IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 92-5668
92-5669
92-5670

Summary Calendar

United States of America,

Plaintiff-Appellee,

versus

John Alan Hudson,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas
(SA-78-CR-163(4), SA-90-CR-132-1 & SA-77-CR-235(1))

(November 12, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

John Alan Hudson pled guilty to three offenses in May 1990. Two involved conspiracies to import marijuana into the United States[1] and a third involved his possession of a firearm and use of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1]SA-77-CR-235, this court's No. 92-5670, alleged a conspiracy to import marijuana during 1975, 1976, and 1977, in violation of 21 U.S.C. § 952(a). SA-78-CR-163, this court's No. 92-5668, alleged a different conspiracy to import marijuana from 1975 to 1978.

a false social security number while avoiding arrest for the first two offenses.[2] The court sentenced Hudson to five year terms on the conspiracy charges and the firearm charge and to two years on the social security charge, to run consecutively for a total prison term of seventeen years. The court also imposed a fine of $10,000.

This appeal arises from Hudson's second collateral attack on his sentence. Hudson took no direct appeal after his sentencing. He filed a motion for resentencing on January 8, 1991, alleging disparity of his sentence compared to his codefendants', his distinguished military service, and his desire to support his family. The district court denied the motion, stating that Hudson had already obtained "substantial clemency through a very favorable plea agreement approved by the Court." Hudson did not appeal this ruling but filed another motion for resentencing in the district court, alleging ineffective assistance of counsel, the government's failure to comply with a plea agreement, and the district court's failure to make a factual finding as to one of his challenges to the PSR. The district court denied the motion without a hearing on January 29, 1992. He appeals the denial of that motion.

Hudson brought his pro se motion pursuant to Federal Rule of Criminal Procedure 35. Because his offenses occurred before November 1, 1987, the version of this rule in force before its 1984 amendment controls. In re: United States, 900 F.2d 800, 803 n.6

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[2]SA-90-CR-132, this court's No. 92-5669, alleged possession of a firearm while a fugitive in violation of 18 U.S.C. § 922(g), and using a false social security number in violation of 42 U.S.C. § 408(g)(2).

(5th Cir.), cert. denied, 498 U.S. 905 (1990); United States v. Ortega, 859 F.2d 327, 334 n.11 (5th Cir. 1988), cert. denied, 489 U.S. 1027 (1989). As Hudson does not allege that his sentence was illegal, Rule 35(b)'s jurisdictional time limit on such claims bars them. See United States v. Cevallos, 538 F.2d 1122, 1127 (5th Cir. 1976).

Because Hudson proceeds pro se, we will also examine his motion as a request for relief under 28 U.S.C. § 2255. See United States v. Santora, 711 F.2d 41, 42 (5th Cir. 1983). Section 2255 provides recourse only for transgressions of constitutional rights and for that narrow compass of other injuries that could not have been raised on direct appeal and, would, if condoned, result in a complete miscarriage of justice. United States v. Perez, 952 F.2d 908, 909 (5th Cir. 1992) (per curiam). His allegations that the PSR contained errors and that the judge failed to make factual findings about them in compliance with rule 32(c)(3)(D) do not raise section 2255 claims, because he could have raised them on direct appeal and they do not raise constitutional questions. See United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992); United States v. Weintraub, 871 F.2d 1257, 1265-66 (5th Cir. 1989).

Hudson's allegations of ineffective assistance of counsel fall within section 2255 but do not trigger a need for an evidentiary hearing. See United States v. Jones, 614 F.2d 80, 82 (5th Cir.), cert. denied, 446 U.S. 945 (1980). An ineffective assistance claim has two elements: that the performance of petitioner's counsel was deficient, and that the deficient performance prejudiced his

defense. Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). The record reveals no serious dispute about the second element of the Strickland test.

Hudson claims that his attorney did not adequately argue about the disparity of his sentencing, factual errors in the PSR and his military service, and did not correct the government's assertion at the time of sentencing that Hudson had not cooperated with the government. As to the first three allegations, the record reveals that Hudson's attorney addressed the issues of disparity and military service in his posttrial motion, and drew the court's attention before trial to many parts of the PSR Hudson found objectionable. Hudson also does not allege that his counsel's alleged failure to object had a prejudicial effect on his sentence. Whether or not Hudson cooperated was but one of many factors the judge was free to consider. Among those factors were many negative ones, such as the years he spent as a fugitive. We find no allegation of prejudice sufficient to justify a hearing on the effectiveness of Hudson's counsel.

Hudson's final allegation is that the government breached part of its plea bargain by erroneously stating at sentencing that he did not cooperate with the government. He does not allege that the government's promise to reveal his cooperation played any role in obtaining his guilty plea. Cf. United States v. Birdwell, 887 F.2d 643, 645 (5th Cir. 1989). His earlier motion to modify sentence made no mention of this promise or his reliance on it. See United States v. Cates, 952 F.2d 149, 154 (5th Cir.), cert. denied, 112

S.Ct. 2319 (1992); United States v. Prince, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, 493 U.S. 932 (1989). When made for the first time at this late date, unaccompanied by any allegation of reliance, this allegation does not compel an evidentiary hearing.

AFFIRMED