UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-9547
No. 92-3057
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Versus

JOE DAVID DELAGARZA,

Defendant-Appellant.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Versus

LARRY LEE OCHSNER,

Defendant-Appellant.

Appeals from the United States District Court
For the Eastern District of Louisiana
(CA-91-1739(CR-89-220) & CA-90-5045(CR 89-220))

(February 24, 1993)

Before JOLLY, DUHE, BARKSDALE, Circuit Judges.

PER CURIAM:[1]

I

Joe David Delagarza and Larry Ochsner, represented by counsel, pleaded guilty to one count of conspiracy to manufacture phenyl-2-propanone (P2P) and one count of use of a firearm in a drug trafficking offense. One week later they filed a pro se motion to withdraw their guilty pleas and to request new counsel, alleging that their attorneys "induced" them to plead guilty. Following an evidentiary hearing the district court denied the motion.

The probation officer preparing the Presentence Investigation Reports (PSR) initially relied on Government information that the object of the conspiracy was to produce ten pounds of methamphetamine to determine Delagarza's and Ochsner's base offense levels. Delagarza and Ochsner objected to this calculation, arguing that the object of the conspiracy was to produce nine pounds of amphetamine. The district court sustained the objections and used nine pounds of amphetamine to determine their base offense levels. Delagarza was sentenced to 151-months imprisonment on count I, a consecutive 60-month term on count II, 3-years supervised release, and a $100 special assessment. Ochsner was sentenced to 154-months imprisonment on count I, a consecutive 60-

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

month term on count II, 3-years supervised release, and a $100 special assessment. Delagarza and Ochsner appealed their convictions arguing only that the district court abused its discretion by denying their motions to withdraw their guilty pleas. Their convictions were affirmed.

Delagarza filed a § 2255 motion alleging that his sentence was unconstitutional because he was convicted of conspiracy to manufacture P2P but was sentenced based on the quantity of amphetamine the conspirators intended to produce and that he was denied effective assistance of counsel. The district court denied his motion on the merits.

Ochsner filed a § 2255 motion alleging he was denied effective assistance of counsel because his attorney was not prepared to go to trial and therefore "induced" him to plead guilty; that the informant provided false information to the Drug Enforcement Agency; that he was convicted under a falsified indictment; that he was sentenced for false charges; and that the probation officer provided false information in the PSR. In his motion to amend his § 2255 motion, Ochsner alleged that P2P is not a controlled substance, and in his response to the Government's answer to his § 2255 motion, he alleged that he was denied effective assistance of counsel because although count I of the indictment did not charge a crime and he had a valid defense to count II, his attorney induced him to plead guilty, and his appellate counsel failed to raise any issues on appeal. The district court denied the motion, but did not address the issues raised in the two subsequent filings.

II

Delagarza and Ochsner alleged that they were denied effective assistance of counsel. To prevail on this claim they must demonstrate that their attorneys' performance was deficient and that the deficient performance prejudiced their defenses. Strickland v. Washington, 466 U.S 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

A

Delagarza alleges that he was denied effective assistance of counsel at sentencing because his attorney failed to object to the use of amphetamine instead of P2P to determine his base offense and failed to object to the inclusion of a juvenile conviction in his criminal history score; and that he was denied effective assistance of appellate counsel because his attorney failed to raise any sentencing issues on appeal.

Under U.S.S.G. § 1B1.3 the district court considers all relevant conduct to determine a defendant's base offense level. Delagarza conceded that the object of the conspiracy was to produce nine pounds of amphetamine. Under § 1B1.3, therefore, the district court properly considered this quantity to determine Delagarza's base offense level. See U.S. v. Byrd, 898 F.2d 450, 452 (5th Cir. 1990) ("The guidelines make clear that in drug distribution cases quantities of drugs not specified in the count of conviction are to be included in determining the base offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction."). Delagarza cannot demonstrate that his attorney's performance was deficient for failing to make this

meritless objection.

Similarly, the district court properly considered Delagarza's 1977 conviction for aggravated rape. Although Delagarza was only sixteen at the time of the offense, he was, as is reflected in his PSR, tried as an adult and represented by counsel, and therefore the conviction is counted. U.S.S.G. §§ 4A1.1(a), 4A1.2(d)(1), (e)(1). Delagarza alleges that he was not represented by counsel, but provides no evidence to support his statement. U.S. v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990) (PSR has sufficient indicia of reliability to permit the district court to consider it evidence). The district court properly considered this conviction and therefore Delagarza's attorney's performance was not deficient for failing to challenge its inclusion in Delagarza's criminal history score.

Finally, Delagarza alleges that his appellate counsel was ineffective for failing to raise any sentencing issues on direct appeal. However, Delagarza does not indicate what issues his appellate counsel should have raised. Delagarza's conclusional allegations are insufficient to state a cognizable ineffective-assistance-of-counsel claim. Knighton v. Maggio, 740 F.2d 1344, 1349 (5th Cir.), cert. denied, 469 U.S. 924 (1984). Delagarza has not demonstrated that he was denied effective assistance of counsel.

B

Ochsner alleges that his trial and appellate counsel were ineffective. He alleges his trial counsel was ineffective because he failed to investigate adequately the facts to determine that P2P

is not a schedule II controlled substance as charged in the indictment and that Ochsner had a valid defense to count II; he conspired with the prosecutor to induce him to plead guilty; he failed to raise a Speedy Trial Act objection; and he failed to object to the use of amphetamine rather than P2P to determine his base offense level. He alleges that his appellate counsel was ineffective because he raised only one issue on direct appeal and other errors were plainly evident from the record.

The Government argues that this Court should not address most of Ochsner's allegations because Ochsner failed to raise them in the district court. Ochsner raised most of the claims in his original § 2255 motion, his motion for leave to amend his § 2255 motion, and his response to the Government's answer to his § 2255 motion. The allegations were thus adequately raised before the district court. See Howard v. King, 707 F.2d 215, 220 (5th Cir. 1983) (In actions involving pro se litigants "the court [is] required to look beyond the [plaintiff's] formal complaint and to consider as amendments to the complaint those materials subsequently filed."); James by James v. Sadler, 909 F.2d 834, 836 (5th Cir. 1990) ("Federal Rule of Civil Procedure 15(a) requires a district judge freely to permit amendments [to a complaint] unless the ends of justice require denial."). As will be discussed below, however, any error in the district court's failing to address the claims in the subsequent filings was harmless because the record clearly establishes that they are meritless. To be sure, Ochsner's Speedy Trial Act and sentencing claims were never raised in the district court and are not properly before this Court. U.S. v.

Smith, 915 F.2d 959, 964 (5th Cir. 1990).

Ochsner argues that his trial attorney failed adequately to investigate the facts of the case because count I of the indictment did not charge an offense and he had a valid defense to count II. Count I of the indictment charged Ochsner with conspiracy to manufacture P2P, a Schedule II controlled substance. Ochsner contends that P2P is not a Schedule II controlled substance. This claim is meritless because P2P is specifically listed as a Schedule II controlled substance. See 21 C.F.R. §§ 1308.12(a) and (g)(1)(i) (1974).

Count II of the indictment charged Ochsner with using or carrying a firearm in furtherance of a drug trafficking offense in violation of 21 U.S.C. § 924(c). Ochsner contends that he had a valid defense to this count because he was in Texas at the time his coconspirators were arrested in possession of the three firearms. A conspirator can be convicted under § 924(c) if a coconspirator used or carried a firearm in furtherance of the conspiracy. See U.S. v. Raborn, 872 F.2d 589, 595-96 (5th Cir. 1989). Thus, Ochsner's challenges to the indictment are meritless; he cannot demonstrate that his attorney was deficient for failing to raise these claims.

Ochsner also argues that his trial attorney was ineffective because he conspired with the prosecutor and induced him to plead guilty. This claim was raised and rejected in Ochsner's motion to withdraw his guilty plea and on direct appeal. Issues raised and rejected on direct appeal may not be considered in a § 2255 motion. U.S. v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476

U.S. 1118 (1986).

Finally, Ochsner alleges that his appellate counsel was ineffective for failing to raise issues on direct appeal that were plainly evident from the record. Ochsner does not indicate what issues his appellate counsel should have raised, and his conclusional allegations are insufficient. Knighton, 740 F.2d at 1349. To the extent that he alleges his appellate counsel should have raised the claims discussed above, these claims were meritless and he cannot show that his attorney's performance was deficient because he failed to raise meritless claims. Ochsner has not demonstrated that he was denied effective assistance of counsel.

III

A

Ochsner next argues that the indictment was fatally defective because P2P is not a Schedule II controlled substance and therefore count I did not charge an offense and the district court did not have subject matter jurisdiction. This claim was not waived by Ochsner's guilty plea and may be raised for the first time in a § 2255 motion. U.S. v. Osiemi, 980 F.2d 344 (5th Cir. Jan. 5, 1993, No. 91-3818) slip p. 1612, 1613. As discussed above, P2P is a Schedule II controlled substance and this claim is meritless. See 21 C.F.R. § 1308.12(g)(1)(i).

B

Ochsner also argues that his sentence was based on false information provided by the probation officer in the PSR; that the district court failed to resolve the factual disputes on the record as required by Fed. R. Crim. P. 32(d); and that he should not have

been sentenced based on the quantity of amphetamine that the conspiracy intended to produce. To the extent that Ochsner alleges that his sentence was based on false information and the district court failed to resolve the factual disputes, his allegations are not supported by the record. The district court carefully considered Ochsner's objections to the PSR and resolved all disputed factual issues that were material to his sentence. To the extent he is challenging the technical application of the sentencing guidelines, his claim is not cognizable in a § 2255 motion. U.S. v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Thus this claim is also meritless.

IV

Finally, Delagarza and Ochsner argue that they were entitled to an evidentiary hearing on their claims. A § 2255 movant is not entitled to an evidentiary hearing of the claims that are either contrary to law or plainly refuted by the record. U.S. v. Green, 882 F.2d 999, 1008 (5th Cir. 1989). As discussed above, the claims raised by Delagarza and Ochsner were meritless or refuted by the record, and an evidentiary hearing was not necessary.

V

For the reasons we have set out in this opinion, the district court's denial and dismissal of each of the claims of each of the appellants, is

A F F I R M E D.