

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-7056  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALBERT L. GRAHAM, SR.,

Defendant-Appellant.

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Appeal from the United States District Court for the  
Southern District of Mississippi  
(CA J90 0502 (W))

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(December 17, 1992)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

In April 1987, Albert Lee Graham pleaded guilty to two counts of bank fraud in Criminal Case No. J86-00053(W) (J86-53). Graham also pleaded guilty to mail fraud in Criminal Case No. J87-00027 (J87-27), which was transferred to the Southern District of Mississippi from Delaware pursuant to Fed. R. Crim. P. 20. In J87-27, the court sentenced Graham to five years of incarceration.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

In J86-53, the court sentenced Graham to five years of incarceration for the first count of bank fraud and to five years of incarceration for the second count of bank fraud, with execution of the latter sentence suspended. The court also placed Graham on active reporting probation for the five-year suspended sentence, beginning upon his release from confinement ordered as to the first count. As a special condition of probation, the court ordered that Graham not be allowed to open or maintain any checking account during the period of probation. The court further ordered that Graham's sentence run consecutive to a state-imposed sentence which he was serving at the time of sentencing. Graham did not pursue a direct appeal.

In June 1987, Graham filed a § 2255 motion to vacate the sentence imposed in J87-27, alleging that his plea was not voluntary, that his due process rights were violated at sentencing because he received a heavier sentence than that promised by the U.S. Attorney in the plea negotiations, that he was denied equal protection of the law, and that his conviction was obtained in violation of double jeopardy. In an amended motion to vacate the sentences imposed in J87-27 and J86-53, Graham added that he was denied effective assistance of counsel, that he was prejudiced by the prosecutor's remark that Graham did not object to a greater sentence, that his due process rights were violated by judicial bias, and that the court violated Fed. R. Crim. P. 11(c). On September 14, 1987, the court denied the motions.

In October 1990, Graham filed a motion to vacate the sentences imposed in J86-53 and J87-27 in civil cause number J90-0502(W), alleging that his plea was not voluntary, his conviction was obtained in violation of double jeopardy, he was denied effective assistance of counsel, and that he was being held after an unlawful arrest. In January 1991, Graham filed another § 2255 motion in civil cause number J91-0025(W) alleging that he was denied due process because was not given credit for time served for his state-imposed sentence. In June 1991, Graham filed a Rule 35(a) motion to correct an illegal sentence which alleged a breach of the plea agreement. Finally, in October 1991, Graham filed a motion to dismiss the indictment for insufficient evidence. The court dismissed all of the motions that Graham filed in one memorandum opinion and order. The Government did not raise, nor did the district court sua sponte raise, the question whether these latter petitions and motions were repetitious under Rule 9(b) of the Rules Governing Section 2255 Cases. The issues are, therefore, properly before this court on this appeal.

The government argues that Graham's appeal is untimely under Fed. R. App. P. 4(b) because notice of appeal in criminal cases must be filed within 10 days after the entry of the judgment or order appealed from. Graham filed notice of appeal on January 21, 1992, thirteen days after the entry of judgment.

The timeliness of Graham's notice of appeal, vis-a-vis the denial of the Rule 35(a) motion, is governed by the 10-day period

prescribed by Fed. R. App. P. 4(b) and Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). Former Rule 35(a) applies to offenses committed before November 1, 1987. Graham committed the offenses in J86-53 from on or about October 1, 1985, through January 20, 1986, and Count Two from on or about January 21, 1986, through March 17, 1986. He committed the offenses in J87-27 beginning October 25, 1984 through November 30, 1984.

This court has held, however, that inasmuch both Rule 35 and § 2255 provide a vehicle for attacking an illegal sentence, given the liberality accorded pro se filings, the Court may elect to construe a Rule 35 pleading as a request for relief under § 2255 to avoid dismissing an appeal as untimely. See U.S. v. Santora, 711 F.2d 41, 42 (5th Cir. 1983). Here, where some pleadings were designated as § 2255 motions and other pleadings sought relief under Rule 35, and where all claims for relief were decided in a single court order, we will not deem the appeal of the Rule 35 motion as untimely.

We will first address Graham's claim that he was denied effective assistance of counsel. We address this claim first because our disposition requires a remand to the district court. If, on remand, this district court should grant relief on this claim, it might provide a remedy of an out of time appeal on Graham's conviction and sentence. If it should do so, the standard of review of Graham's claims on the direct appeal would be

different from the one that we would apply to the same claims arising under a § 2255 proceeding, since we primarily look only for constitutional error in § 2255 proceedings. We, therefore, do not at this time address the other issues that Graham raises because the standard of review is uncertain.

We now turn to the ineffective assistance of counsel claim. Graham argues that he was denied effective assistance of counsel because, inter alia, his lawyer never attempted to appeal the conviction, despite his request that he do so. Graham alleged in the district court that his lawyer was ineffective because he failed to pursue an appeal after Graham was sentenced beyond what was in the plea agreement. Graham's attorney's affidavit does not address whether Graham requested such an appeal. The district court addressed the allegation in its order and found it to be without merit, but made no finding whether Graham had actually requested an appeal and his lawyer failed to file it. Construing Graham's pro se pleadings liberally, however, he has alleged facts sufficient to raise the claim that he was denied effective assistance of counsel because his lawyer failed to file a notice of appeal. See Martin v. Texas, 694 F.2d 423, 425 (5th Cir. 1982).

An accused is constitutionally entitled to effective assistance of counsel on direct appeal as of right. Lofton v. Whitley, 905 F.2d 885, 887 (5th Cir. 1990). If the defendant is actually or constructively denied assistance of appellate counsel, prejudice is presumed, Penson v. Ohio, 488 U.S. 75, 88-89, 109

S.Ct. 346, 102 L.Ed.2d 300 (1988), and neither the Strickland prejudice test nor the harmless error test of Chapman v. California is appropriate. Sharp v. Puckett, 930 F.2d 450, 451-52 (5th Cir. 1991).

"A motion brought under 28 U.S.C. § 2255 can be denied without a hearing only if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." U.S. v. Bartholemew, 974 F.2d 39, 41 (5th Cir. 1992). Because the record is insufficient to show conclusively that Graham is entitled to no relief, an evidentiary hearing appears to be necessary to determine whether Graham requested his counsel to appeal and counsel's response to that request.

Depending on the district court's determination following the evidentiary hearing, Graham might be entitled to post-conviction relief in the form of an out-of-time appeal. See U.S.v. Green, 882 F.2d 999, 1003 (5th Cir. 1989); see also Mack v. Smith, 659 F.2d 23, 25 (5th Cir. 1981). As we have noted, were he to be granted a direct criminal appeal, a different standard of review may apply to any issues remaining in this appeal that he may raise in a direct appeal. Therefore, we pretermitt addressing such issues until such time as they may be presented to us, if at all, in a subsequent appeal.

In conclusion, we VACATE the district court's judgment and REMAND for the sole purpose of determining whether Graham requested his counsel to appeal the conviction and sentence, and if the

district court determines that Graham did make such a request, and his lawyer failed to file the appeal, to apply the appropriate remedy. If the district court should decide that Graham was not denied effective assistance of counsel, it may find it appropriate only to issue a slightly amended opinion and to reinstate previous judgment in this case. In any event, Graham will need to file a new notice of appeal if he wishes this court to review any succeeding judgment of the district court.

VACATED and REMANDED.