial rights attach only when he is formally charged with a crime or actually restrained in connection with that crime.

Cowart v. Hargett, 16 F.3d 642, 645 (5th Cir.) (internal quotation marks and citations omitted), *cert. denied*, ___ U.S. ___, 115 S. Ct. 227 (1994). West was on parole from a previous burglary conviction when he was arrested for possession of burglary tools on June 24, 1987; and he was returned to confinement for a parole violation, to continue serving the sentence on the previous conviction. He was not formally charged for the April 17, 1987, burglary until February 12, 1988, when he was indicted; accordingly, his right to a speedy trial did not attach until then. *See* ***id***. at 646.

> Once the constitutional right to a speedy trial accrues, we determine whether the accused has been deprived of that right by applying the balancing test of ***Barker v. Wingo***[, 407 U.S. 514 (1972)] to determine whether there was an undue delay between charging and trial: (1) the length of delay, (2) the reason for delay, (3) the assertion of the speedy trial right, and (4) prejudice to the accused.

Id. at 646. Unless it is determined that there has been a delay that is presumptively prejudicial, it is not necessary to examine the other ***Barker*** factors. ***Id***.

There was a delay of 395 days between indictment and trial. In ***Cowart***, our court held that a 349-day delay would not be presumptively prejudicial, ***id***. at 646, and noted that, "[a]bsent extreme prejudice or a showing of willfulness by the prosecution to delay the trial in order to hamper the defense, a delay of less

than one year is not sufficient to trigger an examination of the ***Barker*** factors." ***Id***. at 647 (citation omitted). Although the delay in this case was approximately 13 months, we agree with the district court that the delay is not presumptively prejudicial; nevertheless, we will consider the remaining ***Barker*** factors.

The next ***Barker*** factor is the reason for the delay.

> A deliberate and intentional delay by the prosecution for the purpose of hindering the defense or otherwise gaining a tactical advantage is weighed heavily against the state. An unintentional and inadvertent delay, however, is weighed much less heavily. Where the state advances valid reasons for the delay, or the delay is attributable to acts of the defendant, this factor is weighed in favor of the state.

Cowart, 16 F.3d at 647 (citing ***Barker***, 407 U.S. at 531).

West was indicted on February 12, 1988; on February 24, he filed a *pro se* "Demand to be Returned for Trial/Motion to Dismiss"; and, on March 4, the state trial court entered an order authorizing the sheriff to transfer West from the state penitentiary to the county jail. On July 7, West filed a motion to suppress. On July 29, the state court granted West's motion for a continuance; the order states expressly that West "has waived his right to a speedy trial for this Term." At trial, the judge noted that the hearing on West's motion to suppress was continued twice due to the court's crowded docket and the trial of a civil case; that an order denying West's motion to suppress was entered in October 1988; that the parties were engaged in plea negotiations at the time of docket call for the November term of court; and that the case was not

tried during the January 1989 term because of the death of the judge's father. The case was tried in the next term of court.

Although the delay between indictment and trial is not attributable solely to West, a portion of it was caused by his suppression and continuance motions. There is a valid explanation for the remainder of the delay, and there is no evidence of "deliberate and intentional delay by the prosecution for the purpose of hindering the defense or otherwise gaining a tactical advantage". *See* ***id***. at 647. Accordingly, this factor weighs in favor of the State.

The next factor is whether West asserted his right to a speedy trial. "[F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." ***Barker***, 407 U.S. at 532. As stated, on February 24, 1988, West filed a *pro se* "Demand to be Returned for Trial/Motion to Dismiss", which could be construed as an assertion of his right to a speedy trial. As noted, however, West waived his right to a speedy trial when he requested a continuance in July 1988. Moreover, at trial, West requested that his *pro se* motion be "dismissed", and the state court granted his request. Under these circumstances, we conclude that this factor weighs in favor of the State.

The final factor is whether West was prejudiced by the delay. Because the other factors do not weigh heavily against the State (indeed, they weigh in favor of it), West "must make an affirmative showing of actual prejudice." ***Cowart***, 16 F.3d at 647. He has not asserted any actual prejudice to the presentation of his case.

Moreover, his incarceration for another conviction following his parole revocation does not constitute prejudice. ***Id***.

D.

Finally, West asserts that the evidence is insufficient to support his conviction. Under Mississippi law, burglary is (1) the unlawful breaking and entering of a structure, (2) with the intent to steal or commit a felony therein. *See* Miss. Code Ann. § 97-17-33.

The evidence was circumstantial, and consisted of the following. On April 17, 1987, the Hattiesburg, Mississippi, City Hall was burglarized. A safe in the tax department office was broken into; taken from it were $500 in petty cash, some checks, and three rings, which had been placed there for safekeeping by an employee who was on vacation at the time of the burglary. Several other offices were ransacked, another safe was broken into through an adjoining office, and door knobs and dead bolts were twisted off. The investigating officer testified that the locks and deadbolts had been pried or twisted off with what appeared to be a pipe wrench. A key was used to unlock a vending machine, from which the coin box was removed. A grating had been unscrewed from the bottom of a door to gain entrance into a locked office, and a window had been removed from another office door. Photographs were admitted into evidence showing a hole in the side of the safe, with peeled-back metal and broken concrete. A broken screwdriver was found next to the door leading to the safe in the tax department.

Police officers dusted for fingerprints, but were unable to obtain any. On the basis of a ridge pattern found on top of one of the filing cabinets, they determined that the burglar had worn gloves. Some fibers and human hair were found next to the safe, but the state crime laboratory determined that they were insufficient for analysis.

Late on the evening of June 24, 1987, a Hattiesburg police officer was patrolling a high crime area and heard a noise that sounded like the jingling of metal. When he turned around to investigate, he saw a man, later identified as West, walking on the sidewalk in front of a business that had been burglarized numerous times. No other persons were in the vicinity. West identified himself to the officer as Larry Hooker, and showed him a valid driver's license in that name. West walked up to the officer and spoke to him; he was carrying a bag with a shoulder strap, which rattled when he adjusted it. When the officer asked what was in the bag, West stated that he had some tools to work on his bicycle (the officer testified that there was no bicycle in sight), and gave the officer permission to look inside the bag. The bag contained, *inter alia*, two bank bags, a pair of gloves, a shower cap, a hammer, a roofer's tool, a pipe wrench, pry bars, two flashlights, and some vending machine keys.[2] On the bottom of the bag was some loose "safe dust" (powdered concrete residue which

[2] The keys found in West's bag were not tested to see if they would open the vending machines in City Hall.

results when a safe is broken into).[3] The officer testified that none of the tools in the bag were the type that would be consistent with working on a bicycle; another officer testified that they were consistent with the type used to commit the burglary at City Hall. West was arrested and charged with possession of burglary tools. At the time of his arrest, he was unemployed.

After learning of the burglary tools and safe dust found in the bag seized from West, the police detective who had investigated the April 17 City Hall burglary obtained a search warrant for a mini-warehouse rented by West, a safety deposit box rented under the name of Larry Hooker, and the apartment where West resided. At West's residence, in a deadbolted bathroom linen closet, the officers located the rings taken from the tax department safe at City Hall; the rings were in a bank bag.

West contends that the evidence proves only that he possessed stolen property, not that he committed burglary, because, with the exception of the rings recovered from his residence, the State introduced no evidence placing him at the scene of the burglary. A habeas petitioner is entitled to relief on an insufficient evidence claim only if "no rational trier of fact could have found proof of guilt beyond a reasonable doubt". ***Jackson v. Virginia***, 443 U.S. 307, 324 (1979).

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[3] Samples of the concrete from the safe in the tax department were not compared with the concrete dust found in West's bag, because the state crime lab informed the police that there was no way to conduct such a test.

Although nearly two months elapsed between the burglary and West's arrest for possession of burglary tools, a rational juror could have found that West used those tools to commit the burglary at City Hall, and could have inferred that West took the rings, which were found in the locked closet at his residence, from the safe in the tax department at City Hall. "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt.... A jury is free to choose among reasonable constructions of the evidence." ***United States v. Bell***, 678 F.2d 547, 549 (5th Cir. 1982), *aff'd*, 462 U.S. 356 (1983).

III.

For the foregoing reasons, the denial of habeas relief is

AFFIRMED.