IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-2651
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT E. BRUNK,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-86-147-7 & CA-H-89-1297)

(December 17, 1992)

Before JONES, DUHÉ, and WIENER, Circuit Judges.

PER CURIAM*:

In this appeal from the district court's denials of habeas corpus relief, Petitioner-Appellant Robert E. Brunk asserts that the court erred in several respects. This case comes to us in an unusual procedural posture))one in which three of Brunk's four habeas petitions have been denied. Before we may address the merits of those habeas petitions that we find have been properly appealed to this court, we must endeavor to untangle the procedural

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

web in which the case was ensnared when it arrived at this court. The government characterizes this case as a "procedural labyrinth"SQan analogy with which we do not quarrel. We conclude ultimately that the district court committed no reversible error in denying the habeas petitions and thus affirm.

I

FACTS AND PROCEDURAL HISTORY

In late 1986, Brunk was convicted of 1) conspiring to possess with intent to distribute 200 kilograms of cocaine and 2) possession with intent to distribute one kilogram of cocaine.[1] He was sentenced to two concurrent ten year terms, plus a six year special parole term.[2]

Brunk (along with some of his co-defendants) appealed his conviction to this court, asserting, inter alia, insufficiency of the evidence, entrapment, and abuse of discretion by the district court in its denial of Brunk's motion for severance from his co-defendants. We affirmed his conviction, as well as those of his co-defendants.[3] Brunk subsequently moved the district court to reduce his sentence.[4] His motion was denied, and that denial was affirmed by this court on December 15, 1989.[5]

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[1] See 21 U.S.C. §§ 841(a), 841(b)(1)(B), 846 (1988).

[2] In addition, he was ordered to pay $100 in special costs.

[3] United States v. Toro, 840 F.2d 1221, 1237-39 (5th Cir. 1988).

[4] See FED. R. CRIM. P. 35(b).

[5] United States v. Brunk, No. 89-2045 (5th Cir. Dec. 15, 1989)(unpublished opinion).

Before that affirmance of the district court's denial of a reduction of Brunk's sentence, however, he had filed two petitions for habeas relief with the district court.[6] The first petition was filed on April 14, 1989 [the April 14, 1989 (first) petition], asserting three bases for relief: (1) no jury instruction had been given on entrapment; (2) the jury instructions were erroneous; and (3) the imposition of a special term of parole was improper. His second petition was styled as "supplemental" to the first and was filed on August 16, 1989 [the August 16, 1989 (second) petition]. In it, Brunk asserted three additional bases for relief: (1) the government's conspiracy theory as alleged in the indictment was at variance with the proof at trial; (2) there were material errors in the pre-sentence report; and (3) the government had committed equal protection violations by targeting Brunk and his cohorts for arrest and indictment.[7] The second petition was filed in the district court under the same docket number as the first and was later disposed of with the first.

After our affirmance of his sentence, Brunk filed two more habeas petitions))only one of which is relevant to this appeal. That one was filed on January 25, 1990 [the January 25, 1990 (third) petition], again asserting the magical three bases for

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[6] See 28 U.S.C. § 2255 (1988).

[7] We cannot fail to note the novelty of Brunk's argument that the government violates equal protection by targeting people engaged in the violations of the law for arrest and indictment. We suppose that, under his theory, the government could cure its violation only by targeting school teachers and other notorious law-abiders for arrest and indictment. We will have to work out the details of this theory later.

relief: (1) "outrageous" government misconduct; (2) evidentiary errors, specifically that Brunk was not allowed to examine a document[8]; and (3) insufficiency of the evidence. This petition was given a separate docket number by the district court.[9]

Also on January 25, 1990, Brunk filed with the district court a "Motion to Consolidate," requesting that the August 16, 1989 (second) petition and the January 25, 1990 (third) petition be consolidated. Brunk expressly requested, though, that the April 14, 1989 (first) petition not be consolidated with the other two. As noted above, the April 14, 1989 (first) and the August 16, 1989 (second) petitions were already subsisting under the same docket number.

Albeit without benefit of Daedalus's magical ball of thread to assist in our return to daylight, we now proceed through the "devious turns and twists" of the Labyrinth as we factor in the decisions of the district court in the instant case.[10] On June 6, 1990 (June 8 according to the docket sheet), the district court issued an order with the docket number under which both the April 14, 1989 (first) and August 16, 1990 (second) petitions were filed. That order stated:

> The matter now before [sic] is the defendant's motion pursuant to 28 U.S.C. §2225 [sic]. Having

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[8] FED. R. EVID. 612.

[9] Brunk filed a forth habeas petition on June 27, 1990, styled "Supplemental Motion Pursuant To 28 USC 2255." The government asserts, and we accept, that the district court has never ruled on this petition. We do not consider it here.

[10] 1 ROBERT GRAVES, THE GREEK MYTHS 336-41 (1955).

> reviewed the motion and record in this case, the Court is of the opinion that the motion is without merit. It is therefore,
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> ORDERED that the defendant's motion be, and it is hereby, denied.

We construe this order as addressing and denying both of the petitions under the first docket number, i.e., the April 14, 1989 (first) and August 16, 1989 (second) petitions.

Brunk timely filed a notice of appeal of the district court's denial of these first two habeas petitions. The clerk's office of this court then notified Brunk that because the "motion to consolidate the pending § 2255 cases is still pending before th[e district] court, and the record on appeal is needed and cannot be forwarded [because of the pending cases]," his appeal "w[ould] be held in abeyance until the record is available."

We continue deeper into the labyrinthSQand for the first time encounter the scent of AsteriusSQwhen we consider the district court's second order addressing Brunk's quest for habeas relief, which order was issued by that court on December 17, 1991. First, the court stated that "Defendant's second motion under 28 U.S.C. § 2255 . . . is DENIED." In referring to the "second motion," the district court identified by docket number the January 25, 1990 (third) petition. Thus, for our present purposes, the district court denied that third petition. Moreover, our belief that the district court denied both the April 14, 1989 (first) and August 16, 1989 (second) petitions in its June 6, 1990 order is bolstered by the next statement found in the December 17, 1991 order: "The first § 2255 motion [#453, civil docket number C.A. H-89-1297] was

denied on June 8, 1990." The reference is to the record tab (453) and the docket number under which both the first and second petitions were filed.

The court stated secondly that "[Brunk]'s motion to consolidate § 2255 motions is granted." It is simply unclear what was to be consolidated or what effect the consolidation was to have. Brunk's January 25, 1990 motion to consolidate requested that the August 16, 1989 (second) petition (which was denied by the December 8, 1990 denial) and the January 25, 1990 (third) petition (which was disposed of in the same order as to the grant of consolidation) be joined. Brunk did not file a notice of appeal from the denial of the January 25, 1990 (third) petition.

II

PROCEDURAL ANALYSIS

We have still not traversed the procedural labyrinth sufficiently to reach the merits of Brunk's claims; we must first address the government's contention that we lack jurisdiction to review this case. According to the government, we lack jurisdiction because Brunk failed to file a timely notice of appeal, as required by Rule 4(a) of the Federal Rules of Appellate Procedure (FRAP). The government concedes that Brunk filed a timely notice of appeal on July 16, 1990 in response to the court's June 6, 1990 denial of his claims, but insists that this notice of appeal was vitiated when, on December 18, 1991, the court granted Brunk's motion to consolidate his habeas claims. Once the motions were consolidated, the government argues, Brunk's first notice of

appeal was rendered ineffective, and he was required to refile. Having reviewed the record and the applicable law, we find that the motion to consolidate, granted almost one and one-half years after the denial of Brunk's habeas claim, does not vitiate Brunk's original notice of appeal. Thus, we conclude, Brunk's original timely notice of appeal remains valid and we have jurisdiction to rule on the merits of the habeas claims.

In reaching this conclusion, we initially examine FRAP 4(a), the basis of the government's argument that Brunk's first notice of appeal was vitiated by the district court's post-judgment consolidation of his habeas motions. FRAP 4(a) provides that a party must file a notice of appeal within 30 days after the date of entry of the judgment, 60 days if the United States or an agency or officer thereof is a party. FRAP 4(a)(4) provides:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b) [motion for judgment as a matter of law]; (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motions as provided above. No additional fee shall be required for such filing.[11]

Conspicuously absent from the list of motions in FRAP 4(a)(4) is the motion at issue hereSQa motion to consolidate. Moreover, a

[11] FRAP 4(a)(4) (emphasis added).

comparison of the motions listed there with a motion to consolidate reveals an important distinction. Unlike the motions listed in FRAP 4(a)(4), Brunk's motion to consolidate was made prior to the judgment. The government does not address these issues. The cases relied on by the government are unpersuasive, for they involve only the motions listed in FRAP 4(a)(4).[12]

Regarding the first issue, one of the cases cited by the government in its brief, In re Cobb,[13] identifies the salient distinction between those motions listed in FRAP 4(a)(4) and those motions that are not included: the motions listed in the Rule affect the underlying judgment, but those omitted do not. Thus, because the motions listed may alter the substance of a judgment, appeal from the judgment would be premature.[14] Such is not the case, however, under Brunk's motion to consolidate. In no way does that motion affect the substance of the underlying judgment. As such, Brunk's motion to consolidate did not vitiate his notice of appeal.

Regarding the second issuesQthe distinction between motions that are made before entry of judgment and those that are made after entrySQwe conclude that a pending motion is extinguished by entry of the judgment. Therefore, when the court entered judgment

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[12] See, e.g., Craig v. Lynaugh, 846 F.2d 11 (5th Cir. 1988) (Fed. R. Civ. P. 59(e)); Archer v. Lynaugh, 821 F.2d 1094 (5th Cir. 1987) (same); In re Cobb, 750 F.2d 477 (5th Cir. 1985) (Fed. R. Civ. P 52(b)).

[13] 750 F.2d at 477.

[14] Id. at 479.

on Brunk's claims, the motion to consolidate was extinguished, ipso facto, as moot. The subsequent grant of that motion was a hollow act, wholly without effect.

Having thus concluded that a motion to consolidate does not vitiate a notice of appeal, we now turn to the government's second procedural contentionsQnamely, that we may not review the August 16, 1989 (second) petition, or even the fourth habeas petition filed by Brunk, because the district court has not ruled on these petitions. That contention is resolved by a thorough review of the record, our reading of which compels us to disagree with the government at least in part. Although we acknowledge that the court has not ruled on Brunk's fourth habeas claim, we have already concluded from our review of the record that the court's June 6, 1990 order disposed of the April 14, 1989 (first) petition and the August 16, 1989 (second) petition. The court's order, although brief, entirely disposed of the petitions classified under docket number H-89-1297, which included the April 14, 1989 (first) and August 16, 1989 (second) petitions. Absent evidence to the contrary, we will not make the strained inference that the court intended to dispose of only one of the two petitions filed and pending under that docket number.

Curiously, the government concedes that we have jurisdiction to review the January 25, 1990 (third) petition, asserting that "the court's granting of the motion to consolidate effectively merged the issues raised in the second § 2255 motion with the issues raised in the third § 2255 motion and vitiated the original

notice of appeal." We again disagree with the government, concluding that we lack jurisdiction over this third petition. The district court entered a final judgment concerning Brunk's first two habeas claims, and Brunk timely appealed the denial of these motions on July 16, 1990. Once final judgment was entered, the pending motion to consolidate became moot. At that point, the procedure for consolidating appeals required a motion to this court, not to the district court. Moreover, we note that a district court is not vested with an unlimited power to revisit and alter final judgments. We find no support in the Federal Rules of Civil Procedure for the grant of a motion one and one-half years after final judgment. Again, the district court's grant of the motion for consolidation was wholly without effect.

In its brief, the government assumes, without conceding, that we may have jurisdiction to hear the January 25, 1990 (third) petition based on Smith v. Barry.[15] In Barry, the Supreme Court held that a technically invalid notice of appeal by a pro se habeas petitioner may nonetheless be valid if it is the "functional equivalent" of the notice required by FRAP 3. Barry makes clear, however, that despite liberal construction of the rules concerning notice of appeal, noncompliance with the rule is fatal.[16] Because Brunk totally failed to notice an appeal from the court's denial of his January 25, 1990 (third) petition, there can be no functional

[15] 112 S.Ct. 678 (1992).

[16] Id. at 682.

equivalent of such notice.[17]

We conclude, therefore, that we have jurisdiction to review the merits of the April 14, 1989 (first) and August 16, 1989 (second) petitions for habeas corpus. These two petitions were denied by the district court in its order dated June 6, 1990. The subsequent motion to consolidate, filed before final judgment but granted well after judgment was entered, has no effect on the issues appealed to this court. We conclude additionally that we may not review the January 25, 1990 (third) petition or Brunk's fourth habeas motion. The district court denied the January 25, 1990 (third) petition, but Brunk failed to notice an appeal from that judgment. This claim is saved by neither the court's motion to consolidate nor a liberal construction afforded FRAP 3. And, as earlier noted, Brunk's fourth habeas petition is not before us because the district court has not yet entered a judgment concerning that pleading; appeal would thus be premature.

III

SUBSTANTIVE ANALYSIS

Having successfully wended our way through the procedural labyrinth, we are now prepared to face the awesome Minotaur: the merits of Brunk's two reviewable habeas petitions. Brunk alleges

[17] The government also mentions the letter issued by the Clerk of this Court informing the parties that the appeal would be held in abeyance until the motion to consolidate was decided. We do not suggest that the letter has any binding effect in this case, but we note that the letter states only that the appeal must be held in abeyance because the record of the district court was unavailable due to the pending motions. Moreover, the letter makes clear that the consolidation of any appeal must be made by a motion to the court of appeals and would necessitate the filing of another brief.

a total of six points in his two habeas petitions: (1) The court erred by failing to give a jury instruction on entrapment; (2) the jury instruction given was improper; (3) the imposition of a term of special parole was improper; (4) the government impermissibly alleged one conspiracy in the indictment but proved multiple conspiracies at trial; (5) the pre-sentence investigation report contained errors; and (6) the government violated his equal protection rights by targeting Brunk for arrest and indictment. We find all of his claims to be without merit.

Section 2255 allows a federal prisoner to challenge his conviction collaterally "on the basis of errors of law that constitute `a fundamental defect which inherently results in a complete miscarriage of justice.' § 2255 extends primarily to those issues that are of constitutional or jurisdictional magnitude. Any purported error not of such magnitude may only be considered under a § 2255 motion if it could not have been raised on direct appeal and, if condoned, would result in a complete miscarriage of justice."[18] Undoubtably Brunk could have raised the first five issues on direct appeal; therefore, he may not raise them now under § 2255.

Brunk's sixth allegation of error urges a violation of a specific constitutional rightSQequal protectionSQso we consider this claim despite Brunk's failure to raise it on appeal. Brunk insists that the government violated his equal protection rights by

[18] United States v. Shaid, 916 F.2d 894, 986-87 (5th Cir. 1990) (quoting United States v. Addonizio, 442 U.S. 178, 185 (1979) (quoting Hill v. United States, 368 U.s. 424 (1962))).

targeting him for an undercover operation which lead to his arrest and eventual conviction, solely because he had a record of drug law violations. He maintains that the government had the opportunity to involve persons with "spotless" records, but chose instead to target him as a person with a criminal record. Albeit, Brunk's claim is simplistically clever, it is untenable to the point of frivolity. At a minimum, his claim comprises no protected class or fundamental right, and thus would be subject to the rational basis test. That the government's decision to target Brunk in the course of its undercover operation rather than targeting a law-abiding citizen satisfies this standard is not subject to serious question.

IV

CONCLUSION

We have jurisdiction to review Brunk's first and second habeas petitions. We do not consider his third habeas petition because he failed timely to file a notice of appeal from the district court's disposition of that petition. And the fourth petition has yet to be ruled on and therefore is not ripe for appellate review.

As for the merits of the first two petitions, the Minoan labyrinth turns out to be nothing more than Oz's Yellow Brick Road, and the fearsome Minotaur nothing more than the ersatz Wizard with all of the smoke and mirrors swept away.

The decision of the district court is

AFFIRMED.