

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 91-7199

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID BYRON HAYNIE,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
CIV 4 91 306 E (CR4 89 185 E)

April 27, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

David Byron Haynie, proceeding pro se, appeals the district court's denial of his motion under 28 U.S.C. § 2255 (1988) to vacate, set aside, or correct his sentence. Finding no error, we affirm.

Pursuant to a plea agreement, Haynie pled guilty to a two-count indictment charging him with robbery of a savings and loan (Count 1), in violation of 18 U.S.C. § 2113(a) and (d) (1988), and

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

using a firearm during a crime of violence (Count 2), in violation of 18 U.S.C. § 924(c)(1) (1988). Haynie was sentenced to a term of thirty-seven months imprisonment on Count 1, to run consecutively to his sixty month term of imprisonment on Count 2. Haynie was also sentenced to a five-year term of supervised release. Rather than filing a direct appeal, Haynie filed a § 2255 motion to vacate, set aside, or correct his sentence. The district court denied Haynie's motion, finding no merit in any of the over twenty-five grounds of relief cited in Haynie's motion. Haynie appeals the district court's decision, arguing that the court erred in denying him relief based upon his claims of: (a) a misapplication of the sentencing guidelines; (b) the use of illegally-obtained evidence; (c) an unknowing and unintelligent guilty plea; and (d) ineffective assistance of counsel. Haynie also contends that the district court erred in not granting him an evidentiary hearing, discovery, and default judgment.

We initially consider Haynie's motion for appointment of appellate counsel. See Brief for Haynie at 65-67. We may appoint counsel for Haynie where "the interests of justice so require." *Self v. Blackburn*, 751 F.2d 789, 793 (5th Cir. 1985) (citing Fifth Circuit Plan Under the Criminal Justice Act § 2). Haynie has adequately presented his own appeal, such that "[i]t is clear what issues [are] raised." *Id.* Therefore, we conclude that supplemental briefing by appointed counsel would not be in the interests of justice. See *id.*

On the merits of his appeal, Haynie first argues that the district court erred in denying him § 2255 relief based upon an alleged misapplication of the sentencing guidelines.¹ See Brief for Haynie at 32-45. Section 2255 offers relief for a narrow scope of trial errors. *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981). "It is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on direct appeal and, would, if condoned, result in a complete miscarriage of justice." *Id.* Because the sentencing court's application of the guidelines does not raise a constitutional issue, *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2032, 114 L. Ed. 2d 117 (1991), and because Haynie's complaints regarding his sentence could have been raised on direct appeal, we conclude that Haynie failed to state a cognizable error under § 2255.²

Haynie also argues that the district court erred in denying him relief based upon the use of evidence gained through an

¹ Haynie claims that the sentencing court: (a) improperly concluded that he had prior convictions for enhancement purposes, see Brief for Haynie at 36; and (b) failed to resolve disputed issues of fact in accordance with Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure. See Brief for Haynie at 44-45.

² Haynie also complains that the "sentencing guidelines do not comply with the statute creating them and the sentencing commission, because that body failed to obtain an adequate report by the general accounting office." Brief for Haynie at 32. Since this argument fails to raise a constitutional issue, and is such that could have been raised on direct appeal, this argument similarly fails to state a cognizable error under § 2255.

unconstitutional search and seizure.³ See Brief for Haynie at 32. "A defendant can challenge his conviction after it is presumed final only on [errors] of constitutional or jurisdictional magnitude, and may not raise an issue for the first time on collateral review without showing both 'cause' for his procedural default, and 'actual prejudice' resulting from the error." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991) (citation omitted), *cert. denied*, ___ U.S. ___, 112 S. Ct. 978, 117 L. Ed. 2d 141 (1992). Because he pled guilty, Haynie cannot show any actual prejudice resulting from the use of evidence obtained pursuant to the allegedly defective search warrant. "A guilty plea, since it admits all the elements of a formal criminal charge, waives all non-jurisdictional defects in the proceedings against a defendant." *Barrientos v. United States*, 668 F.2d 838, 842 (5th Cir. 1982); see also *United States v. Smallwood*, 920 F.2d 1231, 1240 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2870, 115 L. Ed. 2d 1035 (1991). Accordingly, Haynie could not raise this search and seizure issue for the first time on collateral review before the district court.

Haynie maintains that his guilty plea was entered unknowingly and unintelligently because he was not informed that his retained

³ He alleges that the government obtained a search warrant for his apartment through the use of a perjurious affidavit. See Brief for Haynie at 32; Record on Appeal, vol. 5, at 33. The evidence obtained from the search was considered by the magistrate judge at Haynie's joint probable cause and detention hearing. See Record on Appeal, vol. 5, at 3-39.

counsel was a government informant.⁴ See Brief for Haynie at 27-32. He claims that his retained counsel, Mike Newman, who represented Haynie at his initial appearance before the magistrate judge, made an anonymous phone call to the FBI designating Haynie as the bank robber. See *id.* at 20. Haynie offers no evidence to show that Newman was the informant who phoned the FBI. "Absent evidence in the record, a court cannot consider a habeas petitioner's bald assertions on a critical issue in his *pro se* petition . . . unsupported and unsupportable by anything else contained in the record, to be of probative evidentiary value." *Ross v. Estelle*, 694 F.2d 1008, 1011 (5th Cir. 1983). Accordingly, we find Haynie's challenge to his guilty plea without merit.⁵

Haynie next argues that he was denied effective assistance of both his retained and appointed counsel. See Brief for Haynie at 46-53. We examine claims of ineffective assistance of counsel to

⁴ He also argues that because the sentencing court rejected his plea agreement, he should be allowed to withdraw his plea. See Brief for Haynie at 45-46. The record does not support the conclusion that the court rejected the plea agreement. Although the court did state at the end of the hearing that "[t]here was no plea agreement in this case," see Record on Appeal, vol. 7, at 28, this appears to have been a simple mistake by the court. The sentencing hearing as a whole reflects that the court accepted the plea agreement, as it expressly found that Haynie's guilty plea was factually supported. See *id.* at 3-4.

⁵ Haynie also challenges his guilty plea on the grounds that: (a) the plea was based upon the government's failure to disclose exculpatory evidence to his defense))i.e., that Newman was a government informant, see Brief for Haynie at 13-22; and (b) the government allowed him to be represented by a known-informant. See *id.* at 22-26. Since Haynie's conclusory allegation regarding his counsel's informant status is not supported by the record, we find these additional challenges to his guilty plea similarly without merit.

determine whether counsel's performance was both deficient and prejudicial to the petitioner. *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984).

Haynie first claims that Newman was a government informant, and thus actively represented conflicting interests. See *id.* at 47. He also claims that his appointed counsel's performance was deficient because he did not uncover this alleged conflict of interest. See *id.* at 50. Because Haynie's conclusory allegation regarding Newman's informant status is unsupported by the record, we find these asserted grounds for Haynie's ineffective assistance claim to be without merit. See *Estelle*, 694 F.2d at 1011.

Haynie further claims that his appointed counsel, Michael Ware, provided ineffective assistance of counsel by failing to make various objections during the sentencing hearing. See Brief for Haynie at 50-51. After reviewing the sentencing hearing transcript, we cannot find any instances of objectively deficient performance by Haynie's appointed counsel. Haynie's arguments to the contrary are either completely without merit, or unsupported generalizations.⁶ Accordingly, we conclude that the district court

⁶ For example, Haynie claims that Ware's performance was deficient because he: (a) failed to object to the counting of prior offenses under U.S.S.G. § 4A1.2(c) and (f) (Nov. 1989); (b) failed to "insist[]" at Sentencing that the Court adhere to its decision that it not use the State "priors," see Brief for Haynie at 51; and (c) failed to object to the sentencing court's statement that "there was no plea agreement in this case." See *id.* at 50. The record indicates that the sentencing court properly applied § 4A1.2(c) and (f). See Record on Appeal, vol. 3, at 9-11. The record also shows that the sentencing court never promised to not use "State priors." See Record on Appeal, vol. 5 (sentencing transcript). Lastly, the record does not support Haynie's argument that the sentencing court rejected his guilty plea. See *id.* at 3-

did not err in failing to grant relief on Haynie's claim of ineffective assistance of counsel. See *Estelle*, 694 F.2d at 1011.

Haynie's remaining claims are of little merit and can be disposed of summarily. First, Haynie claims that the district court erred in denying his motion without an evidentiary hearing. Because the record conclusively supports the district court's finding that all of Haynie's claims either lacked merit or were nothing more than conclusory allegations, we conclude that the district court did not err in failing to hold an evidentiary hearing. See *Estelle*, 694 F.2d at 1011 n.2 ("[A] district court does not commit error when it disposes of a habeas petitioner's claims without holding a full-fledged evidentiary hearing when those claims are unmeritorious, conclusory, and wholly unsupported by the record."); see also *United States v. Jones*, 614 F.2d 80, 82 (5th Cir.) (holding that a district court did not err in failing to hold an evidentiary hearing on a § 2255 motion, where petitioner's claims conclusory in nature and unsupported by the record), cert. denied, 446 U.S. 945, 100 S. Ct. 2174, 104 L. Ed. 2d 801 (1980).

Haynie next claims that the district court erred in denying discovery. See Brief for Haynie at 54. A petitioner may invoke the discovery processes available under the Federal Rules of Civil Procedure "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." Rule 6 of the Rule Governing 28 U.S.C. § 2255.

Because Haynie failed to show cause, the district court did not abuse its discretion by denying Haynie discovery.

Lastly, Haynie argues that he is entitled to a default judgment as to any issues that he raised that the government failed to address. See Brief for Haynie at 55. Because Haynie has not established a right to § 2255 relief, this argument is without merit. See Fed. R. Civ. P. 55(e) ("No judgment may be entered against the United States . . . unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.").⁷

For the foregoing reasons, we **DENY** Haynie's motion for appointment of appellate counsel, and **AFFIRM** the district court's judgment.

⁷ Haynie also disputes that he has abused the writ of habeas corpus. See Brief for Haynie at 55. Since the district court's denial was not based on a finding that Haynie abused the writ, this argument is without merit.