UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-1428
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ERIC NELSON BERTRAM,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(CA2-90-0087 & CR-2-86-36)

(March 1, 1993)

Before HIGGINBOTHAM, SMITH, and DeMoss, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

Eric Nelson Bertram was convicted on three federal firearms counts, and this Court affirmed. United States v. Bertram, No. 87-1236 (5th Cir. Sept. 15, 1987) (unpublished). Bertram filed a motion to correct the sentence, which the district court denied, and this

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Court affirmed. United States v. Bertram, No. 89-1018 (5th Cir. Nov. 2, 1989)(unpublished).

Bertram then filed a § 2255 motion. The district court denied the motion with little analysis. This Court vacated and remanded for the district court to explain its reasons for denying the motion. This Court also suggested that an evidentiary hearing might be appropriate. United States v. Bertram, No. 90-1355 (5th Cir. Oct. 16, 1990) (unpublished). Without conducting an evidentiary hearing, the district court entered reasons and again denied the motion.

Relief under § 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. United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981). Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be raised in a collateral proceeding. Id.

Even when a defendant alleges a fundamental constitutional error, he generally "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) (en banc) (quoting United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)), cert. denied, 112 S. Ct. 978 (1992). This procedural bar is invoked only when the government raises it in the district court. United States v. Drobny, 955 F.2d

990, 994-95 (5th Cir. 1992). As the government did not respond to the motion, this procedural bar is not applicable in this case.

OPINION

Ineffective Counsel

Bertram argues that counsel was ineffective for lack of preparation due to the trial court's denial of a motion for a 30-day continuance. Ineffective assistance of counsel claims are reviewed for federal constitutional error under the two-prong standard of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To satisfy this standard, a defendant must establish that counsel's performance fell below an objective standard of reasonable competence and that he was prejudiced by his counsel's deficient performance. Id. at 687.

Judicial scrutiny of counsel's performance is highly deferential. Id. at 689. Courts indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and a defendant must overcome the presumption that the challenged action might be considered sound trial strategy. Id. To demonstrate prejudice, a defendant must show that, but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. Id. at 694. The Supreme Court stated, "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Id. at 697.

This Court has already held that the district court did not abuse its discretion in denying the motion for continuance and went on to state, "Bertram's counsel conducted discovery, filed numerous pretrial motions and requested supoenas [sic] of witnesses. At trial, counsel presented twelve witnesses and cross-examined the government's witnesses." Furthermore, a short preparation time does not necessarily mean that counsel was ineffective. United States v. Stotts, 870 F.2d 288, 290 (5th Cir.), cert. denied, 493 U.S. 861 (1989). Bertram has specified no failing of counsel that would show either deficiency or prejudice.

Moreover, Bertram's allegation that the denial of the continuance resulted in counsel being ineffective is conclusional. A habeas petitioner's conclusional allegations on a critical issue are insufficient to raise a constitutional issue. Koch v. Puckett, 907 F.2d 524, 530 (5th Cir. 1990); Ross v. Estelle, 694 F.2d 1008, 1012 (5th Cir. 1983).

Alibi Witness

Bertram argues that the district court improperly disqualified Mindy Kidder as an alibi witness and that counsel was ineffective for not avoiding this mistake. The trial court sustained the government's objection to the defense calling Kidder if the defense was offering her as an alibi witness.

Bertram makes no specific allegations as to the testimony that Kidder would have given had she testified. Self-serving assertions about the testimony of an uncalled witness are insufficient for post-conviction relief. United States v. Cockrell, 720 F.2d 1423,

1427 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984). The allegation that counsel was ineffective is meritless because Bertram has identified no prejudice.

Bias of Judge

Bertram argues that the district judge was biased because she did not appoint a particular attorney to represent him. He alleges that the judge had a personal relationship with the attorney. He also claims that he had the right to the appointment of the next attorney on the roster. This Court has already held that Bertram showed nothing to indicate bias. Bertram has showed nothing new. Additionally, the constitution does not grant an absolute right to an attorney of one's choice. See United States v. Paternostro, 966 F.2d 907, 912 (5th Cir. 1992).

Right to Testify

Bertram argues that he was denied the opportunity to testify in his own defense and that counsel was ineffective for not putting him on the stand. In the district court, Bertram did not claim that counsel was ineffective in this regard. Bertram may not raise this ineffectiveness claim for the first time on appeal. United States v. Smith, 915 F.2d 959, 962-64 (5th Cir. 1990). Even if the ineffectiveness issue were cognizable, Bertram has not stated what his testimony would have been. He has alleged no prejudice.

In the prior § 2255 appeal, this Court stated that the right to testify issue could implicate the constitution and might require an evidentiary hearing. The Court continued, "[T]he district court may be well versed in the facts giving rise to this claim, but the

order of denial does not give us the benefit of the court's reasoning." Id.

On remand, the district court found:

> The trial record discloses that Bertram did not offer to testify. At the sentencing hearing, the Court noted this fact in the context of Bertram's right to testify if he had chosen to do so. Absent an offer to testify, he has waived any right to complain that the Court refused to allow him to exercise his right to testify.

At sentencing Bertram's counsel told the court that the Presentence Report "says that Mr. Bertram chose not to testify. We believe it should more appropriately reflect that he merely did not testify rather than a matter of the words `chose not to.'" The court responded, "I deny that request. He has the right to do so." Nothing in Bertram's motion or brief explains the purpose of counsel's request.

In his § 2255 motion, Bertram alleged, "Defendant has had four trials in Judge Mary Lou Robinson's courtroom and has not been allowed to testify in any of the trials. These trials started in 1982 and the last was 1986."

On appeal in this Court, Bertram elaborated that he was reluctant to assert his right because, at a previous trial, he asserted the right and "was told to sit down and shut up." He also alleges that trial counsel refused to call him as a witness.

The district court's finding that Bertram did not offer to testify and waived any right to testify adequately disposes of Bertram's allegation that he was prevented from asserting that right.

Representing Self

Bertram argues that he was improperly denied the opportunity to represent himself along with his appointed counsel. He specifically asserts the right to hybrid representation. He has no such right. Neal v. Texas, 870 F.2d 312, 315-16 (5th Cir. 1989).

Withholding Information

Bertram argues that the assistant United States attorney improperly withheld information that witnesses had changed their stories prior to trial. Bertram alleges that the government withheld the information that the original suspect was black; Bertram is white.

The record belies these assertions. The police report of an interview with one of the witnesses to which Bertram refers, Donald Mackie, did state a date differently from a date that Mackie gave in his testimony. The government must have disclosed this discrepancy because Bertram's counsel cross-examined Mackie about it.

As to the other two witnesses to whom Bertram refers, Wendell Darren Miller and Billy Fred Jones, Jr., nothing in the record indicates that discrepancies appeared in their accounts.

The trial court found that the government had been very forthcoming in disclosing information to Bertram. Bertram's conclusional allegations do nothing to bring that finding into question.

Bertram is correct that a black man was the initial suspect. That fact, along with the fact that a more complete investigation led to Bertram, was disclosed to Bertram; the matter was aired at a pretrial hearing.

Perjury by Witnesses

Bertram argues that three government witnesses perjured themselves and the prosecutor knew of such perjury. Bertram reasons that all three witnesses referred to above changed their accounts and must have done so in response to pressure from law enforcement officers to strengthen the government's case. These allegations are entirely conclusional.

Identification Procedures

Bertram argues that the identification procedures were unlawful and that unspecified, uncalled witnesses would have helped his case. He claims that law enforcement officers coerced the only eye witness by repeatedly showing her photographs of Bertram until she identified him.

The admission of an identification that is unreliable because it was elicited by impermissibly suggestive procedures violates a defendant's right to due process. Neil v. Biggers, 409 U.S. 188, 196-99, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). The threshold question is whether the identification process was impermissibly suggestive. If not, the inquiry ends. Otherwise, the court must determine whether the totality of the circumstances indicates that the suggestiveness caused a substantial likelihood of irreparable

misidentification. United States v. Shaw, 894 F.2d 689, 692-93 (5th Cir.), cert. denied, 111 S. Ct. 85 (1990).

This issue was decided adversely to Bertram on his motion to suppress. The trial court held a suppression hearing at which witnesses against Bertram testified.

The record shows that officers did not coerce the only eye witness, as Bertram alleges. Clara Montano was the only person who saw Bertram at the scene of the crime. She testified that she looked directly at Bertram from a short distance for at least a minute in a well-lighted area. She based her identification of Bertram on her observation of him at the crime scene. The officer who showed her a photographic line-up made no suggestions to her.

The record belies Bertram's claim that the identification was improper. His vague assertion that other, uncalled witnesses would have helped is conclusional.

Insufficiency of Evidence

Bertram argues that the evidence was insufficient and counsel was ineffective for not moving for an instructed verdict of not guilty. In the district court, Bertram did not claim that counsel was ineffective in this regard. In the district court, Bertram claimed that the evidence was insufficient because he did not testify. This Court has already held this issue to be without merit. Bertram has shown nothing indicating that a different result would be appropriate.

The ineffectiveness issue may not be raised for the first time on appeal. If it could be, it is meritless because Bertram has alleged no prejudice.

Common-Law Wife

Bertram argues that his common-law wife was improperly allowed to testify at trial and before the grand jury and that he did not have access to her grand jury testimony. In the district court, Bertram did not mention the grand jury.

This issue is meritless for four reasons. First, Bertram -- not the government -- called his wife as a witness. Second, he did not object to any of the cross-examination. Third, this is an evidentiary issue; it does not implicate the constitution because any error in allowing the testimony was not "so extreme that it constituted a denial of fundamental fairness." Jernigan v. Collins, 980 F.2d 292, 298 (5th Cir. Dec. 15, 1992). Fourth, Bertram may not raise the grand jury issue for the first time on appeal.

For all of the foregoing reasons, the judgment of the trial court is AFFIRMED.