

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PABLO GUERRA,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO: H-07-1985
	§	
NATHANIEL QUARTERMAN,	§	
Director of the Texas Department	§	
of Criminal Justice - Correctional	§	
Institutions Division,	§	
Respondent.	§	

MEMORANDUM AND RECOMMENDATION

Petitioner Pablo Guerra's application for writ of habeas corpus pursuant to 28 U.S.C. § 2254 has been referred to this magistrate judge for a report and recommendation. The court recommends that respondent's motion for summary judgment (Dkt. 9) be granted and Guerra's application be denied.

Background

Guerra pleaded guilty to aggravated robbery on February 3, 2005. On April 20, 2005, after preparation of a presentence investigation report and a sentencing hearing, the state court sentenced Guerra to 15 years in prison. On May 19, 2005, Guerra filed a motion for new trial, which was denied by the trial court on May 20, 2005. Guerra did not appeal. Guerra's sentence became final on June 19, 2005.

Guerra's attorney filed an application for writ of habeas corpus on his behalf in the state district court. Guerra has presented a copy of the cover page of his writ with a file-stamped date of April 18, 2006, the date his attorney testifies that he first delivered a copy

of the application to the clerk's office. The clerk did not file the writ application on the trial court's docket until October 17, 2006. The Texas Court of Criminal Appeals denied his state writ application on April 25, 2007 without written order on findings of the trial court.

Guerra filed this federal writ application on June 13, 2007 alleging he received ineffective assistance of counsel at the plea and sentencing phases of his case, and that the trial court erred by failing to inquire into his competency. Respondent contends that Guerra's federal writ application is time-barred, and alternatively without merit.

Analysis

1. Statute of Limitations

Guerra's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (AEDPA). Section 2244 of the AEDPA provides as follows:

(d)(1) A 1-year period of limitation shall apply to an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented

could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). Guerra's federal statute of limitations began to run on June 19, 2005 when his conviction became final and expired one year later on June 19, 2006, absent tolling.

The federal statute of limitations is tolled while a "properly filed" state court writ application is pending. 28 U.S.C. § 2244(d)(2). Therefore, if Guerra's state court writ application was "properly filed" on April 18, 2006, his federal application is timely; if it was "properly filed" on October 17, 2006, it is not.¹

Guerra has presented an affidavit from his former attorney Ralph R. Martinez stating that he filed the writ on April 18, 2006 and attaching a file-stamped copy showing that date. After delivering the application to the clerk's office, Martinez "repeatedly checked on it" and realized that the document "was not showing in the records." According to Martinez, "the writ was finally found and the clerk's office apologized for misplacing it."

These facts present a close question whether the writ application was properly filed. Arguably, filing takes place when the document is presented (physically or electronically) to the clerk for processing. After the document is placed in the clerk's custody, it is the clerk's responsibility to make the appropriate docket entries and maintain the document in the court's file. The court has found no case law indicating whether the statutory phrase "properly filed" refers not only to the actual delivery of the document to the clerk, but also

¹ A state court writ application filed after expiration of the one year limitations period cannot operate to toll the limitations period. *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000).

to actual entry on the docket by the clerk. Even if “properly filed” entails proper docketing by the clerk, there is a reasonable argument in favor of equitable tolling here, since the failure to docket is attributable to the clerk’s office error rather than attorney neglect. For these reasons, the court will assume without deciding that the federal application was timely, and will rule on the merits of Guerra’s petition.

2. Guerra has not shown he is entitled to federal habeas relief.

Guerra is not entitled to federal habeas relief on his claims that were adjudicated on the merits² in state court unless the state court adjudication:

- (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 the State court proceeding.

28 U.S.C. § 2254(d). A state court decision may be “contrary to” federal law as determined by the Supreme Court if the state court arrives at a conclusion opposite of the Supreme Court on a question of law, or if the state court “confronts a set of facts that are materially indistinguishable from a relevant Supreme Court precedent” and reaches an opposite conclusion. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000).

A state court decision involves an “unreasonable application” of federal law if the state court “identifies the correct governing legal principle . . . but unreasonably applies that

² A denial of habeas relief by the Texas Court of Criminal Appeals constitutes a ruling on the merits of the application. *In re Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997).

principle to the facts of the prisoner’s case.” *Id.* at 413. Federal habeas relief is warranted only where the state court decision is both incorrect and objectively unreasonable. *Id.* at 410-11.

The trial court found, based on an affidavit of trial counsel, the evidence of record, and her own recollection that: (1) Guerra was competent to enter his guilty plea; (2) the trial court was not made aware of any evidence suggesting Guerra was incompetent; (3) the trial court did not err if failing to inquire into Guerra’s competence; (4) the PSI contained information regarding Guerra’s mental health history; (5) trial counsel was not ineffective; (6) Guerra entered his guilty plea knowingly and voluntarily; and (7) Guerra failed to show his conviction was improperly obtained.³ The Texas Court of Criminal Appeals adopted these findings. Guerra has not rebutted these findings.

Trial Court’s Failure to Inquire into Competency. A defendant is competent to enter a guilty plea if he “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and . . . has a rational as well as factual understanding of the proceedings against him.” *Dusky v. U.S.*, 362 U.S. 402, 402 (1960); *Godinez v. Moran*, 509 U.S. 389, 399 (1993). In Texas, a defendant is presumed competent unless proven otherwise by a preponderance of the evidence. TEX. CODE OF CRIM. PRO. Art. 46B.003(b). The issue of competency may be raised by a party or by the court on its own motion. TEX. CODE OF CRIM. PRO. Art. 46B.004(a). A trial court is obligated to conduct a competency

³ Record, at 120.

hearing only where the evidence raises a “bona fide doubt” as to defendant’s competence. *Pate v. Robinson*, 383 U.S. 375, 378 (1966).

An April 18, 2005 letter from El Centro De Corazon clinic admitted into evidence during Guerra’s sentencing hearing indicates that Guerra had been diagnosed with general anxiety disorder, major depression, and panic disorder with agoraphobia, and he received mental health counseling from November 10, 2004 through January 31, 2005. In connection with his motion for new trial in May 2005, several family members and friends submitted statements on Guerra’s behalf, none of which mentioned mental health issues. Guerra’s trial counsel submitted an affidavit to the state habeas court stating that he did not have any difficulty discussing the case and the ramifications of a plea with his client; in his opinion, Guerra knew the difference between right and wrong; he did not know of any basis for a doctor to declare Guerra incompetent; Guerra’s family did not provide any information that indicated that Guerra was incompetent to stand trial; and Guerra’s mental health history was included in his PSI report. There is no evidence that Guerra displayed any behavior at the plea or sentencing proceedings that would have alerted the court that he was incompetent. Guerra’s own affidavit says merely that he was seeking treatment for high anxiety and panic attacks and was disoriented and inattentive during his plea.

In short, the record reveals nothing that would have given the trial court “bona fide doubt” as to Guerra’s competency. Guerra has not shown that the state habeas court’s determination on this issue was contrary to or an unreasonable application of federal law, or

based on an unreasonable determination of facts.

Ineffective Assistance of Counsel. The Supreme Court has established a two-part test for determining ineffective assistance of counsel habeas claims. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish an ineffective assistance of counsel claim, a defendant must first show that counsel's performance was "deficient." To do this, a defendant must point to specific errors "so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Id.* The court's scrutiny of counsel's performance is highly deferential; the court presumes that counsel's conduct falls within the wide range of reasonable professional assistance. *Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005).

Second, a defendant must demonstrate that his counsel's performance prejudiced his defense. In other words, a defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.*; *see also United States v. Chavez*, 193 F.3d 375, 379 (5th Cir. 1999) ("the focus here is whether a reasonable probability exists that counsel's deficient performance affected the outcome and denied [the defendant] a fair trial."). In establishing an ineffective assistance of counsel claim, a defendant cannot merely present conclusory allegations. *See Green v. Johnson*, 160 F.3d 1029, 1043 (5th Cir. 1998). Rather, the defendant must allege "specific facts" to support his claim. *Id.*

Guerra faults his counsel for failing to investigate and discover his "extensive" history of mental illness, which he alleges would have shown his incompetency to plead guilty and

mitigated his punishment. Yet, as discussed above, nothing in the record indicates that Guerra's mental illness was so severe as to implicate his competency or mitigate his sentence.

Plea Stage. Trial counsel has testified that he had no difficulty discussing the case with Guerra and that he believed Guerra understood the proceedings. Despite his representation to the contrary in his affidavit, Guerra was provided a 5 week supply of his anti-anxiety medication on January 31, 2005, only days before he entered his guilty plea. The record simply does not support a finding that trial counsel erred in allowing Guerra to plead guilty.⁴

Punishment Stage. Despite Guerra's characterization of the evidence of his mental illness as "vast," the only such records in evidence are those from El Centro De Corazon clinic regarding his treatment beginning in November 2004, and a letter from Dr. Jorge Guerrero at Parkview Medical Associates, P.A. dated August 3, 2005, indicating that Guerra should not travel for prolonged periods by car and required continued medical care. That letter, while mentioning that Guerra suffered from depression/anxiety, focused on Guerra's treatment for "metabolic syndrome." Guerra's trial counsel did in fact present evidence at Guerra's sentencing regarding his treatment at El Centro De Corazon, and Guerra's treatment for mental illness was referenced in his presentence report. Because the court was fully

⁴ This case is certainly not like *Hull v. Freeman*, 932 F.2d 159, 168 (3d Cir. 1991), cited by Guerra, in which the court found trial counsel exceeded the bounds of reasonable professional judgment when he rejected the psychiatric diagnoses of two doctors who found the defendant incompetent to stand trial in favor of his own untrained observation that his client was competent.

apprised of Guerra's mental condition, there is no reason to suspect that testimony from Dr. Guerrero or Guerra's family⁵ would have changed Guerra's sentence.

In sum, the state habeas court's determination that the performance of Guerra's trial counsel was not so deficient as to deny him of his constitutional right to counsel is not contrary to or an unreasonable application of federal law, or based on an unreasonable determination of facts.

Conclusion and Recommendation

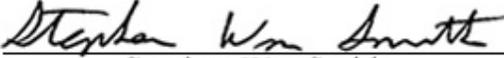
For the reasons discussed above, the court recommends that Guerra's petition be denied.

The court further finds that Guerra has not made a substantial showing that he was denied a constitutional right or that it is debatable whether this court is correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, the court recommends that a certificate of appealability not issue.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* Rule 8(b) of the Rules Governing Section 2254 Cases; 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72.

⁵ As noted above, none of the letters submitted by Guerra's family and friends with the motion for new trial indicated that he suffered from serious mental illness.

Signed at Houston, Texas on August 1, 2008.


Stephen Wm Smith
Stephen Wm Smith
United States Magistrate Judge