UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-8361
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD KEITH HALVERSON,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(P-90-CA-16)

(January 26, 1993)

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

GARWOOD, Circuit Judge:

Petitioner-appellant Ronald Keith Halverson (Halverson) appeals the district court's denial of his motion to vacate under 28 U.S.C. § 2255. Concluding that Halverson's contentions on appeal fail to demonstrate any reversible error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Factual and Procedural Background

On October 30, 1988, Halverson arrived at the Border Patrol checkpoint in Desert Haven, Texas driving a 1988 Mercury Sable with codefendant Bradley Arnold Johnson (Johnson) as a passenger. Border Patrol Agent Frank McKinney inquired as to their citizenship and noticed that Halverson was extremely nervous and avoided eye contact. Agent McKinney asked Halverson what was in the trunk; Halverson responded that it contained a few things that he had bought in Mexico. Halverson agreed to allow Agent McKinney to search the trunk. While Halverson was opening the trunk, Border Patrol Agent Manuel Padilla was walking his trained narcotics dog Itar to a different vehicle. As Itar passed Halverson, Itar alerted positively on Halverson. The car was referred to secondary inspection, where Itar alerted positively to the passenger door and underneath the back seat of the car. Under the back seat on the driver's side, the border patrol agents found a brick shaped package containing approximately 999 grams of 81% pure cocaine.

Halverson was indicted of possession with intent to distribute over 500 grams of cocaine, in violation of 21 U.S.C. § 841(a)(1), and conspiring with Johnson to possess with intent to distribute over 500 grams of cocaine, in violation of 21 U.S.C. § 846. On January 3, 1989, Halverson pleaded guilty to the possession charge in exchange for the government's agreeing to dismiss the conspiracy charge. The government also agreed to recommend that Halverson had accepted responsibility. Before accepting Halverson's plea, the district court asked Halverson if he were competent or taking any medication. After receiving satisfactory responses, the district

court affirmatively declared that it found Halverson competent.

On March 3, 1989, Halverson moved to withdraw his guilty plea. He alleged that he had a serious case of hepatitis when he pleaded guilty and was not thinking clearly. As support, he attached a letter from a doctor who had been treating him since December. At the sentencing hearing on March 6, 1989, the district court held a hearing on the motion to withdraw the guilty plea and denied the motion. The court subsequently sentenced Halverson to eighty-four months' imprisonment and four years' supervised release.

Halverson appealed to this Court, asserting that the district court abused its discretion in refusing to allow him to withdraw his guilty plea. On January 4, 1990, we affirmed the district court's decision in an unpublished opinion. *See United States v. Halverson*, No. 89-1289 (5th Cir. 1990) (unpublished).

On May 1, 1990, Halverson, proceeding *pro se*, filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. He alleged that he was innocent of both charges and that he received ineffective assistance of counsel. On September 20, 1990, the district court denied the motion to vacate, set aside, or correct the sentence. Halverson filed a motion for reconsideration, and subsequently filed an addendum to the motion for reconsideration. On April 23, 1991, the district court denied the motion for reconsideration. That order was clarified on May 17, 1991, when the district court filed a supplemental order. Halverson timely filed a notice of appeal on June 10, 1991.

Discussion

A. Ineffective Assistance of Counsel

Halverson contends that he received ineffective assistance of counsel because his lawyers' advice to enter the plea was unreasonable and prejudicial because there was insufficient evidence to prove that he committed the offense. He also asserts that his lawyers were ineffective by failing to litigate a motion to suppress evidence. His final contention is that his counsel participated in framing him to protect Johnson's identity as a government informant.

The Supreme Court delineated the test for ineffective assistance of counsel in *Strickland v. Washington*, 104 S.Ct. 2052 (1984).

> "To succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate both that his counsel's performance was `outside the wide range of professionally competent assistance,' and that `there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' . . . The burden of proving either element is heavy, as `counsel is strongly presumed to have rendered adequate assistance and . . . exercise[d] reasonable professional judgment,' and every legal proceeding commands a `strong presumption of reliability.'" *Kirkpatrick v. Butler*, 870 F.2d 276, 279 (5th Cir. 1989) (quoting *Strickland*, 104 S.Ct. 2052 (1984)), *cert. denied*, 110 S.Ct. 854 (1990).

The same two-part standard applies to ineffective assistance claims arising out of the plea process: the petitioner must establish "that but for his counsel's alleged failure to inform and misrepresentations he `would not have pleaded guilty and would have insisted on going to trial.'" *United States v. Smith*, 915 F.2d 959, 963 (5th Cir. 1990) (quoting *Uresti v. Lynaugh*, 821 F.2d 1099,

1101 (5th Cir. 1987)).

1. *Insufficient evidence*

Halverson complains that the district court failed to address his contention that his counsel was ineffective when his lawyers advised him to plead guilty despite the existence of a car rental agreement which revealed that Johnson was the sole authorized driver. Halverson contends that the rental agreement thus demonstrates that Johnson was the only one in control of the car, and thus was the only one in possession of the cocaine and therefore his lawyers were ineffective in not presenting a "mere presence" defense.

To establish possession with intent to distribute, the Government must prove beyond a reasonable doubt that the defendant: "(1) knowingly (2) possessed contraband (3) with the intent to distribute it." *United States v. Garcia*, 917 F.2d 1370, 1376 (5th Cir. 1990). In proving possession, the government may establish actual or constructive possession by direct or circumstantial evidence. *Id.* "Constructive possession may be proved by a defendant's ownership, dominion or control over the contraband itself or over the premises or vehicle in which the contraband is concealed." *United States v. Ascarrunz*, 838 F.2d 759, 763-64 (5th Cir. 1988). "Constructive possession need not be exclusive, it may be joint with others, and it may be proven with circumstantial evidence." *United States v. McKnight*, 953 F.2d 898, 901 (5th Cir. 1992), *cert. denied*, 112 S.Ct. 2975 (1992). One who exercises dominion and control over an automobile in which narcotics are concealed may be deemed to be in possession of the narcotics.

United States v. Dreyfus-deCampos, 698 F.2d 227, 229-30 (5th Cir.), *cert. denied*, 103 S.Ct. 2123 (1983).

The record indicates that Halverson was driving when he and Johnson arrived at the Border Patrol checkpoint. Halverson responded to the agent's questions about what was in the trunk and assented to the agent's request to search the trunk, indicating some control over the vehicle. Finally, we note that the narcotics dog Itar alerted positively on Halverson personally. Taken together, these factors indicate sufficient dominion and control over the car and the contraband for constructive possession to be inferred. Because Halverson would not have been entitled to a directed verdict of acquittal on a mere presence defense (or otherwise), and before a

jury such a defense may well not have been successful, his lawyers were not ineffective in advising Halverson to plead and not to go to trial. Furthermore, we note that Halverson benefitted by pleading guilty; the conspiracy charge was dropped and the government agreed to recommend a two-point reduction for acceptance of responsibility, reducing his possible term of imprisonment from 92-115 months to 77-96 months.

2. *Motion to Suppress*

Halverson also argues that his attorneys were ineffective in failing to procure a hearing on his motion to suppress. He relies on *Horton v. Goose Creek I.S.D.*, 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 3536 (1983) to argue that the dog sniff was a search and that the evidence uncovered as a result of the sniff should have been suppressed under the Fourth Amendment. In *Horton*,

dog sniffs were performed randomly at schools. We found the sniffing technique to be intrusive because the dogs sniffed around each child, put their noses on the child, and scratched and manifested other signs of excitement in the case of an alert. We held that "sniffing by dogs of the students' persons in the manner involved in this case is a search within the purview of the fourth amendment." We explicitly refused to decide "whether the use of dogs to sniff people in some other manner, e.g., at some distance, is a search." *Id.* at 479.

The dog sniff in the instant case is under different enough circumstances that it is not controlled by our narrow holding in *Horton*. This sniff was performed at a border checkpoint, a very different environment than a high school. We have previously held that a dog sniff at a primary or secondary checkpoint does not constitute a search. *See United States v. Dovali-Avila*, 895 F.2d 206, 207 (5th Cir. 1990). Furthermore, the record reflects that Agent Padilla was simply walking Itar past Halverson on their way to another location when Itar stopped and alerted on Halverson. While Itar might have placed his nose on Halverson at some point (as Halverson alleges in his affirmation), Agent Padilla did not walk Itar up to Halverson for the express purpose of Itar conducting a dog sniff. In *Horton*, we recognized that courts have adopted a "public smell" doctrine "analogous to the exclusion from fourth amendment coverage of things exposed to the public `view'." *Horton*, 690 F.2d at 477. We reasoned that

> "if a police officer, positioned in a place where he has a right to be, is conscious of an odor, say, of marijuana, no search has occurred; the aroma emanating

> from the property or person is considered exposed to the public `view' and, therefore, unprotected. . . . [T]he sniffing of a dog is `no different,' . . . the dog's olfactory sense merely `enhances' that of the police officer." *Id.*

The dog sniff in the instant case is much more akin to the concept of a public smell than to the intrusive sniffs that occurred in *Horton*.

With the foregoing jurisprudence established, we cannot conclude that Halverson's attorneys were "outside the wide range of professionally competent assistance" in not litigating the motion to suppress. After surveying the relevant case law, Halverson's counsel could have reasonably concluded that their chance of success on a motion to suppress was slight at best and that it would be more beneficial for Halverson to plead guilty and have the government agree to dismiss the conspiracy charge and recommend that he had accepted responsibility. Alternatively, we note that Halverson has not suffered any prejudice from his attorneys' failure to litigate the motion to suppress since, under our reading of *Horton* and *Dovali-Avila*, the motion should have and would have been denied.

In a slight variation, Halverson also contends that his attorneys were ineffective not only for failing to litigate the motion, but also for deceiving him into believing that the district court had denied the motion to suppress. In his sworn affirmation, Halverson states that his attorneys told him he had no choice but to plead guilty, that this upset him because he was innocent, and prompted him to get a drink to calm his nerves. He alleges that this drink combined with his hepatitis caused him to not fully

understand what was going on. He contends that while he was in this muddled condition, his attorneys deceived him into believing that the judge had denied the motion to suppress and that therefore he needed to plead guilty.

This assertion, if true, would raise serious questions regarding the nature of the representation that Halverson received. We have reason to question, however, whether Halverson's attorneys ever specifically stated that the motion to suppress had been denied, as Halverson intimates. First, we note that Halverson never states explicitly that his attorneys *told* (or otherwise informed) him that the motion had been denied; instead, he alleges only that they deceived him into believing this. Second, we note that both of Halverson's attorneys filed affidavits averring that they never told him that the motion had been denied. While there may have been a misunderstanding between Halverson and his attorneys, it appears that the attorneys told Halverson that the motion was as good as denied. Granting that such a statement was somewhat ambiguous, and assuming it actually lead to a misunderstanding, making such a statement was not in and of itself unreasonable. Furthermore, even if we assume that Halverson's attorneys actually told him that the motion had been denied, Halverson has not demonstrated the prejudice necessary for ineffective assistance of counsel because the motion to suppress was not meritorious and would have been denied anyway.

3. *Informer status of codefendant Johnson*

Halverson contends that Johnson was a government informant dealing drugs. He asserts that his attorneys told him that Johnson

was an informant and that Halverson had no choice but to plead guilty. He contends that this recommendation that he plead guilty so that charges could be dismissed against Johnson by the government without exposing his informer status was ineffective assistance. Johnson also argues that the district court erred in not addressing this claim and in refusing to order that certain documents that he requested be produced for at least an *in camera* review.

We find nothing in the record supporting the existence of this far-fetched conspiracy. Halverson's hypothesis is based solely on the fact that Johnson had an FBI number and that Halverson was refused some information from the Drug Enforcement Administration. The assistant United States Attorney filed an affidavit that Johnson was not a government informant. Although habeas petitions should be construed liberally, mere conclusory allegations on a critical matter are insufficient to raise a constitutional issue. *See United States v. Woods*, 870 F.2d 285, 288 n.3 (5th Cir. 1989). "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, because Halverson has produced nothing but conclusory allegations belied by the record, the district court did not err in not granting him relief on this claim.

B. Evidentiary Hearing

Halverson's final claim is that the district court erred in not granting him a hearing on his ineffective assistance claims. Halverson claims that his attorneys' declarations were contradictory, and thus that the district court was required to hold an evidentiary hearing because there were disputed issues of fact outside of the record.

The question whether an evidentiary hearing is necessary to resolve charges of ineffective assistance depends on an assessment of the record. *United States v. Smith*, 915 F.2d 959, 964 (5th Cir. 1990). "If the district court cannot resolve the allegations without examining evidence beyond the record, it must hold a hearing." *Id.* An evidentiary hearing is also unnecessary "when the petitioner's allegations are `inconsistent with his conduct' and when he does not offer `detailed and specific facts' surrounding his allegations." *United States v. Smith*, 915 F.2d 959, 964 (5th Cir. 1990) (quoting *Davis v. Butler*, 825 F.2d 892, 894 (5th Cir. 1987)). Thus, conclusory allegations of ineffective assistance fail to surmount the formidable barrier presented by a petitioner's own open court assertions and thus do not require an evidentiary hearing. *Harmason v. Smith* 888 F.2d 1527, 1531 (5th Cir. 1989).

In the declarations, one of Halverson's attorneys, Michael Hill, attested that Halverson said he would plead guilty if Johnson would get off. Halverson's other lawyer, Michael Gibson, stated that both he and Hill strongly advised Halverson to plead guilty and advised Halverson that his motion to suppress would probably be

denied. The fact that Hill and Gibson have differing accounts of the advice they gave Halverson is not sufficient to require an evidentiary hearing. This seemingly contradictory testimony is only material to the issue of whether Halverson pleaded guilty of his own volition. At the guilty plea hearing, Halverson, under oath, attested that he had possessed the cocaine with the intent to distribute and had agreed to plead guilty of his own volition. Similarly, Halverson admitted his guilt to the probation officer who compiled the presentence report. Because the record reveals that Halverson was not coerced into pleading guilty, an evidentiary hearing was not necessary to resolve the minor variations between Hill's and Gibson's accounts of the advice they gave Halverson.

Conclusion

Having found the district court did not commit any reversible error, we affirm.

AFFIRMED