FILED
United States Court of Appeals
Tenth Circuit
MAY 17 1991
ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RALPH W. SEVERE, Petitioner-Appellant, v. STEPHEN W. KAISER and ATTORNEY GENERAL, Respondents-Appellees.	No. 89-6416 (W.D. Oklahoma) (D.C. No. CIV-89-1559-T)

ORDER AND JUDGMENT*

Before **ANDERSON**, **TACHA**, and **BRORBY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Ralph W. Severe, appearing pro se, appeals the denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The district court denied the petition. We grant the motion for a certificate of probable cause, and affirm.

Severe pled guilty to one count of first degree robbery and two counts of robbery with firearms, all after former conviction

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

of a felony. He was sentenced to 25 years on each count, with the sentences to run concurrently. His first argument is that the district court erred in determining that his guilty plea was knowingly and voluntarily given despite the fact that he had been deprived of insulin periodically during his confinement in the Oklahoma County Jail and, particularly, for the four days prior to entering his guilty plea. He claims that the insulin deprivation caused him to hallucinate and to not be lucid.

Severe attached to his habeas petition affidavits from his mother and sister, which state that they became aware of his insulin deprivation and informed jail officials of the situation. The affidavits also assert that, during the guilty plea proceedings, Severe's sister attempted to inform the judge of Severe's insulin deprivation for the preceding four days, but was told to "shut up and sit down." The judge then directed that the exchange be deleted from the record.

The record in this case amply supports the district court's conclusion that Severe's guilty plea was knowingly and voluntarily given. In the written summary of facts Severe signed in connection with his guilty plea, he responded "no" to the question of whether he was taking any kind of medication and whether it affected his judgment. When questioned orally by the judge during his plea proceedings, Severe said he was taking insulin but that it did not affect his judgment. His attorney stated he had no reason to believe Severe was not competent to understand the proceedings taking place, and the judge, after questioning and observing him, specifically found him competent to enter his plea.

We must accord that finding a presumption of correctness. See Marshall v. Lonberger, 459 U.S. 422, 430-37 (1983); Sumner v. Mata, 449 U.S. 539, 547 (1981); Cartwright v. Maynard, 802 F.2d 1203, 1216-18, (10th Cir. 1986), appealed on other grounds, 822 F.2d 1477 (10th Cir. 1987) (en banc), aff'd, 486 U.S. 356 (1988). We therefore affirm the district court's determination that Severe's guilty plea was freely, knowingly and voluntarily entered.

Severe next argues that in neither the charging information nor the plea and sentencing proceedings did the state inform him whether penalty enhancement was being sought under the general enhancement statute (Okla. Stat. Tit. 21 § 51) or under a specific enhancement statute applicable to those with multiple robbery convictions (Okla. Stat. Tit. 21 § 801). That failure, he argues, violated his due process rights under the Fifth and Fourteenth Amendments. We affirm the district court's rejection of this argument.

As the district court noted, Severe has not cited any authority for his assertion that the state must inform him of the specific penalty enhancement statute, nor are we aware of any such authority. It was clear that Severe was charged with robbery after prior conviction of a felony, as both the summary of facts signed by Severe and the transcript of plea and sentencing proceedings indicate. Furthermore, he was told during the plea and sentencing proceedings that the possible minimum and maximum penalties would be 20 years and an indefinite sentence, respectively. He indicated his understanding of those penalties, both orally and in the written summary of facts. Those penalties correspond to an enhancement under section 51, the general enhancement statute, not under section 801, the specific enhancement statute for multiple robbery convictions. We thus reject the argument that Severe suffered a constitutional deprivation because of an alleged failure to notify him of the specific enhancement statute utilized in his case.[1]

Severe's third argument is that the district court erred in finding that his counsel was not ineffective. Severe alleges that his attorney was aware of the extended insulin deprivation, that he had seen Severe hallucinating at times as a result of such deprivation, that he failed to bring to the court's attention the fact of this deprivation, and that he failed to investigate the possibility that the prolonged insulin deprivation might have affected the voluntariness of his guilty plea. He also charges ineffectiveness in his attorney's alleged failure to investigate and discover what enhancement procedures were being used.

Hill v. Lockhart, 474 U.S. 52 (1985) governs ineffective assistance claims in the guilty plea context. See also Laycock v. New Mexico, 880 F.2d 1184, 1187 (10th Cir. 1989). Hill reiterates the two-part test of Strickland v. Washington, 466 U.S. 668

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[1] In his appellate brief, as in his submissions to the district court, Severe refers to the fact that the Oklahoma Department of Corrections is apparently treating his case as if his penalty had been enhanced under section 801 and is thereby denying him good-time credits and certain prerogatives relating to parole. The district court specifically found that Severe had not exhausted his available remedies on this claim, but concluded that Severe's references to this claim should not be viewed as a separate allegation requiring exhaustion in view of the repeated assertions by the state that section 801 was not, and could not be, the basis for Severe's sentence enhancement.

(1984), pursuant to which an "appellant must show both that his attorney's performance fell below an objective standard of reasonableness and that, but for the counsel's inadequacies, the result of the proceedings would have been different." Tapia v. Tansy, 926 F.2d 1554, 1564 (10th Cir. 1991); see also United States v. Treff, 924 F.2d 975, 979-80 (10th Cir. 1991). The question under the first part of the Strickland test is whether the attorney rendered "reasonably effective assistance." Strickland, 466 U.S. at 687; Laycock, 880 F.2d at 1187. Under the second (prejudice) prong, Severe must show "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59. Failure to satisfy either prong will defeat his claim. See Tapia, 926 F.2d at 1564. We affirm the district court's conclusion that Severe failed to satisfy the prejudice prong of the Strickland test.

Severe asserts that until the plea proceedings, he "had been completely adamant about going to trial on the charges." Brief of Petitioner-Appellant at 11. He further alleges that "had [he] been lucid, received the proper medical assistance to which he was entitled and been made fully aware of the specific enhancement procedures, he would have insisted on proceeding to trial." Id. Such conclusory assertions do not establish prejudice.

Severe specifically stated in the summary of facts and in the plea proceedings that he pled guilty because he committed the acts charged. As the district court noted, prior to the plea agreement, Severe faced a possible minimum sentence of 20 years on each count, with no maximum, and with the possibility that the sentences would run consecutively. These sentences were based upon an enhancement under section 51, the only enhancement provision applicable to Severe.[2] Under the plea arrangement, Severe received 25 year sentences, all running concurrently. We are thus not persuaded by his argument that he was somehow prejudiced by pleading guilty pursuant to the plea arrangement.

Further, the transcript of the plea proceedings and the summary of facts reveal that Severe specifically stated that he had been satisfied with his attorney's representation and advice. As the district court noted, such solemn declarations made in open court carry a strong presumption of truth. See Blackledge v. Allison, 431 U.S. 63, 74 (1977); Laycock v. New Mexico, 880 F.2d 1184, 1186-87 (10th Cir. 1989); Phillips v. Murphy, 796 F.2d 1303, 1304 (10th Cir. 1986). We therefore view with considerable skepticism his conclusory assertion that he would have insisted on going to trial, but for his attorney's errors. Severe has failed to establish that he suffered any prejudice from his counsel's alleged ineffectiveness.

Finally, Severe alleges that the district court erred in denying his habeas petition without conducting an evidentiary hearing on his claims. As the district court noted, an

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[2] The State has consistently argued, and the district court agreed, that Severe's sentence could not have been enhanced under section 801 because that section permits enhancement when there have been three or more robbery with firearms convictions. Severe's prior convictions were not for robbery; only two of the three current convictions were for robbery with firearms. Thus, it appears that the State is correct in arguing that enhancement would only be appropriate under section 51.

evidentiary hearing is unnecessary if an issue can be resolved on the basis of the record. _See_ _Townsend v. Sain_, 372 U.S. 293 (1963); _Cartwright v. Maynard_, 802 F.2d 1203, 1216 (10th Cir. 1986). We have found that each claim can be so resolved. Accordingly, there was no error in refusing to conduct an evidentiary hearing.

The judgment of the district court is AFFIRMED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge