

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3767
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THEODORE EUGENE SIMMERMAN,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CR-89-87 "F" (92-1238))

(February 22, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Petitioner-Appellant Theodore Eugene Simmerman appeals the district court's denial of his motion for habeas corpus relief

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

filed pursuant to 28 U.S.C. § 2255. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Simmerman was convicted and sentenced to 63 months' incarceration for conspiracy to violate the Federal Controlled Substances Act, 21 U.S.C. § 846. The facts pertinent to his conviction were reviewed by this court in United States v. Baxendale, No. 89-3857 (5th Cir. March 18, 1991) (unpublished). Simmerman and Charles Louis Baxendale were charged along with ten other co-defendants for their alleged participation in a multi-state amphetamine manufacturing and distribution organization. Simmerman had participated in a transaction involving ten pounds of amphetamine. He arranged a meeting with a confidential informant (C.I.) and introduced the C.I. to Baxendale. Agents later arrested Baxendale and Simmerman and seized ten pounds of amphetamine from Baxendale's automobile.

Although the initial indictment stemmed from a previous one pound seizure of amphetamine, a specific quantity was never mentioned. Neither was a quantity mentioned in Simmerman's subsequent plea agreement with the government, in which he pleaded guilty to conspiracy to possess with intent to distribute amphetamine. But the government's articulated factual basis for the guilty plea was based on the one pound quantity.

Simmerman objected, prior to sentencing, to the recommendations contained in the Presentence Investigation Report

(PSR) that he be sentenced based on the ten pounds seized from Baxendale's automobile. Simmerman moved to withdraw his guilty plea, alleging that it was motivated by threats. A hearing was held and the district court denied Simmerman's motion. Simmerman was then sentenced based on ten pounds of amphetamine. Baxendale was also convicted and sentenced. On direct appeal we affirmed both convictions.

Simmerman filed a § 28 U.S.C. § 2255 motion, alleging the following nine grounds for relief: (1) the district judge's failure to demonstrate "good behavior" rendered the district court that convicted him "unconstitutional"; (2) "[r]efused access to court, law library and phone calls"; (3) "[r]efusal to allow bail"; (4) "[u]nproven allegations" in PSR; (5) district court's failure to "show nature and cause of actions pending"; (6) "[u]se of convicted felon to create an illegal act"; (7) failure of district court to rule on disputed items in PSR; (8) the government's failure to honor plea agreement; and (9) "[s]entence was not in the guidelines as to Factual Basis, Plea Agreement, Indictments and Bill of Information."

The district court denied § 2255 relief, and ruled, inter alia, that, as Simmerman had a fair opportunity to present his claims on direct appeal, he was procedurally barred from raising grounds 2-9 in a collateral attack. The court relied on our holding in United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 978 (1992). As Simmerman's first ground raised an issue of subject matter

jurisdiction, however, the district court addressed it and ruled that inasmuch as the district judge had not been impeached "at the time of the challenged proceedings," he had authority to exercise Article III powers under the United States Constitution. Simmerman timely filed a notice of appeal.

II

ANALYSIS

A. Conviction of District Judge

Simmerman argues that, because the district court judge was convicted of bribery, he failed to demonstrate "good behavior," which rendered void his power to preside over Simmerman's case. The presiding district judge in Simmerman's case was subsequently indicted and convicted of bribery. See United States v. Collins, 972 F.2d 1385, 1389-95 (5th Cir.), petition for cert. filed, (No. 92-6813) (Dec. 4, 1992).

Simmerman relies, in part, on Art. III, § 1 of the Constitution, which requires that "[t]he judges, both of the supreme and inferior Courts shall hold their Offices during good Behaviour." See id. The Constitution does not contain an automatic impeachment provision for Article III judges found to lack "good Behaviour." Impeachment by Congress is the sole means of removing a federal judge from office. Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 141, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970); United States v. Claiborne, 727 F.2d 842, 845-47 (9th Cir.), cert. denied, 469 U.S. 829 (1984); United States v. Hastings, 681 F.2d 706, 710 (1982), cert. denied, 459 U.S. 1203

(1983). "Impeachment shall not extend further than to removal from Office . . ." See U.S. Const., Art. I, § 3, cl.7. Conviction alone will not remove a federal judge from office. See Claiborne, 727 F.2d at 845-46; Hastings, 681 F.2d at 710. The effects of conviction and impeachment are thus distinguished.

As the procedure for removing federal judges from office is impeachment, and that had not occurred, the district court here was fully empowered to preside as an Article III judge. Simmerman erroneously suggests that the judge who presided over his trial was found guilty before ordering judgment in this case. But even if the judge had been found guilty prior to the sentencing hearing, he would not have been stripped of Article III powers without impeachment by Congress. Simmerman does not argue that the judge was biased pertaining to his case. Claiborne, 727 F.2d at 848.

The district court that heard Simmerman's habeas case found that, "[t]he judge who sentenced Simmerman has not been impeached," and concluded that "[h]e possessed his office and was legally empowered to exercise the duties of his office at the time of the challenged proceedings." For reasons set forth above, the district court did not err so Simmerman's argument collapses.

B. Breach of Plea Agreement; Evidentiary Hearing

Simmerman argues that the government breached its plea agreement when it recommended sentencing based on ten pounds of amphetamine. This argument lacks merit.

Relief under § 2255 is reserved for violations of a defendant's 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). Claims neither stating a constitutional injury nor demonstrating injuries producing a "miscarriage of justice," 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 "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." Shaid, 937 F.2d at 232.

The only exception to the cause-and-prejudice test is the "extraordinary case . . . in which a constitutional violation has probably resulted in the conviction of one who is actually innocent." Id. Simmerman neither contends that he was "actually innocent" of the crime nor offers new evidence demonstrating his factual innocence. See id.

Simmerman argued on direct appeal that the district court erred when it denied his motion to withdraw his guilty plea. He contended, in part, that his plea was unknowing because at the guilty plea hearing he was not aware that the sentence would be based on ten pounds of amphetamine. After the habeas court rejected his arguments and denied his motion, Simmerman argued for the first time in his § 2255 motion that the government had breached its guilty plea agreement.

The habeas court concluded that Simmerman failed to show cause

for not raising the issue on direct appeal but also ruled that the record indicated that the government kept the plea agreement and that Simmerman was confusing facts material to prosecution with facts relevant to sentencing (citing United States v. Rivera, 879 F.2d 1247, 1252-53 (5th Cir.) (Government's promises pertaining to prosecution not applicable to sentencing information set forth in the PSR), cert. denied, 493 U.S. 998 (1989)). That ruling was not erroneous.

For the reasons set forth above, Simmerman has, at the least, failed to show cause for not raising the issue on direct appeal and is therefore barred under Shaid.

Simmerman insists, for the first time on appeal, that this cause should be remanded to the district court for an evidentiary hearing to resolve the disputed factual allegations. This argument too lacks merit.

We will generally refrain from addressing issues not raised before the district court "since no opportunity existed to develop the record on the merits of the allegations." United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988). "[I]ssues raised for the first time on appeal are not reviewable by this Court unless they involve purely legal questions and failure to address them would result in manifest injustice." United States v. Sherbak, 950 F.2d 1095, 1101 (5th Cir. 1992) (internal quotations and citation omitted). Failure to address this issue now would not result in manifest injustice. Simmerman had ample opportunity to raise this argument

in district court.

Most importantly, this issue could have been raised on direct appeal but was not. As Simmerman raises no argument sufficient to warrant § 2255 review under Shaid, he is procedurally barred from raising the evidentiary hearing issue now.

AFFIRMED.