

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-1135
No. 93-1349
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ZAKEE MUHAMMAD IDDEEN, a/k/a
WINDEL X. McMILLIAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

(CA3-89-642-D(CR3-86-141-D))

(April 12, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Pursuant to a plea agreement, Zakee Muhammed Iddeen (Iddeen) pleaded guilty of mail fraud in 1986. Later, the district judge denied Iddeen's motion to withdraw his plea and sentenced him to a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

four-year term of imprisonment on each of the ten counts of conviction. The district judge made the sentences run consecutively. This Court affirmed Iddeen's conviction. The district court denied Iddeen's motion under former Fed. R. Crim P. 35 to reduce his sentence. This Court affirmed the district court's denial.

Iddeen then filed a motion under 28 U.S.C. § 2255 for post-conviction relief. He later amended his motion. The district judge denied Iddeen's motion. Iddeen filed a notice of appeal. The clerk of this Court granted Iddeen a stay of his appeal so that Iddeen could file another § 2255 motion to raise another issue.

Iddeen returned to the district court and filed a motion for rehearing and for recusal of the district judge. The district judge denied Iddeen's motion. Iddeen filed a second motion for § 2255 relief. The magistrate judge recommended that the district judge deny relief. The district judge adopted the magistrate judge's report and recommendations and denied Iddeen's § 2255 motion. The clerk of this Court granted Iddeen's motion to consolidate his appeals.

OPINION

Iddeen first contends that the district judge violated Fed. R. Crim. P. 32 and the Due Process Clause by failing to identify the victims of Iddeen's fraud and by failing to make a specific finding regarding the amount of fraud for which Iddeen was responsible. Iddeen raised in his first § 2255 motion the issue of the district judge's failure to identify the victims. To the extent that Iddeen

wishes to raise a contention under Fed. R. Crim. P. 32, the narrow scope of § 2255 precludes him from so doing.

Relief under 28 U.S.C.A. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding.

United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992)(internal citation omitted). Iddeen could have raised a Rule 32 violation as an issue on direct appeal.

Due process requires that the information that the trial judge relies on in sentencing have "some minimal indicium of reliability" and "bear some rational relationship to the decision to impose a particular sentence." The defendant bears the burden of proving that the information considered in sentencing is "materially untrue."

United States v. Galvan, 949 F.2d 777, 784 (5th Cir. 1991)(citations omitted). The sentencing transcript does not indicate that the district judge relied on the identity of Iddeen's victims when passing sentence. Nor did Iddeen object when the district judge noted that Iddeen's offense had "led to the physical destruction of many people's lives." Iddeen does not contend that the district judge's conclusion was based on facts that are materially untrue. His due process claim regarding the identity of his victims must fail.¹

¹ Iddeen evidently did not raise his contention on direct appeal or in his motion under former Fed. R. Civ. P. 35. See R. 2, 240-48; R. 3, 323-26. The district court did not consider whether Iddeen was procedurally barred from raising the contention in his

Iddeen raised the district judge's failure to make a specific finding on the amount of fraud in the district court solely in his motion for a rehearing and for recusal of the district judge. In that motion, Iddeen contended that counsel's failure to object to the district court's statement that Iddeen had committed a "massive amount of fraud" constituted ineffective assistance of counsel because the district judge had obtained his information from outside the record; that the judge should recuse himself and testify about the definition of a "massive amount of fraud"; and that his sentence was disproportionate. Even construing Iddeen's rehearing and recusal motion liberally in the context of his § 2255 proceeding, see Haines v. Kerner, 404 U.S. 519 (1972), this Court finds that Iddeen failed to raise a claim under either Rule 32 or the Due Process Clause regarding the district judge's finding that he had committed a "massive amount of fraud." Iddeen did not contend that the district judge violated Rule 32 or the Due Process Clause by basing his sentence, in part, on finding that Iddeen had

§ 2255 proceedings. See R. 3, 461-63; Supp. R. 12-14, 64-67, 69. The Government made no appearance in those proceedings and therefore did not raise the procedural bar issue. See Loose Papers, tab B. This Court therefore need not consider whether Iddeen was procedurally barred from raising the due process aspect of the alleged failure of the district court to make factual findings. See U.S. v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992).

engaged in a "massive amount of fraud." See id. Rather, Iddeen's motion was based on ineffective assistance of counsel and recusal arguments.

Even assuming that Iddeen's recusal and rehearing motion should be construed as an amendment to his § 2255 motions, his contention regarding the district judge's finding that he committed a "massive amount of fraud" must fail. First, Iddeen did not object to the district judge's finding. Second, the factual basis for the plea, which Iddeen signed, indicates that he was involved in defrauding insurance companies for at least ten non-existent automobile accidents. Iddeen does not contend that his own factual basis is materially inaccurate. That factual basis supports the district court's conclusion regarding the scope of Iddeen's fraud.

Iddeen, who is represented by counsel, argues that the judge should have recused himself because he had personal knowledge about disputed sentencing facts, specifically, the identity of the victims and the meaning of a "massive amount of fraud." Iddeen also contends that the district judge should be called at an evidentiary hearing to divulge his knowledge.

A federal judge should recuse himself, *inter alia*, "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding[.]" 28 U.S.C. § 455(b)(1). Iddeen has not shown that the district judge had personal, extra-judicial knowledge about any of the facts in Iddeen's case. Iddeen's contention that the district judge should be called as a witness at an evidentiary

hearing is ridiculous and deserves no further comment.

Iddeen next contends that his cumulative sentence of 40 years in prison is disproportionate and violates the Eighth Amendment. He raised his disproportionality contention on direct appeal and in his former Rule 35 motion. "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." United States v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1986). Iddeen is foreclosed from raising his Eighth Amendment contention.

Iddeen contends that his guilty plea was induced by counsel's ineffective assistance. He raised ineffective-assistance contentions in his direct appeal. This Court disposed of those contentions on the merits. "`A claim of ineffective assistance of counsel, once raised, litigated and rejected . . . cannot be raised in a later proceeding merely by varying the factors allegedly demonstrating incompetency.'" Glass v. Butler, 820 F.2d 112, 115 (5th Cir. 1987)(citation omitted). Iddeen therefore is foreclosed from raising his ineffective-assistance contentions.

Iddeen next contends that the district judge violated the Due Process Clause and Fed. R. Crim. P. 32 by relying on information gained at his co-defendants' trial without notifying Iddeen that he would do so and without giving Iddeen an opportunity to controvert the information on which the judge relied. Iddeen raised his contention in his motion under former Rule 35. He therefore is foreclosed from raising his contention in his § 2255 proceeding.

Iddeen next contends that the district court should have held evidentiary hearings on his motions. The district court may dispose of a defendant's § 2255 motion without a hearing if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" United States v. Drummond, 910 F.2d 284, 285 (5th Cir. 1990)(citation omitted), cert. denied, 498 U.S. 1104 (1991). The motion and files of Iddeen's case conclusively show that he is entitled to no relief. No evidentiary hearing was necessary.

Finally, Iddeen contends that the district court should not have dismissed his second motion as an abuse of § 2255. Iddeen argues that he did not know the legal significance of the new grounds of ineffective assistance of counsel he raised in that motion when he filed his first motion. He also argues that the Court may consider the due process claim raised in his second motion because the district court disposed of his first motion on the merits.

As is discussed above, Iddeen is foreclosed from bringing new ineffective-assistance claims. Additionally, as is discussed above, Iddeen is foreclosed from contending that the district judge erred by relying on information gained at the trial of Iddeen's co-defendants. Because Iddeen cannot raise either of the contentions he attempted to raise in his second § 2255 motion, this Court need not address whether the district court dismissed a portion of his second motion as repetitive.

Iddeen's appeal is frivolous. Iddeen now has had three bites at the appellate apple. This Court takes this occasion to warn Iddeen and his retained attorney, Kevin J. Clancy, that future frivolous appeals on Iddeen's behalf, particularly appeals in which he attempts to raise issues he is foreclosed from raising, could result in sanctions.

DISMISSED.