IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4080
Summary Calendar

WENDELL JONES,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director
Texas Dept. of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas
(6:90 CV 534)

(November 18, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Wendell Jones was convicted by a jury of first degree murder in connection with the shotgun slaying of his elderly mother and is serving a life sentence in the custody of the Texas Department of Criminal Justice. Jones appeals the dismissal of his Federal habeas petition.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I

After he was indicted, Jones' attorney moved for a psychiatric examination to determine whether Jones was competent to stand trial. The trial court granted the motion and Jones was examined by a court appointed psychiatrist, Dr. William Langston. His attorney was not present at the examination. A competency hearing was held and a jury determined that Jones was not competent to stand trial. Jones was hospitalized and was ultimately found competent to stand trial. Jones' attorney moved to have Jones examined again by Dr. Langston to determine whether Jones was criminally insane. The motion was granted and Jones was examined a second time by Dr. Langston. At trial, Dr. Langston testified that Jones was "clinically psychotic." Dr. Langston further testified that he doubted that Jones was sane at the time Jones' mother was killed.

Jones argues that he was denied the right to have counsel present during the psychiatric examination, and relies on Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), to support his argument. In Estelle, the Court held that a defendant's Sixth Amendment right to assistance of counsel is abridged when the defendant is not given prior opportunity to consult with counsel about his participation in the psychiatric examination. 451 U.S. at 471. The Court expressly declined to determine whether a defendant is entitled to have counsel present during the examination itself. Id. at 470 n. 14.

In any event, we need not reach the merits of this claim because "it is raised for the first time on appeal, and issues so raised are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice." Self v. Blackburn, 751 F.2d 789, 793 (5th Cir. 1985). Manifest injustice will not result because it does not appear that Jones was denied the right to confer with counsel prior to the examination.

II

Jones contends he was incorrectly determined to be an indigent on appeal in state court. Jones argues that an affidavit was filed which falsely represented that Jones was unable to pay the cost of his appeal.

Federal courts review habeas petitions for errors of a constitutional magnitude which would render the state proceeding as a whole fundamentally unfair. Lavernia v. Lynaugh, 845 F.2d 493, 496 (5th Cir. 1988); Sawyer v. Butler, 881 F.2d 1273, 1288 (5th Cir. 1989), aff'd, 497 U.S. 227 (1990). Jones has not suggested, nor does the record demonstrate, that his status as an indigent on appeal rendered his appeal fundamentally unfair. His case was appealed and reviewed on the merits. The fact that he was not required to pay the costs of the state appeal does not raise a federal constitutional issue.

III

Jones argues that he received ineffective assistance of counsel. Specifically, Jones argues that he paid his attorney to file a petition for discretionary review, but instead the attorney filed an alleged false affidavit of Jones' indigency and then failed to apply for discretionary review to the Texas Supreme Court. An attorney's failure to timely apply for discretionary review does not constitute ineffective assistance of counsel because there is no right to assistance of counsel at that stage of the appellate process. Wainwright v. Torna, 455 U.S. 586, 587-88, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982); Ross v. Moffitt, 417 U.S. 600, 614-15, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Jones complains that his attorney promised but failed to develop a successful insanity defense. Jones argues that a psychiatrist hired by Jones' attorney to evaluate Jones failed to complete his evaluation in time for trial and that Hall's evaluation, when completed, did not support his insanity defense. Jones moved for a continuance to give the psychiatrist additional time to complete his evaluation. The motion was denied because Jones' attorney had not exercised due diligence to secure the testimony of the witness. After the trial, the attorney moved for a new trial on this issue. Jones contends that these motions were "frivolous" and that the trial court's denial of the motion for a continuance for failing to demonstrate due diligence is evidence of his attorney's ineffective assistance.

A habeas petitioner alleging ineffective assistance of counsel must show that his attorney's representation fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The petitioner must also show that he was prejudiced by his attorney's unprofessional errors. Id. at 694.

A review of the state record reveals that additional time would not have enabled Jones to present a stronger insanity defense because the psychiatrist ultimately concluded that Jones was not criminally insane. Since Jones cannot show that he was prejudiced, it is not necessary for this Court to reach the issue whether the attorney's conduct was objectively unreasonable. U.S. v. Pierce, 959 F.2d 1297, 1302 (5th Cir. 1992).

IV

For the reasons stated herein, the judgment of the district court is

A F F I R M E D.[1]

[1]Jones has several pending motions. His motion for leave to file reply brief is denied as moot because the brief may be filed without leave of court. Fed. R. App. P. 28(c). Jones has also moved for leave to file a second reply brief. Rule 28(c) provides that after the reply brief, "No further briefs may be filed except with leave of court." Id. Nevertheless, the court will grant this motion, except insofar as it raises new issues, because movant is appearing pro se. See U.S. v. Prince, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, 493 U.S. 932 (1989) (issues may not be raised for first time in reply brief).

Jones has moved to supplement the record with several documents and exhibits that he believes were omitted from the record because they were filed in a previous federal habeas case. Most of the documents that Jones wishes to file are already in the record. Those that are not in the record are not pertinent to the Court's decision. Therefore, the motion is denied.

Finally, Jones has moved for oral argument and for preference in processing his appeal. Because oral argument is unnecessary in this case, and we have thus placed it on the summary calendar, these motions are denied as moot.