

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4379
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

REGINALD DEAN,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas
(TY 85 51CR)

(October 12, 1993)

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

GARWOOD, Circuit Judge:

Petitioner-appellant Reginald Dean (Dean) appeals the district court's denial of his "Motion to Vacate Judgment in Memorandum Opinion Denying Petitioner's Post Judgment Motions and for the Court to Reconsider the Motions II." We find that because Dean failed to timely appeal the district court's decision on his

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

underlying substantive claims, we are without jurisdiction to review the district court's underlying judgment. Moreover, to the extent that Dean's claims are properly before us, we find no abuse of discretion in the denial of Dean's motion. Accordingly, we affirm the district court's denial of Dean's motion.

Facts and Proceedings Below

On September 19, 1985, Dean was arrested and charged with the robbery of the First National Bank of Bullard in Bullard, Texas. On September 26, 1985, the United States Grand Jury returned an eight count indictment against Dean on charges arising out of the Bullard robbery and also the March 11, 1985, robbery of the Tyler National Bank in Tyler, Texas.

On November 7, 1985, Dean came before the United States District Court for the Eastern District of Texas on a signed plea agreement. Rather than plead guilty, however, Dean withdrew from the plea agreement and decided to go to trial.

On December 11, 1985, the grand jury returned a superseding indictment charging Dean with the same offenses as charged in the earlier indictment and two additional offenses.¹ On March 7, 1986, the district court ordered separate trials for each of the two bank robberies. On March 14, 1986, a jury convicted Dean of various

¹ Both the first indictment and the superseding indictment charged Dean with conspiracy (18 U.S.C. § 371); three counts of armed robbery (18 U.S.C. § 2113(a)(d)); two counts of kidnapping (18 U.S.C. § 2113(a)(e)); and carrying a weapon in the commission of a crime of violence (18 U.S.C. § 924(c)). The superseding indictment added charges for felon in possession of a firearm (18 U.S.C. § 1202(a)) and possession of cocaine (21 U.S.C. §§ 841(1)(1), 844).

charges arising out of the Bullard bank robbery.²

On April 7, 1986, trial began on the severed charges against Dean and a codefendant for the robbery of the Tyler National Bank, but a mistrial was declared after the testimony of the government's first witness. A second trial on the same charges began on June 3, 1986, and on June 6, the jury found Dean guilty on the four counts involved in the severed proceeding.³ On July 25, 1986, the district court sentenced Dean and entered a judgment of conviction. On July 31, 1986, Dean filed a notice of appeal; on February 17, 1987, this Court affirmed his conviction in an unpublished opinion. *United States v. Dean*, No. 86-2620 (5th Cir. Feb 17, 1987) (unpublished).

On November 23, 1988, Dean filed a motion in the district court to vacate judgment under 28 U.S.C. § 2255. In his motion, Dean claimed the following three grounds for relief, among others.⁴ First, Dean argued that the government had violated the rule of *Batson v. Kentucky*, 106 S.Ct. 1712 (1986), through its use of peremptory strikes to eliminate black jurors from the jury panel.

² Dean was found guilty of two counts of armed bank robbery, one count of armed bank robbery and kidnapping, carrying a weapon in the commission of a crime of violence, and felon in the possession of a firearm. In addition, the jury found Dean guilty of possession of cocaine.

³ Dean was convicted of conspiracy (18 U.S.C. § 371); armed robbery (18 U.S.C. § 2113(a)(d)); kidnapping (18 U.S.C. § 2113(a)(e)); and carrying a weapon in the commission of a crime of violence (18 U.S.C. § 924(c)).

⁴ Dean also claimed three additional grounds for relief: namely, (1) double jeopardy for retrial and conviction following a mistrial; (2) the illegal search of Dean's automobile; and, (3) the failure of the government to disclose favorable evidence.

Second, Dean claimed that the district court had imposed his sentences in improper order.⁵ Finally, Dean asserted the ineffective assistance of appellate counsel for the failure to raise a *Batson* claim on direct appeal. On May 14, 1990, after considering the merits of Dean's motion, the district court adopted a magistrate judge's recommendation that the motion be denied. The district court then dismissed the motion with prejudice.

On May 24, 1990, Dean filed a timely served motion to reconsider the district court's May 14, 1990, judgment under Rule 59(e) of the Federal Rules of Civil Procedure. On May 29, 1990, Dean filed a notice of appeal from the May 14, 1990, judgment. The district court, however, had not ruled on the Rule 59(e) motion. This Court, on July 10, 1990, dismissed Dean's appeal, concluding that his notice of appeal had been nullified by the pending Rule 59(e) motion. *United States v. Dean*, No. 90-4445 (5th Cir. Jul. 10, 1990) (unpublished). In our order, we provided notice to Dean that he could file a new notice of appeal within sixty days from the date of the district court's ruling on his May 24, 1990, Rule 59(e) motion. *Id.* at 2.

On October 17, 1990, the district court denied Dean's Rule 59(e) motion because the court concluded that it was based on the same issues Dean had raised in the section 2255 motion he was seeking to have reconsidered. Thereafter, on November 5, 1990,

⁵ Specifically, Dean argued that the district court should have required him to serve his sentence for violation of 18 U.S.C. § 924 before serving his sentence for violation of 18 U.S.C. § 2113(a)(d), and that the court's failure to do so violated congressional intent as to the order of the sentences.

rather than filing a notice of appeal from the district court's final judgment on his section 2255 motion, Dean filed, pursuant to Federal Rule of Civil Procedure 60(b), a motion to reconsider the October 17, 1990, denial of his Rule 59(e) motion. As grounds for relief, Dean's Rule 60(b) motion alleged (1) the government's improper use of peremptory challenges to strike black jurors under *Batson*; (2) the district court's imposition of a five-year sentence under 18 U.S.C. § 924(c) in violation of the *ex post facto* clause; (3) double jeopardy for the conviction on multiple counts for the same offense; and (4) ineffective assistance of counsel for the failure to request lesser-included-offense instructions.

The magistrate judge, noting that while Dean's Rule 60(b) motion restated many of his earlier claims it also raised new claims, directed the government to address both the merits of the new claims as well as the issue of whether the procedural constraints of a *habeas corpus* petition prevented the court from addressing new claims if coupled with repetitive claims. The government argued that the merits of Dean's claims need not be reached because his Rule 60(b) motion was simply a request to reconsider the court's denial of his original section 2255 motion and thus could not be construed as a new section 2255 petition, or, alternatively, if Dean's motion could be characterized as a section 2255 motion, he was precluded from litigating issues decided in the earlier section 2255 motion by Rule 9(b) of the Rules Governing Section 2255 Proceedings in the United States District Court.

The magistrate judge's report recommended that the district court deny all of the claims raised in Dean's Rule 60(b) motion

except the double jeopardy claims. The magistrate judge determined that the *Batson* claim was the same claim that the district court had dismissed with prejudice in its May 14, 1990, order, and since there had been no intervening change in the law warranting its reconsideration, Rule 9(b) barred its substantive review. Because the double jeopardy grounds raised new claims, however, the magistrate judge concluded that they were not barred by Rule 9(b) and thus subject to collateral review under section 2255.⁶ After considering the merits of the double jeopardy claims, the magistrate judge recommended that because Dean's convictions on counts two and three were based on the same conduct, one of the two counts should be vacated. Similarly, because Dean's convictions on counts six and seven were based on the same conduct, the magistrate judge also recommended that one of these counts should be vacated.

After *de novo* review, the district court on January 29, 1992, adopted the recommendations of the magistrate judge, vacating the convictions and sentences under counts three, four, and seven, and denying the remainder of Dean's motion. Subsequently, Dean timely filed a motion to vacate the January 29, 1992, judgment, which the district court denied by orders of March 13 and 18, 1992. Dean timely filed notice of appeal to this Court.

Discussion

I. Scope of Review

⁶ With respect to the remaining two claims, the magistrate judge concluded that (1) because Dean's conviction and five-year sentence were valid under the law applicable to offenses committed at the time of the Tyler bank robbery, there was no *ex post facto* violation, and (2) because no lesser-included-offense instructions were proper, Dean's counsel was not ineffective.

In his appeal, Dean asserts three points of error. First, Dean contends that the district court erred in adopting the magistrate judge's report, which concluded that Dean lost his right to appeal the denial of the November 23, 1988, section 2255 motion due to his failure to timely give notice of appeal. The key issue here is whether Dean's filing of a Rule 60(b) motion rather than filing a notice of appeal bars subsequent, substantive review of the court's denial of his May 24, 1990, Rule 59(e) motion.

The timely service of a Rule 59(e) motion tolls the period for filing a notice of appeal of the underlying judgment, and that period begins to run only upon entry of an order disposing of the motion. See Fed. R. App. P. 4(a)(4)(iii).⁷ The district court denied Dean's Rule 59(e) motion on October 17, 1990. Despite our order informing Dean that he had sixty days from the denial of the Rule 59(e) motion to file a notice of appeal of his underlying section 2255 motion, he failed to do so. Because "[a]dherence to this time limitation is mandatory and jurisdictional," Dean's failure to appeal in time bars subsequent review. *Pryor v. United States Postal Serv.*, 769 F.2d 281, 284 (5th Cir. 1985). His November 5, 1990, Rule 60(b) motion had no effect on the time for

⁷ It is the rule in this Circuit that "any post-judgment motion to alter or amend the judgment served within ten days after the entry of the judgment, other than a motion to correct purely clerical errors covered by Rule 60(a), . . . must, however designated by the movant, be considered as a Rule 59(e) motion for purposes of Fed.R.App.P. 4(a)(4)." *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 667 (5th Cir. 1986) (*en banc*). "If, on the other hand, the motion asks for some relief other than correction of a purely clerical error and is served after the ten-day limit, then Rule 60(b) governs its timeliness and effect." *Id.*

filing notice of appeal from the October 17, 1990, order or the May 14, 1990, judgment. See *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 667 (5th Cir.) (*en banc*), *cert. denied*, 107 S.Ct. 398 (1986). Hence, Dean lost his chance to appeal the denial of his section 2255 motion.

Dean contends that the appellate limitation period was tolled when the district court amended its judgment in response to his second motion for reconsideration. Dean relies on our decision in *Harrell v. Dixon Bay Transp. Co.*, 718 F.2d 123 (5th Cir. 1983), for the proposition that an order amending final judgment tolls the time period for appeal. Dean reads *Harrell* too broadly. In *Harrell*, after judgment was rendered in favor of the plaintiff, the defendant timely moved under Rules 50 and 59(e) for judgment notwithstanding the verdict, and the district court granted the motion in part. We held that, to the extent that the district court granted the defendant's motion, the amended judgment represented the first *adverse* judgment against the plaintiff. Thus, we concluded that the plaintiff's appeal, filed within thirty days of the denial of the plaintiff's post-amended-judgment Rule 59(e) motion, was timely.

Unlike *Harrell*, in the case *sub judice*, the district court amended its judgment *in favor* of Dean. The plaintiff in *Harrell* was allowed to appeal only that part of the district court's judgment that was amended. Here, Dean does not seek review of the issues that prompted the district court to amend the judgment; instead, he seeks review of issues dismissed with prejudice in the district court's May 14, 1990, order. Moreover, *Harrell* involved

timely Rule 59(e) motions; here we are concerned with what is concededly a Rule 60(b) motion, filed after the time for filing any of the motions listed in Fed. R. App. P. 4(a)(4). Because Dean was given notice of and, without any acceptable excuse, failed to exercise his right of appeal of the district court's judgment, he cannot now come through the back door to seek review of the claims raised in his initial section 2255 motion.

Dean's second and third points of error simply reassert two claims previously advanced in his original section 2255 motion. His second point of error is that the district court erred in concluding that he was not entitled to relief for the ineffective assistance of counsel based on counsel's failure to raise the *Batson* claim on direct appeal. Dean's third point of error is that the district court erred by not granting him relief for the imposition of sentences in improper order. These claims were argued in Dean's November 23, 1988, section 2255 motion, and were rejected by the district court. As explained above, because Dean failed to timely appeal the district court's judgment, we are without jurisdiction to conduct a full substantive review of these last two claims. We consider, at most, whether the denial of Rule 60(b) relief in respect thereto was an abuse of discretion. We note that Dean has advanced no basis for relief in support of these claims that was not advanced in his original section 2255 motion or in his May 24, 1990, Rule 59(e) motion. Nor, as noted, has he given an acceptable reason for failing to timely appeal the district court's October 17, 1990, order.

II. Ineffective Assistance of Counsel

Dean contends that the district court should have found that his counsel's failure to raise the *Batson* claim on direct appeal constituted ineffective assistance of counsel. Ineffective assistance of counsel claims are reviewed for federal constitutional error under the two-prong standard of *Strickland v. Washington*, 104 S.Ct. 2052 (1984). To satisfy this standard a criminal defendant must establish: "First, . . . that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense. 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. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable." *Strickland*, 104 S.Ct. at 2064.

Dean's ineffective assistance claim is based on his attorney's failure to raise on appeal a claim for the government's improper use of peremptory challenges in violation of *Batson v. Kentucky*, 106 S.Ct. 1712 (1986). Here, Dean was represented by the same counsel at trial and on direct appeal. Dean's counsel raised the *Batson* issue at trial and the trial court held a hearing to determine whether the government's reasons for striking the black jurors were discriminatory. Although he did not raise a *Batson* claim on direct appeal, Dean's counsel raised several substantive claims. In determining whether counsel's failure to include a *Batson* claim on appeal rendered his performance deficient we "must indulge a strong presumption that counsel's conduct falls within

the wide range of reasonable professional assistance." *Strickland*, 104 S.Ct. at 2065. We cannot now say that his failure to raise this issue, already decided by the district court, so clearly amounted to deficient performance that denial of Rule 60(b) relief from denial of section 2255 relief in respect thereto amounts to an abuse of discretion.

Even if Dean's counsel's performance were deficient, Dean would still be required to demonstrate prejudice. The standard for establishing prejudice under *Strickland* is that the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 2068. In the case *sub judice*, Dean must demonstrate that had his counsel raised a *Batson* claim on appeal, he would have been entitled to relief.

The Supreme Court held in *Batson* that a defendant can establish an equal protection violation based on the government's use of peremptory challenges to remove black veniremen from the jury in his case. *Batson*, 106 S.Ct. at 1723. If the defendant establishes a *prima facie* case that the prosecutor used peremptory challenges to remove potential jurors because of their race, the burden shifts to the government to provide race neutral explanations. *Id.*; see also *United States v. Maseratti*, 1993 WL 326573 (No. 90-2783, 5th Cir. August 27, 1993; slip op. 6461).

Immediately after the jury was seated in the Tyler bank robbery trial, Dean's counsel filed a motion for a mistrial. The motion complained that of the thirty-six members of the jury panel who were eligible to serve, all five black members were struck,

although none were challenged for cause. The district court held a hearing and determined that of the five jurors struck, three were struck by the government, one was struck by the government and Dean's codefendant, and one was struck by Dean himself.

The court directed the government to provide its reasons for striking the four black members of the panel. In response, the government stated that they struck one juror because she was sleeping during *voir dire*; another juror was stricken because he had stated in the *voir dire* for the case preceding Dean's that he could not follow the court's instructions; a third juror was stricken because she appeared to have trouble hearing the questions during *voir dire*; the government struck a fourth juror because he was an employee of the county commissioner, and the government was concerned about possible hostility as a result of recent federal prosecutions of commissioners for a kickback scheme. The court denied Dean's motion for a mistrial, concluding that the government's reasons, although "highly trivial," were legitimate and facially nondiscriminatory.

When a district court makes a ruling on a charge of discriminatory use of peremptory challenges, we review the district court's findings "under 'either a "clearly erroneous" or "great deference" standard.'" *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988) (quoting *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987)). From the record before us, we conclude that the district court did not so clearly err in its determination that the reasons offered by the government for striking the black jurors were race neutral that denial of Rule 60(b) relief from denial of

section 2255 relief in this respect constituted an abuse of discretion. *Cf. Maseratti, supra.*⁸

"Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot," *Hernandez v. New York*, 111 S.Ct. 1859, 1866 (1991); the defendant must then prove racially discriminatory intent or purpose on the part of the government to show a violation of the Fifth Amendment. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 97 S.Ct. 555, 563 (1977). Dean offers no other evidence of discriminatory motive to rebut the government's explanations.

For these reasons, Dean has not shown that it was an abuse of discretion to deny Rule 60(b) relief from the denial of section 2255 relief on his ineffective assistance of counsel claim.

III. Imposition of Sentences in Improper Order

Dean's final point of error is that the district court erred in adopting the magistrate judge's report, which recommended no relief on Dean's claim that the district court imposed his sentences in improper order. Like the ineffective assistance of counsel claim, the issue of the sequence of sentences was also argued in his first section 2255 motion and, therefore, is not

⁸ In *Maseratti*, the court found that government explanations for striking minority jurors were race neutral when one black juror was struck because "she appeared to be sleeping during part of the voir dire" and a second black juror was struck because "she also was not paying attention during the voir dire, and because the prosecutor did not like the fact that she was a City of Houston employee."

properly before this Court. Clearly, the district court did not abuse its discretion in denying Rule 60(b) relief from the section 2255 denial of this claim.

In his instant appeal, Dean argues that the district court erred in ordering him to serve his sentences for counts 5 and 8SOcarrying a weapon in the commission of a crime of violence in violation of 18 U.S.C. § 924(c)SOconsecutive to his sentences for the related counts 2 and 3SOarmed bank robbery in violation of 18 U.S.C. § 2113(a)(d). Dean contends that in enacting section 924(c), Congress intended the sentence to be served before a sentence for the underlying offense. In support of his contention, Dean quotes a comment regarding section 924(c) in the relevant Senate Judiciary Committee report, which states, in substance, that the Committee intended that a sentence for a section 924(c) offense be served prior to a sentence for a section 2113(a)(d) offense.⁹

The magistrate judge's report acknowledged that the Committee comment literally states that the Committee intended a section 924(c) sentence to be served first. The magistrate judge's report

⁹ Report of the Senate Committee on the Judiciary, S.Rep No.225, 98 Cong., 2d Sess. 313-14 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3492. The comment reads, in relevant part,

"[T]he Committee intends that the mandatory sentence under the revised subsection 924(c) be served prior to the start of the sentence for the underlying or any other offense. For example, a person convicted of armed robbery in violation of section 2113(a) and (d) and of using a gun in its commission . . . would have to serve five years . . . less only good time credit for proper behavior in prison, before his sentence for the conviction under section 2113(a) and (d) could start to run."

concluded, however, that a review of the Committee Report as well as the history and purpose of the enactment of section 924(c) reveals that Congress was not concerned with the distinction between "prior" and "subsequent," but rather with the sentences being "consecutive" or "cumulative." To support her conclusion, the magistrate judge looked to the language of the statute, which says nothing about the proper sequence of a section 924(c) sentence, but does expressly prohibit the sentence from being served concurrently with any other sentence. The magistrate judge further concluded that, even if Dean were correct in his contention about the proper ordering of his sentences, he had failed to demonstrate that he had suffered any harm from the way his sentences were actually imposed. The report recommended no relief for Dean's section 924(c) claim, and the district court adopted the magistrate judge's recommendation.

We need not go beyond the statute itself to determine the merits of Dean's claim. "[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 100 S.Ct. 2051, 2056 (1980). "If the language is clear and unambiguous, then a court may end its inquiry." *United States v. Sosa*, 997 F.2d 1130, 1132 (5th Cir. 1993) (citing *Rubin v. United States*, 101 S.Ct. 698, 701 (1981)). In those "rare cases [where] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, . . . those intentions must be controlling." *Griffin v. Oceanic Contractors, Inc.*, 102 S.Ct. 3245, 3250 (1982). Hence, "the plain meaning of an unambiguous statute is controlling unless

it clearly violates Congressional intent." *Sosa*, 997 F.2d at 1132-33.

Here, the language of section 924(c) is unambiguous. The statute expressly provides that a court may "not place on probation or suspend the sentence of any person convicted of a violation of [§ 924(c)]," and that "the term of imprisonment imposed under [§ 924(c) may not] run concurrently with any other term of imprisonment"; however, these restrictions are the only constraints placed on the sentencing court by the statute.¹⁰ Section 924(c) is silent about the order in which sentence should be imposed. Because the statute contains no patent ambiguities, nor any absurdities, the language of the Senate Committee Comment is irrelevant. Thus, the district court did not err in imposing Dean's section 924(c) sentence after the section 2113(a)(d)

¹⁰ The full text of section 924(c)(1) provides:

"Whoever, during and in relation to any crime of violence, including a crime of violence which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device, for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence, be sentenced to imprisonment for five years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for ten years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein." 18 U.S.C. § 924(c)(1) (amended October, 1984).

sentence in the first instance, and, *a fortiori*, the district court did not err in adopting the magistrate judge's recommendation to deny Dean's section 924(c) claim in his Rule 60(b) motion. Nor has Dean alleged any specifics to show legal prejudice in respect to the order of service of his sentences.

Conclusion

None of Dean's arguments on appeal demonstrate reversible error in the district court's denial of his Rule 60(b) motion. Because Dean failed to timely appeal the district court's decision on his underlying substantive claims, we are without jurisdiction to review the district court's May 14, 1990, judgment thereon and its October 17, 1990, denial of Dean's Rule 59(e) motion in respect thereto. Under the circumstances, the district court did not abuse its discretion to the extent that it denied Dean's Rule 60(b) motion. Therefore, the district court's orders of January 29, 1992, and March 13 and 18, 1992, are

AFFIRMED.