

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7365
Summary Calendar

BRINNON DILLON,

Petitioner-Appellant,

VERSUS

EDWARD HARGETT, Superintendent,
Mississippi State Penitentiary, ET AL.,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
CA J91 0634 (L) (N)

August 12, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:¹

Brinnon L. Dillon, convicted in Mississippi for possession of more than one kilogram of marijuana with intent to distribute it, seeks habeas corpus relief based on the ineffective assistance of his counsel on appeal. We affirm the denial of Dillon's habeas petition.

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I.

Brinnon Dillon, represented by attorney Calvin Cosnahan, was convicted by a jury in Pike County, Mississippi, of possessing more than one kilogram of marijuana with intent to distribute it. He was sentenced as a recidivist to serve 30 years without parole and fined \$1,000,000. His counsel filed a notice of appeal to the Mississippi Supreme Court.

On January 11, 1990, before the appellate record and briefs were filed, Dillon was arraigned in Lincoln County on a charge of conspiracy to possess more than one kilogram of marijuana with intent to distribute. Represented by Mr. Cosnahan, Dillon pleaded guilty. The State recommended that Dillon receive a 10-year sentence to run concurrently with his 30-year sentence. The State further recommended deleting the recidivist aspect of the sentence, enabling Dillon to be eligible for parole. The judge observed that if the Pike County conviction was on appeal, the court could not resentence Dillon on it. Dillon's attorney responded that the court had jurisdiction because the appeal had not yet been perfected. The court then sentenced Dillon in accordance with the State's recommendation.

In July 1990, Mr. Cosnahan filed a motion in the Mississippi Supreme Court to dismiss Dillon's appeal. The court dismissed the motion without prejudice, because proof of Dillon's consent was not attached. The lawyer filed another motion to dismiss the appeal in September 1990. He attached a copy of a motion to dismiss the appeal which had been filed in Pike County Circuit Court, signed

and sworn to by Dillon. The Mississippi Supreme Court granted this motion on September 19, 1990.

In August 1991, Dillon filed a motion in the Mississippi Supreme Court to reinstate his direct appeal or for an out-of-time appeal. He attached an affidavit stating that after he paid Mr. Cosnahan to take the appeal, the lawyer moved for its dismissal without his knowledge or approval. Dillon stated that he "cannot read well and [he] only finished the 6th grade in the year 1942." The court denied the motion.

In his federal habeas petition, Dillon alleged that Mr. Cosnahan moved for dismissal of Dillon's direct appeal without explaining the consequences. He alleged that the appeal was dismissed without his consent or knowledge. In an affidavit attached to his traverse, Dillon averred that he was tricked into signing the motion to dismiss his appeal by Mr. Cosnahan's promise to get him sent to a satellite (prison) and to get his sentence reduced to 20 years.

The magistrate judge filed a report recommending denial of habeas relief on grounds that the state arraignment transcript indicated that Dillon waived his direct appeal pursuant to his plea bargain. The magistrate judge found it significant that Dillon did not attempt to reinstate his direct appeal until almost a year later. The district court, adopting the report over Dillon's objections, dismissed his habeas petition. This court granted CPC.

II.

"Under the sixth amendment an indigent defendant is denied his right to effective assistance of counsel when an appointed attorney fails to inform him of his appellate rights in accordance with **Lumpkin v. Smith**, [439 F.2d 1084, 1085 (5th Cir. 1971)]." **Norris v. Wainwright**, 588 F.2d 130, 137 (5th Cir.), **cert. denied**, 444 U.S. 846 (1979). Conversely, "[a] defendant properly informed of his appellate rights may not 'let the matter rest,' and then claim that he did not waive his right to appeal." **Id.** (citation omitted). However, the attorney must not "preempt his client's decision to appeal." If the petitioner makes a showing of a "constructive complete denial of any assistance of appellate counsel," prejudice is presumed. **Lombard v. Lynaugh**, 868 F.2d 1475, 1480 (5th Cir. 1989).

The record does not reflect a complete denial of assistance of counsel on Dillon's appeal. The transcript of Dillon's Lincoln County guilty plea and resentencing reflect that the court explained in detail Dillon's right to appeal and the consequences of his guilty plea. Dillon had ample time to respond or ask questions. Moreover, Dillon denied that anyone had threatened him or promised him anything to cause him to plead guilty. In addition, the court explained the reduction in the Pike County sentence in light of Dillon's unperfected appeal to the Mississippi Supreme Court. Dillon indicated that he understood that explanation.

The transcript of Dillon's guilty plea support a finding that Dillon knowingly signed his motion to dismiss his appeal. Moreover, Dillon's attorney acted reasonably in recommending that Dillon plead guilty and dismiss his appeal in exchange for a reduced sentence.

AFFIRMED.