

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-1692WM

Thomas Lee Umphrey,	*	
	*	
Appellant,	*	Appeal from the United States
	*	District Court for the Western
v.	*	District of Missouri.
	*	
Michael Groose,	*	[UNPUBLISHED]
	*	
Appellee.	*	

Submitted: November 21, 1997
Filed: December 29, 1997

Before FAGG and HANSEN, Circuit Judges, and PIERSOL,* District Judge.

PER CURIAM.

Thomas Lee Umphrey was convicted of robbery in Missouri state court and his conviction was affirmed on direct appeal. See State v. Umphrey, 694 S.W.2d 816 (Mo. Ct. App. 1985) (per curiam). After state postconviction relief was denied, Umphrey filed this federal habeas petition claiming he was denied his Sixth Amendment right to an impartial jury. Two jurors had stated in voir dire that an innocent man would testify on his own behalf, and Umphrey did not take the stand in

*The Honorable Lawrence L. Piersol, United States District Judge for the District of South Dakota, sitting by designation.

his own defense. Umphrey did not preserve the juror bias claim at trial or raise it on direct appeal. The district court denied habeas relief, holding Umphrey procedurally defaulted his juror bias claim in state court and failed to show cause for his procedural default. Umphrey appeals.

Umphrey first asserts we should ignore his procedural default because the record establishes actual juror bias that amounts to a structural constitutional error, see Johnson v. Armontrout, 961 F.2d 748, 751-52 (8th Cir. 1992), but the record does not conclusively establish actual juror bias. Alternatively, Umphrey asserts he has shown cause and prejudice to excuse his procedural default. See Sloan v. Delo, 54 F.3d 1371, 1381-82 (8th Cir. 1995), cert. denied, 116 S. Ct. 728 (1996). According to Umphrey, the state's failure to send him a copy of the voir dire transcript constitutes cause. Umphrey was present at both voir dire and the trial, however, so he did not need the transcript to know of the factual basis for raising the claim on direct appeal. As another cause for default, Umphrey contends his trial attorney's failure to object to the biased jurors amounted to ineffective assistance of counsel. Umphrey did not assert this ineffective assistance claim independently in state postconviction proceedings, so ineffective assistance of trial counsel cannot constitute cause. See Oxford v. Delo, 59 F.3d 741, 747 (8th Cir. 1995), cert. denied, 116 S. Ct. 1361 (1996). Additionally, contrary to Umphrey's view, trial counsel was not ineffective. Trial counsel recognized the juror issue on the record in Umphrey's presence, and for tactical purposes counsel declined to challenge the jurors. Umphrey's claim that ineffective assistance of postconviction counsel excuses his procedural default is meritless. Because there is no right to effective assistance of counsel in postconviction proceedings, ineffective assistance of postconviction counsel cannot serve as cause to excuse a procedural default. See Sweet v. Delo, 125 F.3d 1144, 1151 (8th Cir. 1997).

We thus affirm the denial of Umphrey's habeas petition.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.