IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CARLOS DeLUNA	§	
	§	
V.	§	C.A. NO. C-86-234
	§	
O. L. McCOTTER, DIRECTOR, TEXAS DEPT. OF CORRECTIONS	§	

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS; ORDER VACATING STAY OF EXECUTION

This Court has reviewed the state court records, as well as the pleadings of both parties. The facts of this case were accurately summarized by the Texas Court of Criminal Appeals as follows:

> The evidence showed that during a robbery in Corpus Christi appellant fatally stabbed the clerk of a gas station. He was seen and identified by witnesses before, during, and after the offense. Police conducted a search of the neighborhood into which the robber had reportedly fled and two officers found appellant hiding under a truck parked at a curb.

DeLuna v. State, 711 S.W.2d 44, 45 (Tex. Crim. App. 1986).

The Petitioner's first argument is that the State of Texas applies the death penalty statute in a racially discriminatory manner, and thus his death sentence is invalid. The Petitioner is an Hispanic and the victim, according to the autopsy report, was white. The Petitioner bases his claim of discrimination on statistics which indicate that a capital murder defendant is more likely to receive the death penalty if the victim is white than if the

victim is black or Hispanic. Assuming the accuracy of the statistics and of the autopsy report, Petitioner has nonetheless failed to present a claim which entitles him to relief. Petitioner has not alleged facts specific to his own case that would support an inference that racial considerations played a part in his sentence. See McLeskey v. Kemp, 107 S.Ct. 1756 (1987). Nor may this Court infer purposeful discrimination in Petitioner's case from statistical data. Id.

Petitioner's other allegations all raise ineffective assistance of counsel at various stages of his state trial. These allegations, (A) - (G), D.E. #17, pp. 8-13, must meet the two-prong standard set forth in Strickland v. Washington, 104 S.Ct. 2052, 2064-2066 (1984). Petitioner must show that his defense was prejudiced by his counsel's deficient performance.

DeLuna presents seven allegations of ineffective assistance at trial and seeks a "reasonable amount of time" to review the record to see if allegations of ineffective assistance on appeal can be made. DeLuna's seven allegations are as follows:

(A) and (F). Although Petitioner was arrested in February 1983, his two counsel did not visit him until May 1983 and June 1983. A total of five additional visits were made by counsel between June and the July trial date. Petitioner contends this "lack of contact" was critical to

his defense because his mother, whose testimony would have shown Petitioner was not the assailant but that Petitioner was on the telephone watching the assault, died before trial and counsel failed to preserve her testimony.

Contentions (A) and (F) have no merit. The pretrial hearing transcript of June 20, 1983 (TR. Vol. III, pp. 2-6), shows that Petitioner's attorneys were aware of Mrs. Avalos' potential testimony and of her illness and that her doctor, when contacted on June 20, told the attorneys' investigator that Mrs. Avalos was on the road to recovery and would be able to testify in five days but that he preferred a three-week wait. It was not unreasonable under these circumstances to fail to preserve her testimony.

Even if Mrs. Avalos had testified in person, or by deposition or other means, as Petitioner contends (a matter of speculation), her testimony would have contradicted Petitioner's own testimony at trial. Petitioner testified that a phone call to his stepfather and his mother was made around 8 p.m. from the Circle K Store at Kostoryz and McArdle Streets (TR. Vol. XI, p. 417) and that he then went with Carlos Hernandez (the supposed true assailant) to the house of an acquaintance who was not home (Id., p. 418) and that Hernandez and Petitioner then went to a bar, Wolfey's, for some beer but that Petitioner waited ten minutes inside Wolfey's for Hernandez, who had gone to the Shamrock station. When Hernandez did not return, Petitioner went outside, saw

Hernandez struggling with a woman in the Shamrock station, and ran because he heard police sirens and didn't want to be implicated. Petitioner mentioned no other phone call. (Id., pp. 418-421). Petitioner cannot argue that the decision not to use his mother's testimony was unreasonable and he can show no prejudice from the lack of her testimony. Petitioner has alleged no other prejudice which would have been avoided by additional jail visits.

(B) and (E). Petitioner contends that his attorneys failed to call witnesses to testify at the punishment stage or to investigate Petitioner's history of substance abuse for possible use at the punishment stage, for mitigation purposes. Petitioner contends each of nine named witnesses "had information concerning Petitioner's prior substance abuse and borderline intellectual capacity," and that three of these witnesses "also had information concerning Petitioner's contact with his mother on the night of the offense and the proceedings that took place after that." No affidavits were presented stating what any of these witnesses would have testified to. Alexander v. McCotter, 775 F.2d 595, 602 (5th Cir. 1985). "Complaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy, and because allegations of what a witness would have testified are largely speculative." United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983) (citations omitted).

Petitioner's attorneys' decision to rely solely on jury argument in the punishment phase of the trial was not unreasonable, given the facts of the case, viewed as of the time of the trial. Strickland v. Washington, 104 S.Ct. at 2066. As Respondent points out, revelation of a history of substance abuse (for which there is no evidence but only the Petitioner's assertions) could as easily have swayed the jury in favor of the death sentence as in favor of life imprisonment, there being no evidence of substance abuse having anything to do with Petitioner's behavior on the night of the murder. The jury had already heard from eye witnesses who identified Petitioner as the killer of Wanda Lopez, they had heard the Petitioner lie on the stand (TR. Vol. XI, pp. 416 and 451), and they had been told of Petitioner's bad reputation in the community and of his attack on and attempted rape of a friend's mother (TR. Vol. XII). It is doubtful that the jury would have favorably considered any evidence of substance abuse. The Court notes there was no indication that substance abuse played any role in the attempted rape, nor does Petitioner make any specific claims regarding the effects of substance abuse on his reputation or his behavior. It appears likely that Petitioner's counsel did not want to open the door for additional unfavorable evidence the prosecutor might have presented. Knighton v. Maggio, 740 F.2d 1344, 1346 (5th Cir. 1984).

Petitioner's assertion of borderline intelligence falls under the same guidelines. The only evidence is the

Petitioner's assertion. The Petitioner was examined by at least one psychiatrist prior to trial and was apparently found competent to stand trial. (TR. Vol. II, p. 18). (The psychiatrist's report was not included in the records filed with this Court.) As in Knighton v. Maggio, counsel for Petitioner made the strategic decision to plead for Petitioner's life instead of putting on witnesses.

(C). Petitioner contends his attorneys failed to thoroughly investigate Petitioner's alternative assailant/ Carlos Hernandez claim. Petitioner also contends his attorneys should have sought a new trial when a Carlos Hernandez was arrested in July 1983, on another charge.

Effective counsel has a duty to conduct a reasonable amount of pretrial investigation. Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985). What is "reasonable" must be assessed under all the circumstances, applying a heavy measure of deference to counsel's judgment. Id. In the present case, Petitioner testified that his attorneys obtained mug shots of persons named Carlos Hernandez to show to Petitioner, but Petitioner was unable to identify any of the photographs (TR. Vol. XI, p. 433). Furthermore, the police compared fingerprints found at the crime scene with the fingerprints of persons named Carlos Hernandez in their files but were unable to obtain a match (TR. Vol. XI, p. 458). The record reflects that Petitioner's attorneys made an effort to locate Carlos Hernandez.

Petitioner has not alleged any additional specific information which he gave to his attorneys at the pretrial stage which would have aided them in finding Carlos Hernandez. Petitioner has not alleged any specific acts which his attorneys failed to do. One claiming ineffective assistance of counsel must identify specific omissions by his attorneys, general statements and conclusionary charges will not suffice. Knighton v. Maggio, 740 F.2d 1344 (5th Cir. 1984).

Petitioner does allege that a man named Carlos Hernandez was arrested for an unrelated murder after the conclusion of Petitioner's trial, and that Petitioner brought this fact to the attention of his attorneys. Petitioner claims that his attorneys made no investigation of the arrested suspect to determine if there could be grounds for a new trial. Even if this Court assumes that Petitioner's attorneys reasonably should have followed up on the Carlos Hernandez arrest, Petitioner can show no prejudice as a result of their failure to do so. In order to show prejudice, Petitioner must at least suggest what exculpatory evidence the additional investigation would have uncovered. United States v. Lewis, 786 F.2d 1278 (5th Cir. 1986). It is not reasonable to believe that the location of Petitioner's "Carlos Hernandez" would undermine the confidence in the outcome of the trial. Petitioner's testimony would obviously carry little weight. Two eyewitnesses identified Petitioner as the murderer, one of which had a face-to-face encounter

with Petitioner only moments after the crime. Two more witnesses saw Petitioner fleeing from the scene moments after the murder, and Police found Petitioner a short time later hiding under a car in the neighborhood behind the gas station. In view of the cumulative eyewitness testimony and other circumstantial evidence, it is not reasonable to believe that the location of "Carlos Hernandez" would have affected the outcome of the trial. Given the fact that Petitioner lied about his other alibi witness, Mary Ann Perales, there is substantial doubt that Carlos Hernandez even existed.

(D). Wanda Lopez was on the telephone talking to a police dispatcher when Petitioner attacked her. The struggle was recorded. Petitioner contends his attorneys should have used available technology to determine whether a voice on the police dispatch cassette tape was his or someone else's. For the reasons stated in (C), voice identification analysis would probably have had little effect in the face of the eyewitness testimony implicating the Petitioner. Furthermore, it is not clear to the Court which words on the cassette tape Petitioner would have analyzed. Based on the transcript of the portion of the cassette tape played to the jury (TR. Vol. XI, pp. 381-85), there were no words spoken by the assailant. It is also reasonable to assume that Petitioner's attorneys would not want to call much attention to the cassette tape, given the probable emotional effect on the jury.

(G). Petitioner's final claim is that his counsel advised him not to cooperate with the court-appointed psychiatrist and that as a result there was no "true diagnosis showing a lengthy history of substance abuse and organicity that would have produced evidence in mitigation of punishment." For the reasons stated in (D) and (E) above, the prejudice claimed by Petitioner is speculative. Respondent correctly points out that the advice of Petitioner's counsel was sound since statements made to a psychiatrist could in fact have been used against Petitioner, Estelle v. Smith, 101 S.Ct. 1866 (1981), and that the advice may have been strategic as well, to prevent adverse testimony by the psychiatrist at the punishment phase.

Petitioner's reply to Respondent's motion for summary judgment furnishes no evidentiary basis to justify a hearing. Significant time has been allowed for Petitioner to substantiate his claims and no substantiation has been forthcoming. Additionally, Petitioner has not developed beyond conclusion his allegations of ineffective counsel on appeal.

Under the foregoing circumstances, no hearing is merited. Petitioner's writ of habeas corpus is denied and the agreed stay of execution is lifted.

ORDERED this 13 day of June, 1988.

HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE