

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEP 09 1991

ROBERT L. HOECKER
Clerk

DENNIS DEAN WRIGHT,

Petitioner-Appellant,

v.

STEPHEN KAISER, Warden; ATTORNEY GENERAL,
State of Oklahoma,

Respondents-Appellees.

No. 91-5059
D.C. No. 90-C-855-B)
(N.D. Okla.)

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 case is therefore ordered submitted without oral argument.

Petitioner-appellant Dennis Wright appeals the district court order denying his petition for writ of habeas corpus. On appeal, Wright argues that he was denied effective assistance of counsel due to a conflict of interest. He also asserts that the trial court committed reversible error when it admitted hearsay testimony of a coconspirator prior to establishing the existence

* 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 the conspiracy by independent evidence. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

Wright contends that he was denied his sixth amendment and fourteenth amendment right to effective assistance of counsel because his counsel represented multiple defendants, creating a potential conflict of interest. To demonstrate a violation of the right to counsel, the petitioner "must establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 351 (1980); see also Martinez v. Sullivan, 881 F.2d 921, 930-31 (10th Cir. 1989), cert. denied, 110 S. Ct. 740 (1990). Cuyler establishes that a potential conflict is not prejudicial and does not constitute a sixth amendment violation. Because Wright has failed to demonstrate -- and because the record does not show -- an actual conflict of interest, the petition must be denied on this ground.

Construing Wright's arguments liberally, he essentially contends that the admission of the coconspirator's hearsay statements violated state law and the Confrontation Clause of the sixth amendment. Wright argues that the existence of a conspiracy must be demonstrated by independent evidence before hearsay testimony of a coconspirator can be admitted. Wright's contentions fail on both state law and sixth amendment grounds. First, errors of state law cannot be reviewed by this court on a habeas petition. See Lewis v. Jeffers, 110 S. Ct. 3092, 3102 (1990). Second, the admission of testimony in this case comported with constitutional standards and with the United States Supreme

Court's decision in Bourjaily v. United States, 483 U.S. 171 (1987).

Bourjaily establishes that a trial court may consider both independent evidence and coconspirator hearsay testimony in order to determine the existence of a conspiracy by a preponderance of the evidence. Id. at 182. Normally, a trial judge should make the determinations concerning the existence of a conspiracy before allowing the coconspirator statements to be heard by the jury. However, the judge has discretion to admit the statements in the presence of the jury if they are subsequently "connected up." United States v. Mobile Materials, Inc., 881 F.2d 866, 869 (10th Cir. 1989), cert. denied, 110 S. Ct. 837 (1990). Absent an abuse of discretion, the trial judge's decision will not be reversed. United States v. Wolf, 839 F.2d 1387, 1393 (10th Cir.), cert. denied, 488 U.S. 923 (1988).

In the instant case, the trial judge admitted the hearsay statements in the presence of the jury and did not make a preliminary determination as to whether evidence of a conspiracy had been established by a preponderance of the evidence. However, the record demonstrates that the hearsay statements were supported by independent evidence and also were connected to later testimony proving the existence of the conspiracy. Therefore, we cannot say that the admission of the hearsay evidence was an abuse of discretion.

Because Wright failed to make any showing of an actual conflict of interest and because the trial judge admitted the

coconspirator testimony in accordance with constitutional standards, we **AFFIRM**. The mandate shall issue forthwith.

ENTERED FOR THE COURT

Deanell Reece Tacha
Circuit Judge