United States Court of Appeals for the Fifth Circuit

No. 20-10280

United States Court of Appeals
Fifth Circuit
FILED
May 3, 2021
Lyle W. Cayce
Clerk

FELIX ROBERTS,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:17-CV-3326

ORDER:

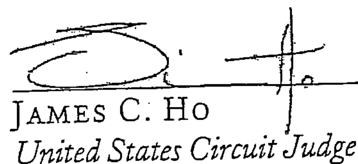
A jury convicted Felix Sam Roberts, Texas prisoner # 02017141, of aggravated assault with a deadly weapon and unlawful possession of a firearm by a felon. He was sentenced in July 2015 to thirty-five years' imprisonment. He now moves for a certificate of appealability (COA) following the district court's denial of his 28 U.S.C. § 2254 petition.

To obtain a COA, a § 2254 petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). At this stage, the "petitioner must demonstrate that reasonable jurists would

find the district court's assessment of the constitutional claims debatable or wrong" and that reasonable jurists could conclude that the issues presented are "adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Roberts has not met this standard.

Roberts's petition alleges ineffective assistance of counsel for failing to raise all available motions and objections, as well as improper jury instructions resulting in an illegal sentence. To prevail on an ineffective assistance of counsel claim, Roberts must show that his counsel's performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). His conclusory allegations of ineffective assistance of counsel fail to make this showing. *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000) ("This Court has made clear that conclusory allegations of ineffective assistance of counsel do not raise a constitutional issue in a federal habeas proceeding."). Roberts also fails to demonstrate how the allegedly improper jury instructions "so infected the entire trial that the resulting conviction violates due process." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991).

Accordingly, his motion for a COA is denied.



JAMES C. HO
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FELIX ROBERTS,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
LORIE DAVIS, *Director, TDCJ-CID*,	)	
	)	
Respondent.	)	Civil Action No. 3:17-CV-3326-C-BT

ORDER

Before the Court are the Findings, Conclusions, and Recommendation of the United States Magistrate Judge therein advising the Court that Petitioner's petition for writ of habeas corpus should be denied and any non-habeas civil claims should be dismissed without prejudice.[1]

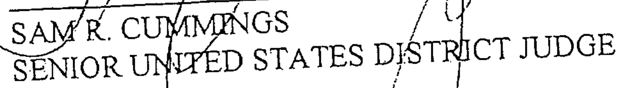
The Court conducts a *de novo* review of those portions of the Magistrate Judge's report or specified proposed findings or recommendations to which a timely objection is made. 28 U.S.C. § 636(b)(1)(C). Portions of the report or proposed findings or recommendations that are not the subject of a timely objection will be accepted by the Court unless they are clearly erroneous or contrary to law. *See United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989).

After due consideration and having conducted a *de novo* review, the Court finds that Petitioner's objections should be **OVERRULED**. The Court has further conducted an independent review of the Magistrate Judge's findings and conclusions and finds no error. It is therefore **ORDERED** that the Findings, Conclusions, and Recommendation are hereby

[1] Petitioner filed timely objections to the Magistrate Judge's Recommendation on November 27, 2019.

ADOPTED as the findings and conclusions of the Court. For the reasons stated therein, Petitioner's petition for writ of habeas corpus is hereby **DENIED**. All remaining non-habeas civil claims are **DISMISSED** without prejudice.[2]

SO ORDERED this 13th day of January, 2020.



SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

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[2] If so desired, Petitioner may raise any and all non-habeas civil claims in a separate civil action.

MIME-Version:1.0
From:ecf_txnd@txnd.uscourts.gov
To:Courtmail@localhost.localdomain

Message-Id:<12046397@txnd.uscourts.gov>
Subject:Activity in Case 3:17-cv-03326-C-BT Roberts v. Davis-Director TDCJ-CID Order
Content-Type: text/plain
This is an automatic e-mail message generated by the CM/ECF system.
Please DO NOT RESPOND to this e-mail because the mail box is unattended.
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U.S. District Court
Northern District of Texas

Notice of Electronic Filing
The following transaction was entered on 1/13/2020 3:18 PM CST and filed on 1/13/2020

Case Name: Roberts v. Davis-Director TDCJ-CID
Case Number: 3:17-cv-03326-C-BT
https://ecf.txnd.uscourts.gov/cgi-bin/DktRpt.pl?296749

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Docket Text:
ORDER: After due consideration and having conducted a de novo review, the Court finds that Petitioner's objections should be OVERRULED. The Court has further conducted an independent review of the Magistrate Judge's findings and conclusions and finds no error. It is therefore ORDERED that the Findings, Conclusions, and Recommendation are hereby ADOPTED as the findings and conclusions of the Court. For the reasons stated therein, Petitioner's petition for writ of habeas corpus is hereby DENIED. All remaining non-habeas civil claims are DISMISSED withort prejudice. (Ordered by Senior Judge Sam R Cummings on 1/13/2020) (aaa)

3:17-cv-03326-C-BT Notice has been electronically mailed to:
Jennifer Louise Wissinger jennifer.wissinger2@oag.texas.gov, ashley.hodgson@oag.texas.gov, laura.haney@oag.texas.gov

3:17-cv-03326-C-BT Notice required by federal rule will be delivered by other means (as detailed in the Clerk's records for orders/judgments) to:

Felix Roberts
#2017141

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FELIX ROBERTS,)
Petitioner,)
v.)
LORIE DAVIS, *Director, TDCJ-CID*,)
Respondent.) Civil Action No. 3:17-CV-3326-C-BT

JUDGMENT

For the reasons stated in the Court's Order of even date,

IT IS ORDERED, ADJUDGED, AND DECREED that Petitioner's petition for writ of habeas corpus be **DENIED**. All remaining non-habeas civil claims are **DISMISSED** without prejudice.

SIGNED this 13th day of January, 2020.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FELIX ROBERTS, Petitioner,	§	
	§	
v.	§	No. 3:17-cv-3326-C (BT)
	§	
LORIE DAVIS, Director, TDCJ-CID Respondent.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Felix Roberts, a Texas prisoner, filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254. For the following reasons, the petition should be denied, and any non-habeas civil claims should be dismissed without prejudice.

I.

In July 2015, a jury found Roberts guilty of aggravated assault with a deadly weapon, in Cause No. F-1445364, (*see* Doc. 24-2 at 22), and unlawful possession of a firearm by a felon, in Cause No. F-1445368. (*See* Doc. 24-5 at 32). In each conviction, the jury also found true the sentence-enhancement allegations that Roberts had two prior felony convictions and sentenced Roberts to thirty-five years of imprisonment. (*See id.*; Doc. 24-2 at 22). The Fifth District Court of Appeals affirmed the trial court's judgments. *See Roberts v. State*, No. 05-15-00936-CR, No. 05-15-00937-CR, 2016 WL 6111069 (Tex. App – Dallas October 19, 2019, pet. ref'd.). Roberts filed a

petition for discretionary review regarding his conviction for possession of a firearm by a felon, *see* doc. 12-19, but not for his conviction for aggravated assault with a deadly weapon. *See* Doc. 14-1. The Texas Court of Criminal Appeals (CCA) refused Roberts's petition for discretionary review. *See* *Roberts v. State*, No. PD-1341-16, (Tex. Crim. App. 2017). Roberts filed two state habeas petitions, attacking his convictions. (Doc. 24-2 at 26-43; Doc. 24-5 at 36-53). The CCA denied both petitions, without a written order, *Ex parte Roberts,* No. 88, 496-01; *Ex parte Roberts,* No. 88, 496-02. (*See* Doc. 24-1; Doc. 24-3).

Roberts then filed the instant amended § 2254 petition. (*See* Doc. 15). He had previously filed a § 2254 petition prior to filing his state habeas petitions. (*See* Doc. 3). Upon the CCA's denial of his state petitions, Roberts filed his amended § 2254 petition, in which he argues:

1(a). His trial attorney provided ineffective assistance of by:

- *i) failing to raise all available motions or objections at trial;
- ii) failing to object to "illegally used enhancements;"
- *iii) failing to call into question prosecutorial misconduct of using perjured testimony and contamination of jury;
- iv) failing to contact defendant in a timely manner;
- v) failing to properly investigate the case;
- vi) failing to interview, subpoena, or question defense witnesses;
- vii) failing to raise proper defenses;

viii) failing to object to the state's amendment of a charging document before trial;

ix) failing to act in a professional manner;

x) failing to put on a proper defense; and

*xi) failing to call into question the contamination of the jury by outside extraneous influence and information.

1(b). His appellate counsel provided ineffective assistance by failing to raise all possible grounds on appeal.

2. The prosecutor committed misconduct by:

i) presenting false evidence at grand jury and at trial;

ii) making improper comments to the jury;

iii) introducing inadmissible evidence to jury;

iv) engaging in selective and vindictive prosecution;

v) violating the Equal Protection clause by bringing charges against Roberts;

vi) withholding exculpatory evidence;

vii) tampering with and destroying evidence; and

viii) using illegal enhancements to increase sentence.

3. The trial court improperly instructed the jury regarding enhancements.

4. The trial court erred by allowing the prosecution to commit perjury regarding the enhancements.

5. He is actually innocent.

6. There is insufficient evidence to support his convictions.

II.

A Unexhausted Claims

Roberts did not raise issues 1(a)(iii-xi), 1(b), 2, 4, and 6, either on direct #1 appeal, or in his state habeas application. On direct appeal, Roberts argued only a violation of state law. Specifically, he argued "reversible error occurred when the trial court failed to instruct the jury to find the offenses and convictions in the enhancement paragraphs sequential." *Roberts*, 2016 WL 6111069 at *1. Importantly, in his petition for discretionary review to the CCA, Roberts continued to argue only that the trial court's jury instruction violated state law. (*See* Doc. 12-19). Roberts also did not raise these issues in his state habeas applications. (*See* Doc. 24-2 at 26-43; Doc. 24-5 at 36-53). #2

Each issue a petitioner raises in a federal habeas writ must have been exhausted. That is, the issue must have been "fairly presented" to the state court. *Picard v. Conner*, 404 U.S. 270, 275 (1971). The exhaustion requirement is not met when new factual claims are made in a federal petition. *Anderson v. Harless,* 459 U.S. 4, 6-7 (1982). If a petitioner fails to exhaust state remedies and the court to which he would be required to present his claims would now find the claims procedurally barred due to the petitioner's own procedural default, "federal courts are barred from reviewing those claims." *Woodfox v. Cain*, 609 F.3d 774, 793 (5th Cir. 2010) (citing *Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995)). To overcome the procedural bar for failure to exhaust state remedies, a petitioner must

"demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). A miscarriage of justice in this context means that the petitioner is actually innocent of the crime for which he was convicted. *See Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992).

In the present case, if Roberts were to return to state court to attempt to exhaust, he would be barred from raising these claims. *See Neville v. Drekte*, 423 F.3d 474, 480 (5th Cir. 2005) (stating that "[e]xcept under extraordinary circumstances, Texas law does not permit successive petitions."). Texas law forbids second or successive applications for post-conviction relief if the claims could have been, but were not, raised in a prior state writ unless "no rational juror could have found the applicant guilty beyond a reasonable doubt." TEX. CODE CRIM. PROC. art. 11.07 § 4(a). Although Roberts claims he is actually innocent, he provides no support from the record for this claim. (*See* Doc. 16 at 27-30). He simply discusses federal case law regarding actual innocence, then states that due to the "similarities" between those cases and his, he qualifies for relief. (*See id.*). Roberts is mistaken. He fails to show that no rational juror could have found him guilty. Because Roberts has failed to establish cause for the default and actual prejudice, these claims are unexhausted and procedurally barred.

To the extent that Roberts raises his actual innocence claim as a freestanding ground for habeas relief, the claim is unavailing. A claim of actual innocence does not state an independent, substantive constitutional claim and is not a basis for federal habeas corpus relief. *See Herrera v. Collins*, 506 U.S. 390 (1993). Claims of actual innocence are not cognizable on federal habeas review. *See United States v. Fields*, 761 F.3d 443, 479 (5th Cir. 2014) ("[Fifth Circuit] caselaw does not recognize freestanding actual innocence claims."). A claim of actual innocence may not be a basis for federal habeas corpus relief absent an independent federal constitutional violation. *See Dowthitt v. Johnson*, 230 F.3d 733, 741 (5th Cir. 2000). Roberts has not shown an independent federal constitutional violation, and so his actual innocence claim is not cognizable on federal habeas appeal.

Look it up

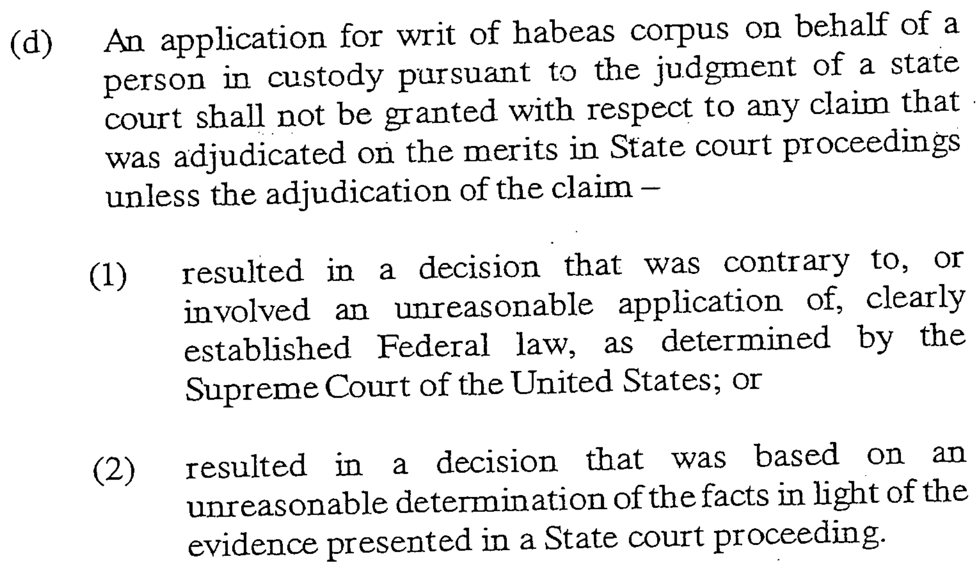
III.

A. Standard of Review for Remaining Claims

The role of federal courts in reviewing habeas corpus petitions by prisoners in state custody is exceedingly narrow. A person seeking federal habeas corpus review must assert a violation of a federal constitutional right. *Lowery v. Collins*, 988 F.2d 1364, 1367 (5th Cir. 1993). Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *West v. Johnson*, 92 F.3d 1385, 1404 (5th Cir. 1996).

When reviewing state proceedings, a federal court does not sit as a super-state appellate court. *Dillard v. Blackburn*, 780 F.2d 509, 513 (5th Cir. 1986).

Federal habeas corpus relief for state prisoners has been further limited by the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"). The pertinent terms of the AEDPA, 28 U.S.C. § 2254 provide:



> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding.

See 28 U.S.C. § 2254(d).

Under the "contrary to" clause, a federal habeas court may grant the writ of habeas corpus if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 380-84 (2000). Under the "unreasonable application" clause, a federal court may grant a writ of habeas corpus if the state court identifies the correct governing legal principle from the United States Supreme Court's decisions,

but unreasonably applies that principle to the facts of the prisoner's case. *Id.* As a condition for obtaining habeas corpus relief from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement. *Harrington v. Richter*, 562 U.S. 86,105 (2011). A petitioner must show that there was no reasonable basis for the state court to deny relief. *Id.*, at 98.

Under Texas law, when the CCA denies a state habeas petition, as in the present case, the "denial" means that the court rejected the merits of a particular claim. *See Miller v. Johnson*, 200 F.3d 274, 281 (5th Cir. 2000) ("Under Texas law, a denial of relief by the Court of Criminal Appeals serves as a denial of relief on the merits of the claim."); *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) (en banc) ("In our writ jurisprudence, a 'denial' signifies that we addressed and rejected the merits of a particular claim while a 'dismissal' means that we declined to consider the claim for reasons unrelated to the claims merits."). Because the CCA denied Roberts's claims on the merits, the deferential AEDPA standard of review applies to this petition.

B. Ineffective Assistance of Counsel

Roberts claims his trial counsel provided ineffective assistance by failing to raise all available motions or objections, and specifically failing to

this too

~~object to "illegally used enhancements."~~ To succeed on a claim of ineffective assistance of counsel, a petitioner must show "counsel's representation fell below an objective standard of reasonableness," with reasonableness judged under professional norms prevailing at the time counsel rendered assistance. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The standard requires the reviewing court to give great deference to counsel's performance, strongly presuming counsel exercised reasonable professional judgment. *Id.* The right to counsel does not require errorless counsel; instead, a criminal defendant is entitled to reasonably effective assistance. *Murray v. Maggio*, 736 F.2d 279, 281-82 (5th Cir. 1984); *Boyd v. Estelle*, 661 F.2d 388, 389 (5th Cir. 1981).

Additionally, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The petitioner must "affirmatively prove," not just allege, prejudice. *Id.* at 693. If he fails to prove prejudice, the court need not address the question of counsel's performance. *Id.* at 697. Merely presenting "conclusory allegations" of deficient performance or prejudice is insufficient to meet the *Strickland* test. *Miller*, 200 F.3d at 282.

Failure to Raise Motions and Objections

In Claim 1(a)(i), Roberts argues that his trial counsel provided ineffective assistance by failing "to raise all available motions, . . . [or]

objections at trial." (*See* Doc. 15 at 6). In Claim 1(a)(ii), he argues that his counsel failed to object to "the illegally used enhancements being utilized to contaminate and deliberately mislead the jury." (*See* Doc. 16 at 43). Roberts provides no support for these vague allegations. While Roberts provides a listing of motions in conjunction with his first claim, he specifically states that the list is for "demonstration only . . . which counsel may or may not have filed and in which may or may not apply to the circumstances of this case." (*See* Doc. 16-2 at 109-11). And with regard to his claim regarding the sentence enhancements, he provides no further argument other than to state that the alleged error deprived him of "the benefit of a fair trial." (*See* Doc. 16 at 43).

Conclusory allegations of ineffective assistance of counsel, in allegedly failing to file motions, to make objections and to follow defendant's instructions, are insufficient to demonstrate ineffective assistance of counsel. *United States v. Demik*, 489 F.3d 644, 647 (5th Cir. 2007). Because Roberts does not point to any evidence in the record to support his contentions, his general complaints are insufficient to demonstrate either deficient performance by his counsel, or prejudice resulting from the alleged deficient performance. *See id.*; *see also Miller*, 200 F.3d at 282.

Further, Roberts raised these issues in his state habeas petition. Because the state habeas court's decision to deny relief did not involve an

unreasonable application of *Strickland*, they should be denied. Roberts fails to show that his counsel's performance was ineffective.

Roberts also fails to show that the state-court decision was unreasonable by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Roberts fails to show there was no reasonable basis for the state court to deny relief. *See Richter*, 526 U.S. at 98.

Improper Jury Instruction

Roberts claims the trial court improperly instructed the jury. He argues the court failed to instruct the jury that "it should find the enhancement allegations true only if the State proved sequential prior felony convictions." (Doc. 16 at 3)(emphasis in original). He provides no support from the record to substantiate this claim, which, unsupported by evidence from the record, is insufficient. *See Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982). Federal courts do not "consider a habeas petitioner's bald assertions on a critical issue in his pro se petition . . . mere conclusory allegations do not raise a constitutional issue in a habeas proceeding." *Smallwood v. Johnson*, 73 F.3d 1343, 1351 (5th Cir. 1996) (quoting *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983)); *see also Lookingbill v. Cockrell*, 293 F.3d 256, 263 (5th Cir. 2002) (stating that

where a habeas petitioner fails to brief an argument adequately, it is considered waived).

Further, the fact that an instruction may be incorrect under state law is not a basis for habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991). The only question in claims of improper state court jury instructions is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *See id.* at 72.

Here, Roberts fails to demonstrate how the jury was improperly instructed, much less, how any single jury instruction resulted in a conviction in violation of his due process rights. Thus, this claim fails. *See id.*

Further, the state habeas court denied this claim when it denied Roberts's application for a state habeas application and Roberts fails to show the state court proceedings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly-established federal law, as determined by the Supreme Court of the United States, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *Williams*, 529 U.S. at 402-03; *Childress v. Johnson*, 103 F.3d 1221, 1224-25 (5th Cir. 1997). Roberts fails to show there was no reasonable basis for the state court to deny relief. *See Richter*, 562 U.S. at 98.

IV.

Finally, Roberts requests "[m]onetary damages in the amount of $88,000 per year for each year [he] has suffered pain and suffering, mental anguish and mental cruelty from [a] wrongful conviction." (Doc. 15 at 7). The Court initially notes that Roberts has not established that he was wrongly convicted. Additionally, 28 U.S.C. § 2254(a) provides that federal courts "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." *See* 28 U.S.C. § 2254 (a). It does not allow for other civil causes of action or monetary damages. *See id.*

V.

For the foregoing reasons, the Court should deny the petition for writ of habeas corpus under 28 U.S.C. § 2254 with prejudice for failure to make a substantial showing of the denial of a federal right, and any non-habeas civil claims should be dismissed without prejudice to properly raising them in a separate civil action.

Signed November 15, 2019,

REBECCA RUTHERFORD
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

~~Affirmed and Opinion Filed October 19, 2016~~

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00936-CR
No. 05-15-00937-CR

FELIX SAM ROBERTS, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 1
Dallas County, Texas
Trial Court Cause No. F-1445364-H

MEMORANDUM OPINION

Before Justices Francis, Stoddart, and Schenck
Opinion by Justice Francis

A jury convicted Felix Sam Roberts of aggravated assault with a deadly weapon and unlawful possession of a firearm by a felon. After finding the enhancement paragraphs true, the jury set punishment at thirty-five and thirty years in prison. In a single point of error in each case, appellant contends reversible error occurred when the trial court failed to instruct the jury to find the offenses and convictions in the enhancement paragraphs sequential. We affirm the trial court's judgments.

The indictments in each case alleged two previous offenses for purposes of punishment enhancement. At the punishment phase, the State read the portions of the indictments describing the enhancement offenses to the jury and submitted as evidence the judgments for the convictions alleged in the indictments. The indictments specifically alleged, and the judgments

showed, that, in each case, appellant committed the second enhancement offense after being finally convicted of the first enhancement offense.

Appellant then testified about his previous convictions. After discussing the various allegations, the State asked, "So the paragraphs we're talking about, these enhancement paragraphs, you admitted that you did all of that, right?" Appellant responded "Yes, ma'am." Although appellant pleaded "not true" to the enhancement allegations, he admitted each specific enhancement allegation in his testimony.

The charge of the court in each case set out the enhancement allegations. The charge in the aggravated assault case read:

> Paragraph Two of the indictment alleges that prior to the commission of the aforesaid offense, the said defendant was convicted of the felony offense of driving while intoxicated/3rd on the 27th day of July, 2009, in Cause Number 401-82401/08 on the docket of the 401st District Court of Collin County, Texas under the name of Felix Sam Roberts, and said conviction was a final conviction and was a conviction for an offense committed by him, the said Felix Sam Roberts, prior to the commission of the offense herein before charged against him, as set forth in the first paragraph hereof . . . .
>
> It is further alleged the said defendant, Felix Sam Roberts was convicted of the felony offense of driving while intoxicated /3rd on the 8th day of April, 2005, in Cause Number F0534491, on the docket of the 292nd Judicial District Court of Dallas County, Texas under the name of Felix Sam Roberts, and said conviction was a final conviction and was a conviction for an offense committed by him, the said Felix Sam Roberts, prior to the commission of the offense.

The charge in the unlawful possession of a firearm by a felon case read:

> Paragraph Two of the indictment alleges that prior to the commission of the aforesaid offense, the said defendant was convicted of the felony offense of driving while intoxicated /3rd on the 8th day of April, 2005, in Cause Number F0534491, on the docket of the 292nd Judicial District Court of Dallas County, Texas under the name of Felix Sam Roberts, and said conviction was a final conviction and was a conviction for an offense committed by him, the said Felix Sam Roberts, prior to the commission of the offense herein before charged against him, as set forth in the first paragraph thereof. . . .
>
> It is further alleged the said defendant, Felix Sam Roberts was convicted of the felony offense of burglary of a vehicle on the 30th day of December, 1997, in Cause Number F9270224, on the docket of the Criminal District Court No. 1 of

> Dallas County, Texas, under the name of Felix Sam Roberts, and said conviction was a conviction for an offense committed by him, the said Felix Sam Roberts, prior to the commission of the offense or offense. To this allegation the defendant has entered a plea of not true.

Although the prior convictions were listed in chronological order, the charges did not contain any language that the second enhancement offenses were committed after the convictions for the first enhancement offenses became final. Appellant lodged no objection to the charge, and the jury returned a verdict finding the paragraphs true and assessed an enhanced sentence.

A court's charge to the jury must correctly apply the law to the facts of the case. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007). Under the penal code, except in circumstances not applicable here, if it is shown on the trial of a felony offense other than a state jail felony punishable under section 12.35(a) that the defendant has previously been finally convicted of two felonies, and the second previous felony conviction was for an offense that occurred after the first previous felony conviction became final, on conviction the defendant shall be punished by imprisonment for life, or for any term of not more than 99 years or less than 25 years. *See* TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2016). Aggravated assault with a deadly weapon and unlawful possession of a firearm by a felony are second- and third-degree felonies, respectively. *See* TEX. PENAL CODE ANN. §§ 22.02 & 46.04 (West 2011).

Here, the previous judgments submitted by the State and appellant's own testimony provided prima facie evidence that appellant was finally convicted of two separate, sequential felony offenses prior to the offenses for which he was standing trial. Thus, the evidence supports enhanced punishment under section 12.42(d). Appellant agrees the State proved the enhancement allegations at trial, does not contest the evidence to support them, and complains only of the instructions given to the jury. He contends that because the court never specifically instructed the jury that it had to find the second previous felony offense was committed subsequent to the first previous felony conviction having become final, enhancement was

improper and remand for a new punishment hearing is required. In the unlawful possession of a firearm by a felon offense, he asserts the sentence is illegal. Based on the record before us, we cannot agree.

While the charges did not contain the language specifying that the "second felony conviction was for an offense that occurred subsequent to the first felony conviction having become final," the only evidence of previous convictions given to the jury was of offenses in which the second offense occurred after the conviction for the first offense became final. Furthermore, the charges instructed the jury to find the State's enhancement allegations true only if they found and believed that "prior to the commission of the offense [for which he was on trial] . . . the defendant has twice before been duly and legally convicted of a felony *as set and presented to you.*" Thus, for the jury to find the allegations true, it necessarily had to find appellant previously committed two felony offenses, the second of which was committed after his conviction for the first offense became final, because only sequential previous offenses and convictions were presented for the jury's consideration.

Even if it was error to fail to include the language that appellant complains was omitted, he has made no attempt to demonstrate how he was harmed. Based on the record as a whole, we conclude appellant did not suffer egregious harm as a result of the instructions given. *See Rice v. State*, 746 S.W.2d 356, 361(Tex. App.—Fort Worth 1988, pet. ref'd); *Damian v. State*, 776 S.W.2d 659, 665 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd). We resolve these issues against him.

We affirm the trial court's judgments.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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TEX. R. APP. P. 47.1
150936F.U05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

FELIX SAM ROBERTS, Appellant

No. 05-15-00936-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 1, Dallas County, Texas
Trial Court Cause No. F1445364-H.
Opinion delivered by Justice Francis.
Justices Stoddart and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered October 19, 2016.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

FELIX SAM ROBERTS, Appellant

No. 05-15-00937-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 1, Dallas County, Texas
Trial Court Cause No. F1445368-H.
Opinion delivered by Justice Francis.
Justices Stoddart and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered October 19, 2016.

FILE COPY

HIEF JUSTICE
AROLYN WRIGHT

JUSTICES
DAVID L. BRIDGES
MOLLY FRANCIS
DOUGLAS S. LANG
ELIZABETH LANG-MIERS
ROBERT M. FILLMORE
LANA MYERS
DAVID EVANS
DAVID LEWIS
DA BROWN
RAIG STODDART
BILL WHITEHILL
DAVID J. SCHENCK

Court of Appeals
Fifth District of Texas at Dallas

600 OMMERCE STREET, SUITE 200
DALLAS, TEXAS 75202
(214) 712-3400

LISA MATZ
LERK OF THE OURT
(214) 712-3450
theclerk@5th.txcourts.gov

GAYLE UMPA
BUSINESS DMINISTRATOR
(214) 712-3434
gayle.humpa@5th.txcourts.gov

FACSIMILE
(214) 745-1083

INTERNET
WWW.TXCOURTS.GOV/5THCOA.ASPX

October 19, 2016

Felix Sam Roberts
#2017141
Lychner Unit
2350 Atascocita Road
Humble, TX 77396

Bruce Anton
Sorrels, Udashen & Anton
2311 Cedar Springs Rd Ste 250
Dallas, TX 75201-7845
* DELIVERED VIA E-MAIL *

Justin Johnson
Dallas County District Attorney's Office
133 N. Riverfront Blvd., LB-19
Dallas, TX 75207
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 05-15-00936/0937-CR
Trial Court Case Number: F-1445364-H

Style: Felix Sam Roberts
v.
The State of Texas

Please find attached the opinion that issued in the above cause today.

Respectfully,

/s/ Lisa Matz, Clerk of the Court

cc: Felicia Pitre (DELIVERED VIA E-MAIL)
Susan Hawk (DELIVERED VIA E-MAIL)
The Honorable Robert Burns (DELIVERED VIA E-MAIL)
The Honorable Mary L. Murphy (DELIVERED VIA E-MAIL)
Christina O'Neil (DELIVERED VIA E-MAIL)

APPENDIX D

2016 WL 6111069
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

Do Not Publish TEX. R. APP. P. 47.1
Court of Appeals of Texas,
Dallas.

Felix Sam ROBERTS, Appellant
v.
The STATE of Texas, Appellee

No. 05–15–00936–CR, No. 05–15–00937–CR
|
Opinion Filed October 19, 2016
|
Discretionary Review Refused March 1, 2017

On Appeal from the Criminal District Court No. 1, Dallas County, Texas, Trial Court Cause No. F–1445364–H, The Honorable Robert Burns, Judge

Attorneys and Law Firms

Bruce Anton, Dallas, TX, for appellants

Justin Johnson, Susan Hawk, Dallas, TX, for appellees.

Before Justices Francis, Stoddart, and Schenck

MEMORANDUM OPINION

Opinion by Justice Francis

*1 A jury convicted Felix Sam Roberts of aggravated assault with a deadly weapon and unlawful possession of a firearm by a felon. After finding the enhancement paragraphs true, the jury set punishment at thirty-five and thirty years in prison. In a single point of error in each case, appellant contends reversible error occurred when the trial court failed to instruct the jury to find the offenses and convictions in the enhancement paragraphs sequential. We affirm the trial court's judgments.

The indictments in each case alleged two previous offenses for purposes of punishment enhancement. At the punishment phase, the State read the portions of the indictments describing the enhancement offenses to the jury and submitted as evidence the judgments for the convictions alleged in the indictments. The indictments specifically alleged, and the judgments showed, that, in each case, appellant committed the second enhancement offense after being finally convicted of the first enhancement offense.

Appellant then testified about his previous convictions. After discussing the various allegations, the State asked, "So the paragraphs we're talking about, these enhancement paragraphs, you admitted that you did all of that, right?" Appellant responded "Yes, ma'am." Although appellant pleaded "not true" to the enhancement allegations, he admitted each specific enhancement allegation in his testimony.

The charge of the court in each case set out the enhancement allegations. The charge in the aggravated assault case read:

> Paragraph Two of the indictment alleges that prior to the commission of the aforesaid offense, the said defendant was convicted of the felony offense of driving while intoxicated/3rd on the 27th day of July, 2009, in Cause Number 401–82401/08 on the docket of the 401st District Court of Collin County, Texas under the name of Felix Sam Roberts, and said conviction was a final conviction and was a conviction for an offense committed by him, the said Felix Sam Roberts, prior to the commission of the offense herein before charged against him, as set forth in the first paragraph hereof ....
>
> It is further alleged the said defendant, Felix Sam Roberts was convicted of the felony offense of driving while intoxicated /3rd on the 8th day of April, 2005, in Cause Number F0534491, on the docket of the 292nd Judicial District Court of Dallas County, Texas under the name of Felix Sam Roberts, and said conviction was a final conviction and was a conviction for an offense committed by him, the said Felix Sam Roberts, prior to the commission of the offense.

The charge in the unlawful possession of a firearm by a felon case read:

> Paragraph Two of the indictment alleges that prior to the commission of the aforesaid offense, the said defendant was convicted of the felony offense of driving while intoxicated /3rd on the 8th day of April, 2005, in Cause Number F0534491, on the docket of the 292nd

Judicial District Court of Dallas County, Texas under the name of Felix Sam Roberts, and said conviction was a final conviction and was a conviction for an offense committed by him, the said Felix Sam Roberts, prior to the commission of the offense herein before charged against him, as set forth in the first paragraph thereof. ...

*2 It is further alleged the said defendant, Felix Sam Roberts was convicted of the felony offense of burglary of a vehicle on the 30th day of December, 1997, in Cause Number F9270224, on the docket of the Criminal District Court No. 1 of Dallas County, Texas, under the name of Felix Sam Roberts, and said conviction was a conviction for an offense committed by him, the said Felix Sam Roberts, prior to the commission of the offense or offense. To this allegation the defendant has entered a plea of not true.

Although the prior convictions were listed in chronological order, the charges did not contain any language that the second enhancement offenses were committed after the convictions for the first enhancement offenses became final. Appellant lodged no objection to the charge, and the jury returned a verdict finding the paragraphs true and assessed an enhanced sentence.

A court's charge to the jury must correctly apply the law to the facts of the case. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007). Under the penal code, except in circumstances not applicable here, if it is shown on the trial of a felony offense other than a state jail felony punishable under section 12.35(a) that the defendant has previously been finally convicted of two felonies, and the second previous felony conviction was for an offense that occurred after the first previous felony conviction became final, on conviction the defendant shall be punished by imprisonment for life, or for any term of not more than 99 years or less than 25 years. *See* TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2016). Aggravated assault with a deadly weapon and unlawful possession of a firearm by a felony are second- and third-degree felonies, respectively. *See* TEX. PENAL CODE ANN. §§ 22.02 & 46.04 (West 2011).

Here, the previous judgments submitted by the State and appellant's own testimony provided prima facie evidence that appellant was finally convicted of two separate, sequential felony offenses prior to the offenses for which he was standing trial. Thus, the evidence supports enhanced punishment under section 12.42(d). Appellant agrees the State proved the enhancement allegations at trial, does not contest the evidence to support them, and complains only of the instructions given to the jury. He contends that because the court never specifically instructed the jury that it had to find the second previous felony offense was committed subsequent to the first previous felony conviction having become final, enhancement was improper and remand for a new punishment hearing is required. In the unlawful possession of a firearm by a felon offense, he asserts the sentence is illegal. Based on the record before us, we cannot agree.

While the charges did not contain the language specifying that the "second felony conviction was for an offense that occurred subsequent to the first felony conviction having become final," the only evidence of previous convictions given to the jury was of offenses in which the second offense occurred after the conviction for the first offense became final. Furthermore, the charges instructed the jury to find the State's enhancement allegations true only if they found and believed that "prior to the commission of the offense [for which he was on trial] ... the defendant has twice before been duly and legally convicted of a felony *as set and presented to you.*" Thus, for the jury to find the allegations true, it necessarily had to find appellant previously committed two felony offenses, the second of which was committed after his conviction for the first offense became final, because only sequential previous offenses and convictions were presented for the jury's consideration.

*3 Even if it was error to fail to include the language that appellant complains was omitted, he has made no attempt to demonstrate how he was harmed. Based on the record as a whole, we conclude appellant did not suffer egregious harm as a result of the instructions given. *See Rice v. State*, 746 S.W.2d 356, 361(Tex. App.–Fort Worth 1988, pet. ref'd); *Damian v. State*, 776 S.W.2d 659, 665 (Tex. App.–Houston [14th Dist.] 1989, pet. ref'd). We resolve these issues against him.

We affirm the trial court's judgments.

All Citations

Not Reported in S.W.3d, 2016 WL 6111069

... No claim to original U.S. Government Works.

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APPENDIX E

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

July 02, 2021

#2017141
Mr. Felix Roberts
CID Estelle Unit
264 FM 3478
Huntsville, TX 77320-3320

No. 20-10280 Roberts v. Lumpkin
USDC No. 3:17-CV-3326

Dear Mr. Roberts,

We will take no action on your motion for rehearing and en banc reconsideration. The time for filing a petition for rehearing under has expired.

The court already has issued its final ruling and will not rule upon the matter further. The Court denied COA on May 3, 2021 and denied reconsideration on June 21, 2021. The appeal is closed.

Sincerely,

LYLE W. CAYCE, Clerk
Claudia N. Farrington

By: ______________________
Claudia N. Farrington, Deputy Clerk
504-310-7706

cc: Ms. Jennifer Wissinger