

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3994
Summary Calendar

UNITED STATES OF AMERICA,

Petitioner-Appellee,

versus

DELORES SCOTT,

Respondent-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CR 89-00310 (004))

(January 26, 1993)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.*

GARWOOD, Circuit Judge:

Defendant-appellant Delores Scott (Scott) is presently serving a six-year sentence for federal drug and firearms convictions. Acting pro se, she filed a motion before the district court for a modification of her sentence; treating this motion as a petition for habeas corpus under 28 U.S.C. § 2255, the trial court denied

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

her motion. Scott appeals this denial of relief and requests appointment of counsel. Finding the issues raised by Scott in this appeal to be without merit, we decline to appoint counsel and affirm the decision of the district court.

Facts and Prior Proceedings

A complete discussion of the facts of this case is set forth in our prior opinion on direct appeal, in which we affirmed the convictions of Scott and her co-conspirators. *United States v. Beverly*, 921 F.2d 559, 560-61, 563 (5th Cir.), *cert. denied*, 111 S. Ct. 2869 (1991). We give here only the facts relevant to our discussion of the issues presented in this section 2255 appeal.

Between April 21, 1989, and June 23, 1989, agents from the Bureau of Alcohol, Tobacco, and Firearms (ATF) monitored or participated in a number of undercover drug purchases from an apartment in New Orleans shared by Scott and her co-conspirators, Carl Sykes (Sykes), Emanuel Brown (Brown), and Boisey Beverly (Beverly). Firearms and references thereto figured into several of these purchases. In April, Charles Kilbourne (Kilbourne), a confidential informant for the government, purchased cocaine from Sykes. Following the sale, Sykes escorted Kilbourne from the apartment to Kilbourne's car; Sykes was armed with a semi-automatic handgun at the time. On June 6, Kilbourne and ATF agent David Sullivan (Sullivan) purchased cocaine from Sykes and Brown. Noticing what appeared to be the outline of a handgun under Sykes' shirt, Sullivan asked him if he were afraid of being "ripped off." Sykes replied that if someone were to try, "it would be like Vietnam around here." Later in June, Sullivan bought cocaine from

Scott; after this sale, while escorting Sullivan to his car, Beverly asked Sullivan if he were interested in purchasing firearms.

Federal agents executed a search warrant of Scott's apartment on June 23, 1989. During the search, the agents found two loaded handguns and ammunition in a box under a bed. The guns were a Smith and Wesson .357 Magnum revolver and a Rossi 38 caliber revolver. The agents also found a small amount of cocaine and \$2,200.00 in cash, some of which was marked and came from the June 6 sale from Sykes and Brown.

In July 1989, Scott was charged in four counts of a six-count indictment.¹ The first three counts alleged violations of 21 U.S.C. §§ 846 and 841(a): (1) conspiracy to distribute cocaine; (2) distribution of cocaine; and (3) possession of cocaine with intent to distribute. In the last count, Scott was charged with using and carrying firearms during and in relation to the drug trafficking offense of conspiracy to distribute cocaine, in violation of 18 U.S.C. § 924(c)(1). Scott's co-conspirators were also charged in the conspiracy and firearms counts.

Scott and her co-conspirators were tried and found guilty on all counts in a jury trial. None of the defendants contested their drug convictions, but together they filed a motion for acquittal on the firearms count, contending that there was insufficient evidence that the firearms found during execution of the search warrant were used or carried in relation to the conspiracy to sell cocaine. The

¹ The remaining two counts involved distribution charges against Scott's co-conspirators.

district court denied this motion and sentenced the defendants.²

Scott and the other defendants appealed their firearms convictions on the ground of insufficient evidence. We affirmed, holding that the evidence supported the firearms convictions. *Beverly*, 921 F.2d at 563. Scott now claims that her sentence should be modified pursuant to 28 U.S.C. § 2255.

Discussion

Scott raises two issues in her petition for relief: (1) whether the evidence was insufficient to support her conviction on the firearms count; and (2) whether she was prejudiced by her trial counsel's failure to move for a severance on the firearms count.

We have previously specifically considered and decided the insufficiency of the evidence claim adversely to Scott on direct appeal and need not consider it further. Scott may not raise by a section 2255 motion what she has already challenged on direct appeal. *United States v. Kalish*, 780 F.2d 506, 507-508 (5th Cir.) ("It is settled in this Circuit that issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 Motions."), *cert. denied*, 476 U.S. 1118, 106 S.Ct. 1977 (1986); *Ordonez v. United States*, 588 F.2d 448, 448-49 (5th Cir.) (same), *cert. denied*, 441 U.S. 963, 99 S.Ct. 2409 (1979); *Buckelew v. United States*, 575 F.2d 515, 517-18 (5th Cir. 1978) ("a matter need not be reconsidered on a section 2255 motion if it has already been determined on direct appeal"). No reason

² Scott received three concurrent twelve-month sentences on the drug counts, a five-year sentence on the firearm count to run consecutively to the other counts, and a three-year term of supervised release to begin after she is released from prison.

appears to depart in this case from the foregoing general rule.

Although Scott raised her claim of ineffective assistance of counsel before the district court, she did not base this claim on her trial counsel's failure to move for a severance on the firearm count.³ We will consider an issue raised for the first time on appeal only if it is a purely legal issue and if we must consider it in order to avoid a miscarriage of justice. *United States v. D.K.G. Appaloosas, Inc.*, 829 F.2d 532, 537-38 (5th Cir. 1987), *cert. denied sub nom. One 1984 Lincoln Mark VII Two-Door v. United States*, 485 U.S. 976, 108 S.Ct. 1270 (1988). Assuming, *arguendo*, that Scott's claim in this respect has not been waived by failure to raise it below, the claim is nevertheless without merit and Scott is not entitled to relief thereon.

In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), the Supreme Court set forth a two-part test for evaluating claims of ineffective assistance of counsel; both prongs of the test must be met in order to establish the ineffective assistance claim. First, Scott must show that her counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* A lawyer's representation is deficient only if it falls below an

³ At the district court level, Scott claimed that she received ineffective assistance because her counsel (1) failed to properly instruct her on the charges against her; and (2) failed to defend her against allegedly frivolous charges made by the undercover agent. She did not produce any evidence to support these claims, however, and the district court properly denied her section 2255 motion. Scott does not pursue these particular grounds before this Court.

objective standard of reasonableness, measured under prevailing professional norms. *Id.* at 688, 104 S.Ct. at 2064, 2065.

Second, Scott must show that her defense was prejudiced by the deficient performance. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064. In order to establish prejudice, Scott must show that there is a reasonable probability that a different result would have occurred but for the deficient representation. *Id.* at 694, 104 S.Ct. at 2068.

Scott was represented at trial and on direct appeal by John Mulvehill, a federal public defender. In assessing Mr. Mulvehill's failure to move for a severance, we must afford his performance a high degree of deference. *Id.* at 689, 104 S.Ct. at 2065. We find that his actions were not unreasonably deficient.

As a general rule, persons indicted together should be tried together. *United States v. Rocha*, 916 F.2d 219, 227-28 (5th Cir. 1990), *cert. denied sub nom. Hinojosa v. United States*, 111 S.Ct. 2057 (1991). Rule 14, Fed. R. Crim. P., however, allows severance if it appears that a defendant is prejudiced by the joinder of other defendants for trial. This prejudice may arise if a co-defendant refuses to give exculpatory testimony or if a co-defendant asserts irreconcilable or mutually exclusive defenses. *Rocha*, 916 F.2d at 231-32.

No such prejudice has been shown in this case; therefore, Mr. Mulvehill's failure to move for a severance did not constitute deficient representation. See *United States v. Garza*, 563 F.2d

1164, 1166 (5th Cir. 1977) ("When, as in this case, severance is not required as a matter of law, the failure to seek such relief can amount to nothing more than a mistaken tactical decision" and not to ineffective counsel), *cert. denied*, 434 U.S. 1077, 98 S.Ct. 1268 (1978).

Moreover, severance was not required because the firearms charge related to the conspiracy charge; Scott was indicted and convicted on the conspiracy charge with her co-conspirators and has not contested this conviction either on direct appeal or by the section 2255 motion before us now. We held on direct appeal that the evidence was sufficient to support her conviction on the firearms charge. We stated in our decision:

"The guns were found with ammunition in a bedroom containing cocaine. Delores Scott, moreover, was found in the apartment in possession of approximately \$2,200 in cash A jury thus could reasonably connect the cash to the drug trafficking, and infer that these specific guns were used as protection `in relation to' both the ill-gained cash and drugs found in the room." *Beverly*, 921 F.2d at 563.

Because Scott was clearly a member of the conspiracy, the offense to which the firearms charge related, and because there was sufficient evidence to support her conviction on the firearms offense, we cannot say that her trial counsel acted unreasonably in not moving for a severance. We also note that, because Scott's participation in the conspiracy with all the other defendants was shown, there was no evidence in the trial that would not have been admissible in a separate trial of Scott alone. See, e.g., *Bourgaily v. United States*, 107 S.Ct. 2775 (1987). Having satisfied ourselves that Scott's representation was not

unconstitutionally deficient, we need not consider the second part of the *Strickland* test; we note, however, that Scott has made no showing of any likelihood that the result would have been different had her trial been severed from that of her co-conspirators.

Our holding that Scott's trial counsel did not err in failing to request a severance is supported by the Supreme Court's opinion in *Pinkerton v. United States*, 328 U.S. 640, 647, 66 S.Ct. 1180, 1184 (1946). In *Pinkerton*, the Court ruled that a member of a continuing conspiracy may be held responsible for the substantive offenses committed by other members in furtherance of the conspiracy, even though that member does not participate in, or have actual knowledge of, the substantive offense.

We have applied this rule in the context of use or possession of firearms in furtherance of drug conspiracies. In *United States v. Raborn*, 872 F.2d 589, 595-96 (5th Cir. 1989), we affirmed a defendant's conviction of carrying the firearm found in his co-conspirator's truck pursuant to and in furtherance of a drug trafficking crime. Following *Pinkerton*, we held that a firearm conviction was proper even if the defendant did not have actual knowledge that his co-conspirator possessed the pistol, because the defendant was a member of the conspiracy. See also *United States v. Golter*, 880 F.2d 91, 93-94 (8th Cir. 1989) (firearms conviction proper under *Pinkerton* doctrine where co-conspirator's possession of a handgun was in furtherance of a drug conspiracy).

In the case before us, the district court charged the jury with a *Pinkerton* instruction. Thus the jury could properly have convicted Scott of the firearms offense on the basis of her

involvement with the drug conspiracy.

In her appellate brief, Scott moved this Court for appointment of counsel. Representation for financially eligible persons seeking relief under section 2255 may be provided when the interests of justice so require. 18 U.S.C. § 3006A(a)(2). As Scott's pro se brief describes the facts and issues adequately enough to enable us to render an opinion, the interests of justice do not require that we appoint counsel to pursue the matter further. See *Schwander v. Blackburn*, 750 F.2d 494, 502-503 (5th Cir. 1985).

Conclusion

We deny the motion for appointment of counsel. We affirm the district court's denial of section 2255 relief.

AFFIRMED.