UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1976
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOEL RODRIGUEZ LOPEZ,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
4:92 CV 652 A (CR4 90 76)

(June 25, 1993)

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

PER CURIAM:

Appellant Joel Rodriguez Lopez (Lopez) was indicted with various drug-related offenses occurring in April and May 1990. He pleaded guilty to count four of the indictmentSQpossession with the intent to distribute heroin. In November 1990, the district court sentenced Lopez to serve a term of ninety-five months incarceration

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and five years supervised release and assessed a mandatory $50 assessment and a $25,000 cost of incarceration and supervision fine. Lopez did not appeal.

In August 1992, Lopez filed a motion pursuant to 28 U.S.C. § 2255 to modify his sentence asserting that he is entitled as a matter of right to a sentence reduction for his acceptance of responsibility because he pleaded guilty and that, because he is unable to pay the $25,000 fine, it should be reduced. The court denied the motion, and Lopez appeals.

Lopez admits that the issues he raised in district court are not the same issues he now addresses on appeal. White brief at 3. He attempts to recast the issues presented in the original section 2255 motion to conform to the issues presented on appeal and/or seeks a remand so as to avoid dismissal pursuant to Rule 9(b) following section 2255 should he raise these claims in a second section 2255 motion. Issues raised for the first time on appeal should not be considered unless they involve purely legal questions and the failure to address them would result in a manifest miscarriage of justice. *See Self v. Blackburn*, 751 F.2d 789, 795 (5th Cir. 1985). That standard is not met here.

Lopez's district court arguments are not viable. Relief under section 2255 "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." *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981). Claims regarding application of the guidelines to sentences that are within the statutory range and

could have been raised on direct appeal are not cognizable in a section 2255 motion. *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992); *United States v. Perez*, 952 F.2d 908 (5th Cir. 1992). In any event, a guilty plea alone does not entitle one to an adjustment for acceptance of responsibility. *See* U.S.S.G. § 3E1.1(c).

Moreover, Lopez's argument, based on *United States v. Alfaro*, 919 F.2d 962, 965 (5th Cir. 1990), that the government had to prove that he was able to pay the fine is incorrect. The guidelines require a fine unless a defendant shows he cannot pay it. The government must show ability to pay only if the PSR recommends against imposing a fine because the defendant does not have the ability to pay. *United States v. Fair*, 979 F.2d 1037, 1040-41 (5th Cir. 1992). The district court in this case did adopt the PSR. However, because Lopez has never asserted that the PSR recommended against a fine or said he was unable to pay and because Lopez makes extensive challenges to the financial data compiled in the PSR, *see* White brief at 121-12, it is assumed that it indicated the ability to pay a fine (or at least did not indicate the contrary).

Lopez's new argument as to acceptance of responsibility is that he was denied his constitutional right to confront a witness at the sentencing hearing because the probation officer gave hearsay evidence that was relied upon by the court in determining his sentence. White brief at 5-6. This was not raised below and we therefore decline to consider it. In any event, from what Lopez

asserts in his appellate brief,[1] it appears that the probation officer did not give hearsay testimony but declined instead to comment on a conversation between Lopez and another probation officer. The probation officer is quoted in Lopez's brief as saying, "I don't know whether he told that to Mr. Cavazos." White brief, 5. Therefore, there is no indication in the record that the probation officer gave hearsay testimony or that Lopez was denied an opportunity to call Cavazos to testify as to whether Lopez was cooperative, thereby showing acceptance of responsibility. Thus, even if the claim were raised below, which it was not, it is not shown to have any merit.

As for the imposition of a fine, Lopez now asserts that information in the PSR was incorrect. Such a challenge generally cannot be made in a section 2255 motion. *See United States v. Bartholomew*, 974 F.2d 39, 42 (5th Cir. 1992). Lopez does not assert any reason why he did not object to these asserted inaccuracies at sentencing. *See id.* Hence this claim does not entitle Lopez to section 2255 relief.

Finally, Lopez discusses three issues that he states should be remanded to the district court for determination: (1) sentence entrapment because the agents involved him in multiple transactions; (2) denial of a right to appeal because of misrepresentation by his attorney; and (3) denial of effective assistance of counsel because counsel advised him not to cooperate with the probation officer in drafting the PSR. White brief at 15-

[1] A copy of the sentencing transcript is not included in the record.

21. None of the issues was raised in district court and they involve questions of fact that cannot be addressed for the first time on appeal. *Blackburn*, 751 F.2d at 795.

The district court's denial of Lopez's section 2255 motion is accordingly

AFFIRMED.