UNITED STATES COURT OF APPEALS
for the Fifth Circuit

Nos. 91-1811 and 91-1812
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

EARNEST CONROD,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(CRG 90 030 D & CA WC 91 006)

(December 28, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Appellant Conrod pled guilty to one count of conspiracy to distribute drugs and was sentenced. No direct appeal was taken. He moved under 18 U.S.C. § 3585 for credit against his sentence for time spent on bail before conviction, and he then filed a motion under 28 U.S.C. § 2255. The district court denied both motions. Appeals were taken and the cases consolidated here.

Appellant moved the district court under 18 U.S.C. § 3585(b)

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[1] 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

for credit for time "spent in official detention prior to the date the sentence commences." This is an attack upon the execution of his sentence and not its legality and is properly the subject of a habeas corpus petition under 28 U.S.C. § 2241. Such a proceeding must be brought in the district where the mover is incarcerated. See United States v. Gabor, 905 F.2d 76, 77-78 (5th Cir. 1990). Appellant is confined in Tennessee, not in the Northern District of Mississippi where he brought this action. As a result, the district court lacked jurisdiction and its order denying relief is vacated and the case remanded with instructions to dismiss for lack of jurisdiction.

In No. 91-1812, Appellant complains that the district court did not require the state to show cause why the writ should not be granted, and did not hold an evidentiary hearing before denying his habeas petition. 28 U.S.C. § 2243 requires such an order "unless it appears from the application that the applicant or person detained is not entitled to the writ." In Guice v. Fortenberry, 661 F.2d 496, 503 (5th Cir. 1981) (en banc), this Court held that it is necessary to conduct a hearing on a habeas corpus petition if "petitioner alleges facts that, if proved, would entitle him to the writ."

Appellant contends that he received ineffective assistance of counsel in making his guilty plea. He must, therefore, have alleged facts showing that counsel's performance was deficient and that this deficiency prejudiced his defense. To show prejudice he must establish that, but for deficient performance, he would not

have pleaded guilty. Hill v. Lockhart, 474 U.S. 52 (1985). The facts alleged are insufficient for this purpose.[2] Appellant's first claim of error by his counsel was that counsel failed to challenge his warrantless arrest and the evidence seized in relation thereto. The claim is without merit. By his own admission, Appellant fled the scene of the crime when he became suspicious of the undercover agent, and the police then chased him down and arrested him. The warrantless arrest of an individual in a public place upon probable cause does not violate the Fourth Amendment. United States v. Santana, 427 U.S. 38 (1976); United States v. Watson, 423 U.S. 411 (1976). These officers clearly had probable cause to arrest Appellant because they observed the ongoing negotiations for the purchase of the drugs. Counsel's performance was not deficient.

Appellant's next three claims of ineffectiveness stem from his claim of innocence. All claims are based, however, on Appellant's erroneous view that he was innocent of drug trafficking crimes because he personally did not handle the drugs. He apparently misapprehends the distinction between conspiring to distribute drugs and the actual possession and distribution of drugs. "The essence of a conspiracy under § 846 is an agreement to violate the narcotics laws . . . . The Government does not have to show an

[2] Appellant argues that the district court should have allowed him to amend his petition or appointed counsel to assist him. A review of the briefs in this appeal convinces us that the opportunity to amend would have produced no substantial change in the allegations and nothing in the record indicates that the interests of justice require that counsel be appointed. See Schwander v. Blackburn, 750 F.2d 494, 502 (5th Cir. 1985).

overt act in furtherance of the conspiracy." United States v. Natel, 812 F.2d 937, 940 (5th Cir. 1987). Appellant pled guilty to conspiracy. This crime was accomplished when the agreement was made to exchange the money for the drugs.

Next, Appellant contends that counsel was ineffective because he failed to pursue an entrapment defense. This likewise fails because such a defense could not have been successful. In the first place, Appellant was not initially approached by Government agents to become involved in the crime, but was originally approached by a co-defendant. Secondly, by his own admission, Appellant was a drug trafficker. There is little doubt that the Government could have easily shown predisposition for this type of activity.

Finally, Appellant raises for the first time on appeal the claim that he was induced to plead guilty by a promise from his counsel that he would receive no more than two years imprisonment if he cooperated with the Government. We do not consider issues raised for the first time on appeal unless they involve purely legal questions. United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). This issue raises factual questions not simply legal questions and we will not consider it.

In No. 91-1812 the judgment of the district court is affirmed. In No. 91-1811 the judgment of the district court is vacated. That matter is remanded with instructions to the district court to dismiss for lack of jurisdiction.

AFFIRMED in part, VACATED and REMANDED in part.