

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-5099
Summary Calendar

TONY CURTIS SMITH,

Petitioner-Appellant,

VERSUS

JOHN P. WHITLEY, Warden
Louisiana State Penitentiary,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(CA-90-0487)

(November 19, 1993)

Before DAVIS, JONES and DUHÉ, Circuit Judges.
PER CURIAM:¹

Smith appeals the district court's denial of his petition for habeas-corpus relief. We find no error and affirm.

I.

Tony Curtis Smith is a Louisiana state prisoner seeking habeas-corpus relief. Smith was convicted in a state jury trial of armed robbery and sentenced to 60 years in prison. After

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

unsuccessfully applying for post-conviction relief at the state level, Smith filed a petition for habeas-corpus relief in federal district court. The petition was denied and Smith now appeals that denial.

II.

A.

Smith first argues that he was deprived of due process because his trial occurred after the time limitation established by Louisiana law had expired. Under Louisiana law, a trial for armed robbery must commence within two years after the filing of a bill of information. La. Code Crim. Proc. Ann. 578(2) (West 1981).

The bill of information was filed in this case on March 31, 1980. The arraignment took place on February 8, 1982 after the process to have Smith extradited from California was complete, and trial was originally set to begin on March 22, 1982. The trial did not begin until April due to a conflict in defense counsel's schedule.

When a habeas-corpus petitioner alleges a violation of state procedure, this court must determine whether there has been a constitutional infraction of defendant's due process rights which would render the trial as a whole fundamentally unfair. **Manning v. Warden, Louisiana State Penitentiary**, 786 F.2d 710, 711-12 (5th Cir. 1986). The state appellate court ruled that Smith's contest of extradition from California caused the delay in his arraignment. Furthermore, while the original trial date was within the two year limitation, it was delayed by defense counsel's request for a

continuance. The record indicates that the delay did not render Smith's trial "fundamentally unfair."

B.

Smith next argues that his trial counsel did not provide effective legal assistance because he failed to file a motion to quash the bill of information after the two-year limitation period had expired. To prove ineffective assistance of counsel, a defendant must affirmatively show that 1) his counsel's performance fell below an objective standard of reasonableness; and 2) the deficient performance prejudiced the defense. **Strickland v. Washington**, 466 U.S. 668, 687-88, 104 S. Ct. 2052 (1984). Appellate scrutiny of counsel's performance must be highly deferential, and a strong presumption exists that an attorney's performance "falls within the wide range of reasonable professional assistance." **Id.**

The Louisiana Code of Criminal Procedure provides that the limitations period can be interrupted if, among other things, the defendant cannot be tried because his presence for trial cannot be obtained by legal process, "or for any other reason beyond the control of the state." La. Code. Crim. Proc. Ann. 579.A.(2). Had Smith's attorney not asked for a continuance, the State would have proceeded within the two-year period. Considering this circumstance, Smith's attorney did not act outside of the range of competent professional assistance by failing to file a motion to quash.

C.

Smith also argues that the evidence is insufficient to support his conviction because the State did not prove that the victim of the robbery was the same person named in the indictment. Smith was convicted of armed robbery, which is "the taking of anything of value belonging to another from the person of another or that is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon." La. Rev. Stat. Ann. 14:64.A (West 1986). The defendant does not dispute that evidence at trial showed that the property taken during the robbery was taken "from the person of another."

In robbery cases, it is the felonious taking that forms the essence of the jury question; not the perfect title of the alleged owner. **State v. Perry**, 612 So.2d 986, 988 (La. Ct. App. 1993). It is the victim's greater possessory interest in the property stolen, vis-a-vis the accused, that is essential in proving the crime. **Id.** James A. Pearce was the senior bank official present at the time of the robbery. He had a far greater right to possess or control the property taken from the bank. Accordingly, Smith's argument has no merit.

D.

Finally, Smith argues that he was denied due process because the State knowingly used false testimony at trial. He further asserts that he was denied his constitutional right to confrontation because his ignorance of the false testimony prevented him from impeaching the credibility of the allegedly perjurious witness.

Smith's argument centers around the testimony of Jackson, a fellow participant in the robbery. According to Smith, Jackson testified at an earlier trial that he, Jackson, remained by the door of the bank, except for one occasion when he entered the vault to remove the money. At Smith's trial, Jackson testified that Smith entered the vault with a bank employee and that he was by the door of the vault and went up to get the money bag. Rather than showing false testimony, the testimony at Smith's trial agrees with the alleged testimony provided at an earlier trial. In both, Jackson went into the vault once to retrieve a money bag.

In addition, for the use of perjured testimony to constitute constitutional error, the prosecution must have knowingly used the testimony to obtain a conviction. **Smith v. Black**, 904 F.2d 950, 961 (5th Cir. 1990). There is no evidence that the prosecution knew of or used perjured testimony. A new trial is not required unless the false testimony could in any reasonable likelihood have affected the judgment of the jury. **Brown v. Wainwright**, 785 F.2d 1457, 1463 (11th Cir. 1986). Even if we assume that the testimony was false and the prosecutor knew it, petitioner cannot show that the discrepancies he alleges could reasonably have affected the jury's judgment. Both versions show petitioner as an armed robber.

Regarding the Confrontation Clause argument, this court must analyze Smith's missed opportunity to impeach Jackson under the harmless-error analysis. **Delaware v. Van Arsdall**, 475 U.S. 673, 684 (1986). Whether such an error is harmless depends upon a host of factors: the importance of the witness's testimony in the prosecution case, whether the evidence was cumulative, the presence

or absence of corroborating or contradicting evidence on material points, the extent of the cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. **Id.** at 684. In light of these factors, any error caused by Smith's inability to cross-examine Jackson based on the alleged discrepancy regarding who entered the vault amounted to harmless error.

For all of the foregoing reasons, we affirm the judgment of the district court.