UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60628

WILLIE JAMES NELSON,

Petitioner-Appellant,

versus

EDWARD HARGETT, Superintendent,
Mississippi State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
(1:91-CV-186-S-D)

August 15, 1995

Before WISDOM, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Willie James Nelson, an inmate in the Mississippi State Penitentiary, appeals the denial of 28 U.S.C. § 2254 habeas relief, contending that he received ineffective assistance of counsel. We **AFFIRM**.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Nelson is serving a 30-year sentence as a result of his pleading guilty to a charge of selling cocaine in August 1985. (The cocaine was purchased by an undercover officer.) On Nelson's prior appeal from the denial of habeas relief, our court affirmed the district court's conclusion that Nelson's guilty plea precluded review of his speedy trial claim, but remanded for an evidentiary hearing on Nelson's ineffective assistance of counsel claim, which was premised, in substantial part, on counsel's failure to investigate and assert a speedy trial defense. ***Nelson v. Hargett***, 989 F.2d 847 (5th Cir. 1993).

On remand, counsel was appointed to represent Nelson. The magistrate judge conducted an evidentiary hearing, and again recommended denial of habeas relief. The district court adopted the recommendation, concluding that counsel's recommendation that Nelson plead guilty, rather than pursue his speedy trial defense, was a reasonable strategic decision, considering that Nelson, in exchange for pleading guilty, obtained the dismissal, in essence, of two other pending drug charges, deletion of the habitual offender and enhanced punishment provisions of the indictment, and an agreement by the State not to proceed on two other drug charges that were being considered by the grand jury.

II.

Nelson contends that the district court erred by concluding that counsel made a reasonable strategic decision in waiving the speedy trial defense. He maintains that he would have prevailed if

counsel had pursued the defense, and that he would not have pleaded guilty.[2] As is more than well-established, in order to succeed on his ineffective assistance of counsel claim, Nelson had the burden of proving both that "counsel's representation fell below an objective standard of reasonableness and that this deficient performance prejudiced his defense". ***Nelson***, 989 F.2d at 850. To establish the requisite prejudice, Nelson was required to demonstrate that, "but for his attorney's errors, he would not have pleaded guilty and would have insisted upon going to trial". ***Id***.

At the hearing on remand, Nelson testified that, for the case at issue, he was arrested in Mississippi on October 11, 1985, for allegedly selling cocaine to an undercover agent that August. (He was indicted for that offense in February 1986, as a habitual offender (cause number 9461). The indictment listed two prior convictions in support of the habitual offender charge. The first was a 1983 Mississippi conviction for selling marijuana. *But*, the

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[2] Nelson states in his brief that counsel was ineffective by (1) meeting with his client on only one occasion prior to the date of the guilty plea; (2) failing to investigate an alibi defense; (3) failing to investigate the speedy trial defense; (4) failing to file any pleading raising any defense; and (5) failing to challenge the habitual offender indictments. However, the only claimed instance of ineffectiveness developed in his brief is the failure to investigate the speedy trial defense. Accordingly, we consider the other bases abandoned. *See* Fed. R. App. P. 28(a)(6) ("argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on"); ***Yohey v. Collins***, 985 F.2d 222, 224-25 (5th Cir. 1993) (issues which are raised, but not argued, are considered to have been abandoned).

We note also that, contrary to Fed. R. App. P. 28(a)(4) and (6), Nelson's brief does not contain any cites to the record. Counsel is cautioned that this can result in the appeal being dismissed. *See* ***Moore v. F.D.I.C.***, 993 F.2d 106 (5th Cir. 1993).

second was a *December 1985* Florida conviction for trafficking in cocaine (which, as indicated, was subsequent to the charge in issue, as discussed *infra*).) Nelson testified that, during the latter part of October 1985, he was transferred from Mississippi to Florida to face a pending drug charge; that he pleaded guilty to that charge, and received a four-year sentence; that, while incarcerated in Florida, he filed motions to dismiss and for a speedy trial in Mississippi, in the case in issue (no. 9461); and that he was released by Florida in July 1987, and returned to his home in Columbus, Mississippi.[3]

Over a year later, on August 18, 1988, Nelson was arrested, after being stopped in a car in which drugs were found. Upon being arrested, he was served with the February 1986 indictment for the case in issue (no. 9461). The record reflects that two additional charges were also pending against Nelson: delivery of cocaine on October 11, 1985 (cause number 9460); and sale of cocaine on August 23, 1985 (cause number 9462).

Nelson testified that he told his retained counsel, Donald Steighner, that he had two alibi witnesses willing to testify on his behalf with respect to the case in issue (no. 9461); that he told Steighner about his previously filed speedy trial motions, and

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[3] The state court record does not contain any motions to dismiss. However, it contains a "Memorandium [*sic*] of Law", which Nelson filed in September 1986, in which he sought dismissal of the charge if the State failed to bring him to trial within 180 days. The state court record also contains a March 1988 order denying Nelson's speedy trial request, on the ground that Nelson remained incarcerated in Florida, and that the State of Mississippi was unable to obtain custody of Nelson until the expiration of that sentence.

offered to go to Florida to obtain copies of them; and that Steighner advised him not to worry about obtaining the documents, because the time for a speedy trial had elapsed and he did not need to pursue any other defenses. Nelson testified that Steighner did not investigate the case, interview witnesses, review his file, or file a motion to dismiss based on the speedy trial violation.

Nelson testified that on November 15, 1988, Steighner contacted him, and told him to come to the courthouse immediately; that, upon arrival, Steighner recommended that he accept a plea bargain; and that Steighner told him that if he accepted the bargain, with a recommended 30-year sentence, he would be out of jail in seven and one-half years.[4] Nelson testified that he inquired about the speedy trial defense, and Steighner stated that he had searched the files but could not find Nelson's motions.[5]

Nelson testified that there were only two charges pending against him at the time he entered his plea; that Steighner did not discuss with him the charges arising out of his August 1988 arrest, which had not yet been presented to the grand jury; and that he was not concerned about those recent (1988) charges, because the owner of the car had admitted owning the drugs. Nelson testified that Steighner told him that he would receive a 90-year sentence if he did not plead guilty, and that the assertion of the speedy trial

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[4] Nelson testified that he later learned that he would not become eligible for parole until he had served ten years.

[5] Nelson testified that his sister subsequently discovered in the state court record the earlier referenced March 1988 order denying the motions.

claim would make no difference; and that he pleaded guilty because he was threatened with the 90-year sentence.

Lee Howard, an assistant district attorney who negotiated Nelson's plea bargain, testified for the State at the evidentiary hearing on remand. Howard, a state court judge at the time of the hearing, testified that, if convicted as a habitual offender, Nelson would not have been eligible for parole; that Nelson had two other cases pending against him and two more cases being prepared for presentation to the grand jury; and that he recommended the plea bargain as a "package deal" to dispose of all the charges.

The transcript of Nelson's rearraignment hearing corroborates Howard's testimony. It reflects that, in exchange for the guilty plea to the charge in the case in issue (no. 9461), the State agreed to retire two other pending drug charges (nos. 9460 and 9462), and also agreed to retire the two new charges, stemming from Nelson's August 1988 arrest, that were awaiting presentment to the grand jury.

On cross-examination of Howard, Nelson's habeas counsel pointed out that, although Nelson was indicted in February 1986 for an offense committed in August 1985, one of the convictions relied upon in charging him as a habitual offender had not occurred until later that year -- December. Howard acknowledged that it was questionable whether the later conviction could have been properly used to support a habitual offender conviction, and that the indictment was subject to attack on that basis.

Howard acknowledged also that the State had been unaware of Nelson's return from Florida, and testified that he was not aware of any efforts to have Nelson returned to Mississippi for trial. Howard admitted that a district attorney should initiate proceedings to obtain a defendant from another jurisdiction if the defendant moves for a speedy trial, and that a district attorney could request the state attorney general to seek extradition if difficulties were encountered; but he had no recollection of such action being taken in Nelson's case.

Harold Alderson, a criminal investigator for the district attorney's office, testified that he had researched the records of the Lowndes County Sheriff's office and determined that a detainer had been placed on Nelson; but that the sheriff's department apparently was not informed of Nelson's release from Florida. On cross-examination, Alderson testified that he did not know when the detainer was placed, and that he had no knowledge of any attempt to have Nelson returned to Mississippi for trial.

Nelson testified on rebuttal that he was not asked to sign an extradition waiver while incarcerated in Florida; that Florida officials encouraged him to get the Mississippi case resolved so that he would be eligible for parole in Florida; that he was never advised that there was a detainer filed against him in Florida; and that his prison record did not reflect the placement of a detainer.

Steighner's affidavit was admitted into evidence over Nelson's objection.[6] Steighner stated in his affidavit that he fully investigated all the charges against Nelson; that he was aware of a possible speedy trial defense to one of the pending charges; that his strategy was to waive that issue in order to have the State "withdraw any sentencing under the habitual offender provisions" and retire the other pending charges, any one of which could result in Nelson's third felony conviction as a habitual offender; and that he was not aware of, nor did he find, any credible witnesses or evidence to defend against the charges pending against Nelson. Steighner stated further:

> Mr. Nelson understood that the speedy trial issue was a potential defense but was also well aware that a 3rd conviction was highly likely on the other pending charges. He was aware that a third felony conviction on any of the other pending charges could result in a possible sentence far in excess of the plea bargain arrangement.

Even assuming, for the case in issue, that Nelson's speedy trial defense would have been successful and would have resulted in the dismissal of the charge to which he pleaded guilty, we

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[6] Steighner was beyond the subpoena power of the court (he was residing in Pennsylvania). Evidence may be submitted by deposition or by affidavit in habeas cases; but, if affidavits are admitted, "any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits". *See* 28 U.S.C. § 2246. Generally, contested fact issues may not be decided on the basis of an affidavit, unless the affidavit is corroborated by other evidence in the record. *See* ***Scott v. Estelle***, 567 F.2d 632, 633 (5th Cir. 1978). The district court held that there were no contested facts sufficient to preclude consideration of Steighner's affidavit. During the evidentiary hearing, counsel for the State offered to provide Steighner's telephone number to Nelson's counsel, and stated that she believed that Steighner was at home that morning. Nelson neither requested the telephone number, nor an opportunity to propound interrogatories to Steighner.

nevertheless cannot conclude that, because he failed to assert it, counsel's performance was deficient. Accordingly, Nelson's claim fails.

In the alternative, and as stated, even if counsel's performance was deficient, Nelson must demonstrate also that he was prejudiced by it. As our court noted in Nelson's prior appeal, "when the alleged error of counsel is failure to advise of an affirmative defense, the outcome of the prejudice element of the test will depend largely on whether the affirmative defense likely would have succeeded at trial". ***Nelson***, 989 F.2d at 850. (brackets, internal quotation marks, and citations omitted). In this case, however, we must consider not only the likelihood of Nelson's success on the speedy trial defense to the charge to which he pleaded guilty, but also the fact that, if he had not pleaded guilty, he would have had to face trial on that charge, as well as four others. Therefore, in order to determine whether Nelson was prejudiced, we cannot limit our analysis to the likelihood of success of Nelson's speedy trial defense to the charge to which he pleaded guilty. Instead, we also must consider the likelihood that he could present a successful defense to the four additional charges which were disposed of in his plea bargain.

The caption of the earlier referenced order by the state court in March 1988 denying Nelson's speedy trial motion references cause numbers 9461 (the charge to which Nelson pleaded guilty) and 9462 (charging another sale of cocaine on August 23, 1985). Accordingly, despite Nelson's failure to present any evidence with

respect to the charge in cause number 9462, we will assume that he had a valid speedy trial defense to that charge, as well as to the charge in number 9461 (the charge to which he pleaded guilty). Nelson testified that he did not know anything about the charge of delivery of cocaine on October 11, 1985 (no. 9460), and he presented no evidence or testimony regarding any possible defense to that charge. With respect to the two charges pending before the grand jury, arising out of his August 1988 arrest, Nelson testified that he could have defended successfully against those charges, because his brother-in-law, who owned the car in which the drugs were found, had admitted that the drugs were his and that Nelson had nothing to do with them. However, Nelson failed to submit any evidence, by affidavit or otherwise, to corroborate his self-serving testimony that the drugs did not belong to him. Therefore, at the very least, he has not demonstrated a reasonable probability that he could have mounted a successful defense to the August 1988 charges.

Steighner stated in his affidavit that he was aware of the potential speedy trial defense, but was also aware that Nelson was facing additional drug charges and that, if convicted on them, he would be sentenced as a habitual offender; that his strategy was to waive the speedy trial defense in return for the State withdrawing the habitual offender provisions in the indictment and its agreement to retire other charges pending against Nelson; that, if he had pursued the speedy trial defense, Nelson would have had no leverage to plea bargain and no defense to present with respect to

the new drug charges; and that he believed Nelson would have received a far greater sentence if convicted on the additional charges than he received under the plea agreement. Steighner's affidavit is corroborated by Howard's testimony that, if Nelson had been convicted of any one of the other charges, he would have been subject to a 90-year sentence without parole, as Steighner allegedly advised Nelson prior to the entry of his plea.

In sum, Nelson has not shown that he was prejudiced by counsel's strategic decision to forego the speedy trial defense in order to obtain for Nelson a 30-year sentence with parole eligibility, and eliminate the risk of a 90-year sentence. *See* ***United States v. Sanchez***, No. 94-20443, at 5 (5th Cir. Mar. 3, 1995) (unpublished) (defendant was not prejudiced by counsel's failure to assert an affirmative defense to the offense to which he pleaded guilty, because the defense would not have been relevant if he was tried for the charges dismissed as a result of the guilty plea); *see also* ***Cox v. Lockhart***, 970 F.2d 448, 455 (8th Cir. 1992) (counsel's advice to accept plea offer for reduced charge, eliminating risk of death penalty or life imprisonment without parole, rather than pursuing motion to dismiss for speedy trial violation, was a reasonable tactical decision).

III.

For the foregoing alternative reasons, the district court did not err by denying habeas relief. The judgment is

AFFIRMED.