

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 94-60477  
Summary Calendar

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ENRIQUE SAUCEDA,

Petitioner-Appellant,

VERSUS

WAYNE SCOTT, Director, TDCJ-Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court  
for the Southern District of Texas  
(CA C 91 297)

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March 21, 1995

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:<sup>1</sup>

Appellant Saucedo, a Texas state prisoner serving a life sentence for murder, appeals the district court's denial of his habeas corpus application. He claims ineffective assistance of trial counsel. We affirm.

We examine Appellant's claims under the well-known deficient performance/prejudice standard of Strickland v. Washington, 466 U.S. 668, 688 (1984), employing the "strong presumption" that

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<sup>1</sup> 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

counsel's conduct fell "within the wide range of reasonable professional competence." Bridge v. Lynaugh, 838 F.2d 770, 773, rhq. denied, 843 F.2d 499 (5th Cir. 1988).

Sauceda elected to be sentenced by the trial judge rather than the jury. He claims that trial counsel rendered ineffective assistance by failing to advise him that, under Texas law, the Texas trial court could not assess a probated sentence whereas the jury could have. The district court found that, while counsel may have been inept, there was no evidence that, had Appellant elected to have the jury assess punishment, he would have received probation. Appellant does not challenge that finding on appeal. Assuming without deciding that counsel's performance was deficient, there is no showing in this record that Appellant suffered prejudice. All he contends is that he might have received probation. The record contains eye-witness testimony that he committed a brutal murder. He has failed to establish a reasonable probability that he would have received a significantly less harsh sentence if the jury had sentenced him.

Next, Appellant contends that counsel was ineffective for failing to inform him of a pretrial plea bargain offer of ten years. The record contains conflicting evidence as to whether or not the offer was conveyed to Appellant. The record does not, however, contain any evidence that Appellant would have accepted the offer had it been conveyed to him. Appellant testified only that the offer was not conveyed, not that he would have accepted it. Consequently, no prejudice is shown.

Finally Appellant claims that counsel was ineffective by failing to request a jury instruction on his defense theory that his brother actually killed the victim. He contends counsel should have requested an instruction that specifically directed the jury to acquit him if they found that his brother had shot and killed the victim. Trial counsel brought this defense theory to the attention of the jury throughout the trial. The jury charge carefully explained and defined each element of the offense and advised the jury that it must acquit the Appellant unless it found, beyond a reasonable doubt, that he committed each and every essential element of the offense. Thus the charge effectively instructed the jury as to his theory of defense.

AFFIRMED.