

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2811
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TOMMY ALEXANDER, SR.,

Defendant-Appellant.

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

(CA-H-92-1979 (CR-89-331-1))

(February 24, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Tommy Alexander, Sr. appeals the district court's dismissal as frivolous of his motion under § 2255, collaterally attacking his controlled substance and firearms

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

convictions, urging several constitutional deficiencies. Finding that Alexander's claims implicating the use of false testimony by the prosecution, a Brady violation and ineffective assistance of counsel are not facially frivolous, and finding no articulation of reasons by the district court for denying the § 2255 motion, we vacate that denial and remand the case to the district court for additional proceedings.

I.

FACTS AND PROCEEDINGS

Alexander was convicted of numerous counts of manufacturing, distributing, and possessing with intent to distribute controlled substances, plus a firearms count. He was sentenced to life imprisonment on several of the counts. After we affirmed his conviction and sentence on direct appeal, Alexander filed a motion attacking his sentence under 28 U.S.C. § 2255. He raised a number of constitutional issues, including the knowing use of false evidence by the prosecution, the withholding of evidence by the prosecution in violation of Brady v. Maryland,¹ and ineffective assistance of counsel in several respects. The U.S. Attorney received notice of Alexander's motion but did not file a response. The district court denied Alexander's § 2255 motion summarily, holding no hearing and making no factual findings or conclusions of law.

Alexander filed a motion to proceed in forma pauperis (IFP) on appeal and a request for a certificate of probable cause (CPC). He

¹ 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

stated that the issue he intended to raise on appeal was whether

[t]he District Court abused its discretion when it summarily denied Movant's Motion to Vacate sentence under 28 U.S.C. Section 2255 without issuing a show cause order or by not making any findings of fact or conclusions of law as mandated by Section 2255 and the decisions so requiring by the U.S. Court of Appeals for the Fifth Circuit.

The district court denied IFP and CPC.² The court found that Alexander met the economic eligibility requirements to proceed IFP, but that his appeal did not raise a non-frivolous issue and was not taken in good faith. Alexander then filed a motion to proceed IFP on appeal in this court, but has since remitted his full filing fee, mooting his IFP motion.

II

ANALYSIS

In his appellate brief, Alexander raises the issues of knowing use of false testimony by the prosecution, a Brady violation, and ineffective assistance of counsel. None of these issues are facially frivolous. We cannot determine why the district court found them to be frivolous because it did not articulate any reasons for denying Alexander's § 2255 motion. Even though we evaluate whether the appeal presents non-frivolous issues de novo, we remain a court of error. See White v. Texas American Bank/Galleria, 958 F.2d 80, 82 (5th Cir. 1992). "Without adequate findings of fact and conclusions of law, [we are] severely hampered if not completely obstructed in [our] review." Id.

² Although the district court denied CPC, a certificate of probable cause is not required under § 2255.

28 U.S.C. § 2255 provides that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." When the allegations in the § 2255 motion are not negated by the record, the district court must hold an evidentiary hearing. United States v. Briggs, 939 F.2d 222, 228 (5th Cir. 1991). Alexander's allegations of the use of false testimony, a Brady violation, and ineffective assistance are not conclusively negated by the record. Therefore, at a minimum he is entitled to findings of fact and conclusions of law. The district court should give serious consideration to holding an evidentiary hearing. We have no choice but to vacate the district court's order of denial and to remand this case for further development of Alexander's claims, including the entry of findings of fact and conclusions of law. See United States v. Auten, 632 F.2d 478, 482-83 (5th Cir. 1980); Friedman v. United States, 588 F.2d 1010, 1014-17 (5th Cir. 1979).

Alexander has also filed a motion requesting that we order the government to respond to his § 2255 motion and his brief. This motion is denied as moot as it pertains to appellate proceedings. VACATED and REMANDED.