

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5621
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN A. MAGNONE,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(SA-90-CA-484 (SA-88-CR-291(3)))

(April 29, 1993)

Before POLITZ, Chief Judge, DUHÉ and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:*

Juan A. Magnone, convicted on his guilty plea of drug-trafficking offenses, appeals the denial of his motion for relief under 28 U.S.C. § 2255. For the reasons assigned, we affirm in part, vacate in part, and remand.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

On November 16, 1988 Magnone was indicted for conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846. The following February another indictment arising from a separate drug operation charged Magnone with aiding and abetting aviation smuggling in violation of 18 U.S.C. § 2 and 19 U.S.C. § 1590(a), and conspiracy to import, possess, and distribute marihuana in violation of 21 U.S.C. §§ 841(a)(1), 846, 952, 960, and 963. Magnone entered guilty pleas to the cocaine and aviation smuggling charges, in exchange for which the government agreed to dismiss the marihuana importation charge and not oppose a two-point offense level reduction for acceptance of personal responsibility under U.S.S.G. § 3E1.1(a).

Because the Sentencing Guidelines punish both the cocaine and aviation smuggling¹ violations under section 2D1.1² by reference to the amounts of contraband involved, section 3D1.2(d) required grouping of the offenses for the purpose of offense level

¹ The trial court found that section 2D1.4 governed sentencing on the aviation smuggling count. In reaching this result, the trial court first noted that section 2X2.1 punishes aiding and abetting by reference to the penalty for the underlying offense. As the Sentencing Guidelines contain no provision for aviation smuggling, section 2X5.1 required application of the most analogous guideline -- in this case, section 2D1.4 because the smuggling operation involved a controlled substance.

² At the time of Magnone's sentencing, section 2D1.4 punished inchoate drug importation and distribution offenses as though completed, incorporating the penalties provided by section 2D1.1. The Sentencing Commission has since deleted section 2D1.4, and now punishes the offenses formerly there treated directly under section 2D1.1.

calculation. Thus, under section 3D1.3(b), the district court calculated Magnone's base offense level at 26 by applying section 2D1.1 to the aggregate amount of contraband involved in both operations.³ Assessment of a four-point offense level increase for leadership role under section 3B1.1(a),⁴ and denial of the two-point reduction for acceptance of personal responsibility, resulted in a total offense level of 30. The trial court imposed concurrent 110-month imprisonment and three-year supervised release terms, a \$3,000 fine, and the statutory assessments. Magnone failed to perfect a timely direct appeal and the district court denied leave to appeal out of time.

Magnone then filed the instant motion for post conviction relief under 28 U.S.C. § 2255, claiming ineffective assistance of counsel;⁵ sentencing on the basis of unreliable and erroneous

³ The marihuana and cocaine offenses involved 540 pounds and 300 grams of contraband, respectively. The drug equivalency table equated these amounts to 304.944 grams of heroin, yielding an offense level of 26 under section 2D1.1(c)(9).

⁴ The court imposed this enhancement on the basis of information in the PSR identifying Magnone as the supplier in the cocaine offense, and as the leader of a six-person criminal organization in the marihuana offense.

⁵ Magnone alleged that his attorney labored under a conflict of interest; failed to make an independent investigation of or present mitigating evidence of his acceptance of personal responsibility or leadership role in the offense; failed to provide a copy of the PSR, or object under Fed.R.Crim.P. 32(c)(3)(A) to the probation department's failure to do so until minutes before sentencing; failed to contest the enhancement assessed for leadership role; failed adequately to explain the charges leveled against him; and failed to file a timely notice of appeal in disregard of a request to do so.

information in the PSR concerning his leadership role in the offense and acceptance of personal responsibility; failure of the trial court to provide a copy of the PSR before sentencing as required by Fed.R.Crim.P. 32(c)(3)(A); and incorrect application of the sentencing guidelines by the district court. Accepting the recommendation of a magistrate judge, the district court denied relief without a hearing.⁶ Magnone timely appealed.

Analysis

On appeal, Magnone challenges the district court's denial of habeas corpus relief on several grounds without an evidentiary hearing. The district court may dispose of a section 2255 motion without an evidentiary hearing only if the motion asserts claims not admitting of relief or plainly refuted by the record.⁷ We review such dispositions only for abuse of discretion.⁸

Magnone first challenges the district court's rejection

⁶ The magistrate judge treated Magnone's motion as relating only to his conviction on the November 1988 indictment. Neither party challenges this characterization on appeal and we therefore do not consider its propriety.

⁷ 28 U.S.C. § 2255 ("Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."); **United States v. Bartholomew**, 974 F.2d 39 (5th Cir. 1992) (citing **United States v. Auten**, 632 F.2d 478 (5th Cir. 1980)); **United States v. Green**, 882 F.2d 999 (5th Cir. 1989).

⁸ **Bartholomew**.

without a hearing of his ineffective assistance of counsel claims. In order to obtain relief for ineffective assistance of counsel, a petitioner must establish both deficient performance and prejudice.⁹ Proof of attorney performance outside "the wide range of reasonable professional assistance," overcoming a presumption of adequacy, satisfies the performance requirement.¹⁰ Deficient performance prejudices the defendant only where "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."¹¹

Conflict of Interest

Magnone claims that because a government agent and confidential informant recommended and hired his attorney for him, his attorney labored under a conflict of interest, thereby denying him effective assistance of counsel. Conflict of interest allegations support an ineffective assistance claim only where the petitioner shows that his attorney actively represented conflicting interests, and that the conflict adversely affected his performance.¹² Where a petitioner makes this showing, we will

⁹ **Lockhart v. Fretwell**, 113 S.Ct. 838 (1993) (citing **Strickland v. Washington**, 466 U.S. 668 (1984)). Habeas corpus petitioners seeking relief on this basis bear the burden of demonstrating both of these elements. **Burnett v. Collins**, 982 F.2d 922 (5th Cir. 1993).

¹⁰ **Strickland**, 466 U.S. at 689.

¹¹ **Lockhart**, 113 S.Ct. _____ (quoting **Strickland**).

¹² **Burger v. Kemp**, 483 U.S. 776, 783 (1987) (citing **Strickland**; **Cuyler v. Sullivan**, 446 U.S. 335 (1980)); **Young v.**

presume prejudice.¹³ Here, although Magnone alleged a vague connection between his attorney and persons of potentially adverse interest, he did not allege the required active representation of those interests.¹⁴ The district court properly denied relief on this claim without an evidentiary hearing.¹⁵

Counsel's Performance at Sentencing

Magnone further claims as ineffective assistance of counsel his attorney's failure to: (1) provide him a copy of the PSR, as required by Fed.R.Crim.P. 32 or object to the trial court's failure to do so; (2) investigate the accuracy of information in the PSR; (3) present mitigating evidence relating to his role in the offense; and (4) object to the four-point offense level increase under section 3B1.1(a). He alleges with specificity inaccuracies in the PSR regarding his role in the aviation smuggling offense

Herring, 938 F.2d 543 (5th Cir. 1991).

¹³ **Strickland; Young**.

¹⁴ Further, Magnone's numerous claims of deficient attorney performance do not alone suffice as an allegation of adverse effect on performance produced by a conflict of interest. See **Koch v. Puckett**, 907 F.2d 524 (5th Cir. 1990).

¹⁵ In his briefs to this court Magnone claims that his attorney also represented a cooperating codefendant. If true, this allegation suggests the possibility that Magnone's attorney actively represented conflicting interests. Magnone failed to bring this allegation to the attention of the district court; we may not now consider it. **United States v. Smith**, 915 F.2d 959 (5th Cir. 1990).

which proper review and investigation would have revealed.¹⁶ Magnone thus contends that his attorney's deficiencies contributed to the improper assessment of a four-point offense level increase for a leadership role.¹⁷

The district court found that, because Magnone alleged inaccuracies in the PSR relating solely to the aviation smuggling offense, he had failed to allege prejudice with regard to the cocaine conviction. The record belies this analysis; in assessing the four-point upward adjustment for leadership role in the cocaine offense the district court relied on Magnone's leadership role in the aviation smuggling offense.¹⁸ Magnone's allegations regarding his attorney's performance meet the deficiency prong of

¹⁶ Additionally, Magnone's district court filings identify witnesses whose testimony he claims would substantiate his allegations of inaccuracy.

¹⁷ Notwithstanding his sworn statements at the guilty plea proceeding, Magnone further claims that investigation would have revealed that he was not the supplier in the cocaine offense as alleged in the PSR.

¹⁸ Under section 3B1.1(a), sentencing courts may assess a four-level upward adjustment only for leadership role in "criminal activity that involved five or more participants or was otherwise extensive." The PSR indicates involvement of only four people in the cocaine offense. Further, a single transaction involving 300 grams of cocaine does not qualify that offense as "extensive" criminal activity. Compare, e.g., United States v. Stouffer, 1993 WL 71072 (5th Cir. Mar. 16, 1993) (district court designation as "extensive" under section 3B1.1(a) of scheme to defraud 2000 investors of at least \$11 million not clearly erroneous); **United States v. Pierce**, 893 F.2d 669 (5th Cir. 1990) (drug trafficking offense involving several shipments of cocaine from California to Texas properly considered "extensive" under section 3B1.1). Thus, Magnone's leadership role in that offense could not alone support a four-level upward adjustment.

Strickland.¹⁹ The inaccuracies which Magnone alleges as flowing from his attorney's shortcomings, if proven, might well constitute prejudice under **Strickland**. As the record does not conclusively resolve this claim, it should not have been dismissed without an evidentiary hearing.

Failure to File Timely Notice of Appeal

Magnone also claims that his attorney's failure, in disregard of a direct request, to file a timely notice of appeal amounted to ineffective assistance of counsel. Compromising a client's right to appeal a criminal conviction constitutes deficient performance under **Strickland**. We presume prejudice in such an instance.²⁰ The record does not refute this allegation which, if true, would admit of habeas corpus relief. The district court should not have dismissed this claim without an evidentiary hearing.

Fed.R.Crim.P. 32(c)(3)(A)

Magnone next challenges the district court's denial of relief on his claim that he did not receive a copy of the PSR as required by Fed.R.Crim.P. 32(c)(3)(A).²¹ He claims that he was not given a

¹⁹ **Bartholomew** (attorney's failure to comply with Fed.R.Crim.P. 32 requirement that counsel and defendant read and review PSR prior to sentencing is inadequate performance under **Strickland**).

²⁰ See **United States v. Gipson**, 985 F.2d 212 (5th Cir. 1993).

²¹ Rule 32(c)(3)(A) requires disclosure of the PSR to both the defendant and his counsel at least ten days prior to sentencing, subject to three exceptions not apparently relevant in this case. Magnone does not dispute that his attorney received a copy of the PSR in a timely manner.

copy of the PSR until moments before the sentencing hearing.²² Magnone contends that, as a result, he neither objected to nor presented evidence rebutting critical factual inaccuracies therein.²³

A claim under Rule 32 which the defendant could have presented on direct appeal (or through a motion under former Fed.R.Crim.P. 35) provides no basis for postconviction relief.²⁴ In this case, however, Magnone lists his attorney's failure to urge a Rule 32 objection at trial, to review the PSR with him, and to file a timely notice of appeal as requested. Magnone further alleges the existence of evidence proving that the PSR inaccurately depicted his role in the aviation smuggling operation. These allegations, if proven, would bring Magnone's complaint within the compass of section 2255, and would admit of relief.²⁵ This claim, also, should not have been dismissed without an evidentiary hearing.

²² We note that the sentencing transcript reflects no reply by Magnone to the court's inquiry concerning his timely receipt and review of the PSR. In addition, Magnone apparently signed a statement acknowledging receipt of the PSR on July 7, 1989 -- the date of his sentencing hearing.

²³ The district court erroneously relied on a characterization of this claim as directed solely at the cocaine conviction in disposing of the Rule 32(c)(3)(A) challenge.

²⁴ **Bartholomew; United States v. Prince**, 868 F.2d 1379 (5th Cir. 1989).

²⁵ **Bartholomew**.

Application of Section 3E1.1(a)

Magnone challenges the sentencing court's denial of an offense level reduction for acceptance of personal responsibility under section 3E1.1(a). Such claims, where the petitioner could have raised them on direct appeal, do not admit of habeas corpus relief.²⁶ Assuming *arguendo* that this claim falls within the ambit of section 2255, it lacks merit. Magnone argues that the court denied this reduction on the basis of an erroneous finding that he continued his involvement in the aviation smuggling case while on bond in the cocaine prosecution. While under oath at his plea proceeding, however, Magnone admitted participation during late January 1989 in the aviation smuggling operation. The record plainly refutes Magnone's contention, and fully supports the denial of an offense level reduction under section 3E1.1(a).²⁷ The district court properly disposed of this claim without an evidentiary hearing.

Remaining Claims

We decline to consider claims which Magnone raises for the first time on appeal.²⁸

²⁶ **United States v. Perez**, 952 F.2d 908 (5th Cir. 1992).

²⁷ See **United States v. Sherbak**, 950 F.2d 1095 (5th Cir. 1992) (district court findings with regard to defendant's acceptance of personal responsibility reviewable only against clearly erroneous standard).

²⁸ **Smith**. For the first time on appeal, Magnone challenges the knowing and voluntary character of his plea and claims that the district court improperly sentenced him more harshly than it did his criminal associates; the plea colloquy did not comply with

Conclusion

Magnone claims ineffective assistance of counsel and violation of Fed.R.Crim.P. 32 which, if proven, would admit of habeas corpus relief. We therefore VACATE the judgment with regard to those claims and REMAND for further proceedings. In connection therewith, the district court may wish to consider appointment of counsel for Magnone. In all other respects, the judgment of the district court is AFFIRMED.

Fed.R.Crim.P. 11; the district court sentenced him to incarceration in excess of the five years provided for by a secret agreement; and the trial court failed to advise him of his right to appeal.