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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DYKE EDWARD NELSON,  
  
Petitioner - Appellant,  
  
v.  
  
TERESA A. SCHWARTZ, Warden,  
substituted for Ana M Ramirez Palmer,  
  
Respondent - Appellee.

No. 06-55852

D.C. No. CV-96-07525-JVS

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
James V. Selna, District Judge, Presiding

Argued and Submitted April 8, 2008  
Pasadena, California

Before: CANBY, KLEINFELD, and BYBEE, Circuit Judges.

The federal district court did not abuse its discretion in denying Petitioner Dyke Nelson's 28 U.S.C. § 2254 claims without an evidentiary hearing or an opportunity to seek discovery. *See Davis v. Woodford*, 384 F.3d 628, 638 (9th Cir.

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

2004) (evidentiary hearing); *Anderson v. Calderon*, 232 F.3d 1053, 1099 (9th Cir. 2000)(discovery). Unlike *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000), where we remanded for an evidentiary hearing where no court had ever considered the substance of the petitioner's motion for appointment of substitute counsel (*Marsden* motion), *People v. Marsden*, 465 P.2d 44 (1970), here the California trial court did consider Nelson's *Marsden* motion.

Nelson failed to produce in the district court the transcript of the first of his two hearings regarding substitute counsel in the State Superior Court. Though the court had sealed the transcript so that the prosecutor would not have access to whatever the disagreement might be between Nelson and his lawyer, no reason is shown why Nelson could not obtain the transcript or other account by motion in the Superior Court or otherwise show what transpired. The transcript of the second Marsden hearing shows that the Superior Court gave careful consideration to Nelson's demand for substitute counsel and did not make an unreasonable determination of the facts.

The Superior Court judge relied on his own personal observation of the relationship between Nelson and his attorney, and his attorney's conduct in court

through the trial. Nelson provided to the district court no evidence of anything that happened outside the observation of the Superior Court judge. Nelson asserts that he has repeatedly sought the transcript from his first *Marsden* hearing, but he does not say what he did to seek it, or what it would show that would establish a basis for relief.

DENIED.