

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3453
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AARON R. MERCADEL,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CR-88-124-F (C.A. 92-606-F)
- - - - -

March 18, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Aaron R. Mercadel pleaded guilty to one count of conspiracy to possess cocaine with intent to distribute and one count of possession of cocaine with intent to distribute, and was sentenced to 78 months imprisonment and 4 years supervised release. His third § 2255 motion alleging that the sentencing court violated the plea agreement because it considered the facts of the dismissed counts in determining his base offense level in violation was dismissed as successive under Rule 9(b), or alternatively on the merits.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

A claim raised in a serial § 2255 motion must be dismissed as successive unless the movant demonstrates "cause" for not raising the issue in the previous petition and "prejudice" if the court fails to consider the new point. Selvage v. Collins, 972 F.2d 101, 102 (5th Cir. 1992). This cause-and-prejudice standard is the same standard applied in procedural default cases. McCleskey v. Zant, ___ U.S. ___, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991) (habeas petition under § 2254). If the movant cannot show cause, failure to raise the issue may still be excused if the petitioner can show that "a fundamental miscarriage of justice would result from a failure to entertain the claim." Id. The rules governing successive § 2254 petitions apply to § 2255 motions. McCleskey, 111 S.Ct. at 1478 n.1.

Mercadel argues that since his two prior § 2255 motions the law has changed and the district court is no longer permitted to consider the facts underlying dismissed counts to determine the base offense level. However, Mercadel relies on a Ninth Circuit case which is in conflict with this Court's law, see United States v. Edwards, 911 F.2d 1031, 1033-34 (5th Cir. 1990); United States v. Castro-Cervantes, 927 F.2d 1079, 1081-82 (9th Cir. 1990), and was decided before he filed his first § 2255 motion. Mercadel has not demonstrated cause for raising this issue in a successive motion.

Mercadel also cannot demonstrate that a failure to consider the claim will result in "a fundamental miscarriage of justice" because he does not challenge the accuracy of the facts relied on by the sentencing court. Mercadel has not satisfied the standard

for bringing a successive § 2255 motion, and the district court properly dismissed the motion as successive under Rule 9(b).

For the first time on appeal Mercadel argues that the district court improperly refused to depart downward from the guidelines. Issues raised for the first time on appeal are reviewable by this Court only if they involve purely legal questions and failure to consider them would result in manifest injustice. United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). The Court declines to review this claim because the "technical application" of the sentencing guidelines is not a constitutional issue cognizable under § 2255, see United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992), and therefore failure to consider the claim will not result in manifest injustice.

AFFIRMED; motion to strike the Appellee's brief is DENIED.