UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-3002
Summary Calendar

United States of America,

Plaintiff-Appellee,

VERSUS

James T. Cronan,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 90-126 D(CA#91-4226D))

(January 14, 1993)

Before THORNBERRY, DAVIS, and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge[*]:

James T. Cronan, proceeding pro se, brought this collateral attack on his conviction by filing a motion to vacate sentence pursuant to 28 U.S.C. § 2255. He claims that the district court that convicted him denied him the right to present an insanity

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

defense, that he was both incompetent to stand trial and insane at the time of the instant offense and that his attorney rendered ineffective assistance of counsel. The Government claims that Cronan is procedurally barred from even raising his claims on collateral attack. We find no merit in either the Government's claim or Cronan's motion and affirm the district court's denial of Cronan's motion to vacate his sentence.

I. Facts and Prior Proceedings

James T. Cronan was indicted on March 30, 1990 on one count of possession with intent to distribute heroin, and one count of distribution of heroin.[1] Cronan gave notice of his intent to use the insanity defense and the trial court granted the Government's motion for a psychiatric examination and a competency hearing. After the examination, the district court, sua sponte, entered an order finding Cronan competent to stand trial. Subsequently, the Government moved to preclude Cronan from introducing expert testimony on the issue of insanity. Cronan did not oppose the motion since he did not intend to call experts. The case proceeded to trial and Cronan was found guilty as charged and received two concurrent 240-month sentences of incarceration, two concurrent 3-year terms of supervised release, and a $100 special assessment fee. Cronan directly appealed his conviction and this Court affirmed. **U.S. v. Cronan**, 937 F.2d 163 (5th Cir. 1991).

Cronan then filed a motion to vacate his sentence pursuant to

[1] 21 U.S.C. § 841(a)(1).

28 U.S.C. § 2255, which the district court denied. Cronan timely appealed.

II. Issues on Appeal

Cronan raises the following issues on appeal: (1) Whether the district court prejudiced Cronan by refusing his insanity defense; (2) Whether Cronan was insane at the time of the crime and incompetent to stand trial; (3) Whether Cronan's attorney provided ineffective assistance of counsel. The government raises the following issue on appeal: (4) Whether Cronan is procedurally barred from raising his claims.

III. Standard of Review

On collateral review, we view the facts in the light most favorable to the verdict. **U.S. v. Drobny**, 955 F.2d 990, 992 (5th Cir. 1992).

IV. Discussion

A. Issue One

Cronan alleges that the district court erred by refusing to allow him to use the insanity defense. In addition, Cronan argues that the district court erred by relying on only one competency report and examination. First of all, Cronan did not raise these issues at the district court section 2255 proceeding, therefore, we do not consider these issues on appeal. **U.S. v. Smith**, 915 F.2d 959, 964 (5th Cir. 1990). Moreover, the district court did not "refuse" to hear the insanity defense. Rather, the record shows

that Cronan's attorney withdrew the insanity defense at the request of Cronan.[2] Further, there is no evidence in the record that Cronan ever objected to or contested the results of his psychiatric examination. Therefore, there is no merit in his claim that the district court erred by relying on only one competency report and examination.

B. Issue Two

Cronan next argues that he was legally insane at the time he committed the crime and that he was incompetent to stand trial, both due to the medication that he was taking. Cronan did not raise the incompetency issue before the district court, therefore we will not consider this argument. **Smith**, 915 F.2d at 964. Moreover, after the initial psychiatric evaluation, the district court found Cronan competent to stand trial and Cronan offers no evidence to contradict this finding. This argument has no merit.

Cronan also argues that he was legally insane at the time of the crime. Only violations of constitutional rights and a narrow range of other injuries that could not be raised on direct appeal may be raised under section 2255. **U.S. v. Vaughn**, 955 F.2d 367, 368 (5th Cir. 1992). Further, in order for relief to be granted under section 2255, the violation must work a complete miscarriage of justice. **Id.** Cronan failed to assert his insanity claim at the district court during trial, therefore, his claim does not rise to the level of a constitutional violation. **See Volson v. Blackburn**,

[2] To the judge: "He has instructed me not to argue [insanity] because he thinks we are winning...."

794 F.2d 173, 176-77 (5th Cir. 1986). In addition, given the sparse allegations regarding this alleged insanity contained in his section 2255 motion, even if the issue could not have been raised on direct appeal, he has not shown a "complete miscarriage of justice." **Vaughn**, 955 F.2d at 368. Clearly, a defendant could have a mental disorder and still be legally responsible for his crime.[3] **U.S. v. Collins**, 690 F.2d 431, 434 (5th Cir. 1982). Therefore, Cronan's assertion that he should be "presumed" insane because he has been in and out of mental institutions for several years has no merit.

Cronan stresses that the fact that he was taking Haldol, a very strong anti-psychotic tranquilizer, on the day of the offense, shows that he was legally insane. Cronan argues that 13 days prior to the offense, he went to the emergency room of East Jefferson General Hospital and was diagnosed with schizophrenia, drug abuse, and was prescribed Haldol. A copy of the emergency room report was submitted for the record and clearly indicates that Cronan was already on Haldol,[4] Cronan was oriented, had no overt hallucinations or delusions, was awake and alert, but did show a depressed mood and a flat affect. Cronan's argument that by implication, he was legally insane 13 days after the emergency room visit when he committed the instant offense because he was

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[3] A federal criminal defendant is legally insane if, at the time of the crime, he was incapable of appreciating the wrongfulness of his conduct. **Collins**, 690 F.2d at 434.

[4] Cronan told the physician that, "it [Haldol] don't work good on me. I don't feel good."

prescribed Haldol, is not supported by the emergency room report. Finally, Cronan argues that on March 29, 1990, the day after he was arrested, the correctional center physician found him to be incoherent and hearing voices and promptly sent him to the mental health unit for treatment. Cronan insists this shows that he was incompetent to stand trial. While Cronan alleges that he was found "psychotic" the day after his arrest, he failed to raise this allegation at the district court level and is precluded from doing so now. **Smith**, 915 F.2d at 964.

C. Issue Three

Cronan complains that his counsel was ineffective. The Supreme Court has established a two-part test to evaluate claims of ineffective assistance of counsel. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In order to establish such a claim, a defendant must meet both prongs of this test. First, the defendant must show that his counsel's performance was deficient. "This requires showing that counsel made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment." **Id.** A lawyer's representation is deficient only if it falls below an objective standard of reasonableness, measured under prevailing professional norms. **Id.** at 2064.

Second, the defendant must show that his defense was prejudiced by the deficient performance. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 2064.

In order to establish prejudice, he must show that there is a reasonable probability that a different result would have occurred but for the deficient representation. Id. at 2068. In assessing counsel's decisions, we must afford his performance a high degree of deference. Id. at 2065. "[S]econd-guessing is not the test for ineffective assistance of counsel." **King v. Lynaugh**, 868 F.2d 1400, 1405 (5th Cir.), **cert. denied,** 489 U.S. 1099, 109 S.Ct. 1576, 103 L.Ed 2d 942 (1989).

Cronan alleges that his attorney was ineffective for not presenting an insanity defense. The decision not to proceed with an insanity defense is ordinarily a matter of trial strategy which is well within the acceptable range of professional conduct. **See McInerney v. Puckett**, 919 F.2d 350, 353 (5th Cir. 1990). Cronan has not shown extraordinary circumstances that would warrant deviation from this general rule.

Cronan also alleges ineffective assistance due to his attorney's failure to: (1) move for an independent psychiatric examination; and, (2) call defense witnesses in addition to Cronan's mother. Cronan has failed to show that his defense was prejudiced by the attorney's actions as required under **Strickland**. He has failed to show how the attorney's conduct would have changed the outcome of the trial. While we construe pro se habeas corpus petitions liberally,[5] mere conclusory allegations on a critical issue are insufficient to raise a constitutional issue. **Ross v. Estelle**, 694 F.2d 1008, 1012 (5th Cir. 1983). Therefore, we are

[5] **Guidroz v. Lynaugh**, 852 F.2d 832, 834 (5th Cir. 1988).

not persuaded to change the disposition of the court below based on the conclusory allegations that Cronan presented in his habeas petition to the district court or in his brief to this Court.

D. Issue Four

The Government contends that Cronan is procedurally barred from raising the issues contained in his section 2255 motion. To invoke the procedural bar, however, the Government must raise it at the district court level. **Drobny**, 955 F.2d 990, 995 (5th Cir. 1992). Generally, this Court will not consider a legal issue not presented to the district court. **Id.** (citing **Washington v. Watkins**, 655 F.2d 1346, 1368 (5th Cir. Unit A Sept. 1981).

Conclusion

Based on the foregoing, reviewed in the light most favorable to the verdict, we affirm the district court.