IN THE UNITED STATES OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5665
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROY MARION JONES,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(SA 92 CA 0188 (SA 78 CR 163))

(August 2, 1993)

Before JOLLY, WIENER, and E. GARZA, Circuit Judges.

PER CURIAM:*

I

Roy Marion Jones and nine others were named in a 19-count indictment filed on August 6, 1978. The indictment charged Jones with conspiracy, importation of marijuana, aiding and abetting the importation of marijuana, the possession of marijuana, the aiding and abetting of the possession of marijuana, and forgery of a pilot

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

certificate. Jones agreed to plead guilty to one count of importation of marijuana in violation of 21 U.S.C. §§ 952 and 960, and to forgery of a pilot certificate in violation of 49 U.S.C. § 1472(b). At arraignment and sentencing, the district court was presented with enhancement information consisting of the May 25, 1972 conviction of Jones for aiding and abetting the possession with intent to distribute marijuana. Jones affirmed that he had been so convicted. The district court then sentenced Jones to eight years of imprisonment, a ten-year term of special parole, and a $15,000 fine for violating 21 U.S.C. §§ 960(a)(1), 952(a) and 18 U.S.C. § 2. The district court sentenced Jones to three years of imprisonment on the forgery count. The three-year term was to be served concurrently with the eight-year prison term. The other counts of the indictment against Jones were dismissed.

On May 7, 1979, Jones filed a motion for reduction of sentence pursuant to Fed. R. Civ. P. 35 on the basis that the sentence was unduly harsh. The district court denied the motion. Jones filed a motion for reconsideration which was denied.

On October 29, 1980, Jones filed a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. Jones asserted that he was denied the effective assistance of counsel during the negotiation of his plea agreement. The magistrate recommended that the motion be denied as Jones's allegations were "legally inadequate". The magistrate issued his recommendation on November 21, 1980. On February 18, 1981, Jones's motion was

transferred from the docket of Judge John H. Wood, Jr. to Judge Fred Shannon. On March 11, 1982, the district court adopted the magistrate's recommendation and denied Jones's motion.[1]

On February 26, 1992, Jones filed a petition for a writ of error coram nobis. Jones alleged that the enhancement of his sentence based on his 1972 conviction was improper because it was barred by statutes of limitations found in 21 U.S.C. §§ 851(e) and 3282. Jones also alleged that his counsel was ineffective because he did not object to the enhancement information. Further, Jones alleged that his plea bargain agreement had been violated because he had entered a plea under one statute and sentence had been imposed under another statute. Finally, Jones alleged that the district court did not perform a de novo review of the magistrate's report. The district court correctly construed the petition for a writ of error coram nobis as a motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 because Jones was still in custody. See U.S. v. Drobny, 955 F.2d 990, 996 (5th Cir. 1992). The district court then evaluated Jones's claims, found them to be without merit and denied his motion. Jones has timely appealed this denial.

[1] Jones's fourth issue on appeal disputes the entering of this order.

II

Jones asserts that he agreed to plead guilty to offenses defined by one set of statutes and was sentenced based on offenses defined by another set of statutes. In paragraph 1 of the plea bargain agreement, Jones agreed to plead guilty to the importation of marijuana in violation of 21 U.S.C. §§ 952, 960, and forging a pilot certificate in violation of 49 U.S.C. § 1472(b). Paragraph 2a of the plea agreement stated that if Jones did not plead guilty the Government would have to prove that he had violated 21 U.S.C. §§ 952, 963, 18 U.S.C. § 2, and 49 U.S.C. § 1472(b). Jones has incorrectly read the plea agreement and states that he pleaded guilty to the offenses listed in § 2a, not those listed in paragraph 1 of the plea agreement. The record shows that the district court sentenced Jones based on 21 U.S.C. §§ 952(a), 960(a)(1), 18 U.S.C. § 2, and 49 U.S.C. § 1472(b), the same as described in paragraph 1 of the plea agreement. There is no factual basis for this allegation.

III

Jones next argues that his 1972 conviction could not be used to enhance his 1978 conviction because of the operation of the statutes of limitations set out in 21 U.S.C. §§ 851 and 3282. Section 851(e) provides that a defendant may not challenge the validity of a conviction to be used for enhancement purposes if that conviction occurred more than five years in the past. This section had nothing to do with limiting the Government's use of

prior convictions for enhancement purposes. See U.S. v. Nanez, 694 F.2d 405, 412-13 (5th Cir. 1982), cert. denied, 461 U.S. 909 (1983). Similarly, the statute of limitations for non-capital offenses found at 18 U.S.C. § 3282 provides for a five-year limitations period on prosecutions following the commission of an offense. This section does not apply to enhancement information. Although it did not deal specifically with § 3282, Nanez approved the use of an eight-year-old conviction for enhancement purposes. See 694 F.2d at 412-13.

On appeal, Jones also has raised the issue of a failure to file the enhancement information as required by 21 U.S.C. § 851(a)(1). See U.S. v. Noland, 495 F.2d 529, 531-34 (5th Cir.), cert. denied, 419 U.S. 966 (1974). Jones, however, did not raise this issue in the district court. Issues raised for the first time on appeal "are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice." Self v. Blackburn, 751 F.2d 789, 793 (5th Cir. 1985). This issue involves a factual dispute because the record on appeal does not show that the enhancement information was filed in accordance with § 851(a)(1), but the transcript of Jones's arraignment indicates that the enhancement information was filed. The arraignment transcript states that "[o]n the Defendant, Roy Marion Jones, there's been an enhancement filed in his case and has been given Cause Number SA-78-CR-167." The record in SA-78-CR-167 is not before the Court on appeal. In any event, factual error or

not, there is nothing here that convinces us that Jones was the victim of manifest injustice, and consequently find this claim without merit.

IV

In his motion before the district court, Jones asserted that his counsel had been ineffective because he did not object to the enhancement information at arraignment. Also, Jones asserted that his new counsel at sentencing did not make the objection because he was not given sufficient time to study the facts of the case. To prevail on an ineffective assistance claim, the defendant must show that his counsel's performance was deficient, and that the deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the context of a guilty plea, a defendant must show "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

In the district court, Jones raised only the issue of ineffective assistance of counsel resulting from a failure to object to the enhancement information at arraignment and at sentencing. Jones alleged that the breach of counsel's duty was caused by a lack of time to adequately investigate the conviction used for enhancement. Jones asserted that because he had not had effective assistance of counsel on the earlier offense, the

conviction could not be used for enhancement purposes. 21 U.S.C. § 851(e) bars a challenge to that conviction because more than five years had elapsed; Jones therefore can show no prejudice. Stated differently, even if counsel had found something wrong with the conviction, its validity could not now be challenged. See Nanez, 694 F.2d at 412-13.

On appeal, Jones also alleges that his counsel should have objected to the enhancement information on direct appeal or through a Rule 35 motion. These issues were not raised before the district court. These claims, raised for the first time on appeal, are not reviewable on appeal. See Self,V751 F.2d at 793.

Finally, Jones contends that the district court failed to enter its order denying his first § 2255 motion.[2] The record shows that the district court adopted the magistrate's recommendation and denied Jones's motion on March 11, 1982. Therefore, the argument has no merit.

IV

For the reasons stated herein, the judgment of the district court is

A F F I R M E D.

[2] In the district court, Jones also alleged that the district court did not conduct a de novo review of his first § 2255 petition. This claim was not raised on appeal.