UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-7808

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ORLANDO LEON BENITEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA M92-131(CR M-88-439))

(November 30, 1993)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Defendant Orlando Leon-Benitez ("Leon"), *pro se*, appeals an order of the district court denying his motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Leon was tried before a jury and convicted of knowingly and unlawfully creating and supplying false writings and documents to be used in making applications for temporary resident status, in violation of 8 U.S.C. § 1160(b)(7)(A)(ii) and 18 U.S.C. § 2, and of knowingly

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

transporting illegal aliens, in violation of 8 U.S.C. § 1324(a)(1) and 18 U.S.C. § 2. Leon was sentenced to a 30 month term of imprisonment. When Leon directly appealed his conviction and sentence, we affirmed in an unpublished opinion. *See United States of America v. Leon-Benitez*, No. 90-2349 (5th Cir. Oct. 11, 1991). Leon now seeks to vacate his sentence pursuant to §2255 based upon five claims of error not raised in his direct appeal. We affirm.

I

"Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). "The scope of the remedy under § 2255 is commensurate with that of the writ of habeas corpus." *United States v. Cates*, 952 F.2d 149, 151 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2319, 119 L. Ed. 2d 238 (1992). Accordingly, "[n]onconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding." *Vaughn*, 955 F.2d at 368.

II

Leon first contends that the government improperly introduced one of Leon's business cards in evidence.[1] However, the district court never admitted the card in evidence. Moreover, Leon failed to make a contemporaneous objection or ask for any type of limiting

[1] The card, which is included in the record on appeal, was marked for identification purposes but never admitted in evidence.

instruction at trial. Accordingly, we find his claim of error to be without merit.

III

Leon next argues that the government improperly used as evidence against him two affidavits that the government allegedly obtained by coercing the affiants. However, Leon's counsel introduced the affidavits and sought their admission in evidence. "A party cannot complain on appeal of errors which he himself induced the district court to commit." *United States v. Lopez-Escobar*, 920 F.2d 1241, 1246 (5th Cir. 1991). Thus, assuming *arguendo* that the government obtained the affidavits at issue by coercing the witnesses, the district court cannot be faulted for admitting, at Leon's request, the affidavits in evidence.[2]

IV

Leon next contends that the government improperly induced, and then called as a surprise witness, one of the drivers))Roberto Cesar Rodriguez-Calderon))who transported illegal aliens at Leon's direction. Leon, however, failed to ask the district court for a continuance with which any alleged surprise could be cured. *See United States v. Sparks*, 2 F.3d 574, 584 (5th Cir. 1993) (noting that the normal remedy for surprise is a continuance); *United States v. Jennings*, 724 F.2d 436, 445 (5th Cir.) (same), *cert. denied*, 467 U.S. 1227, 104 S. Ct. 2682, 81 L. Ed. 2d 877 (1984).

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[2] Leon additionally contended before the district court that the government improperly used the affidavits to obtain his indictment. However, Leon fails to raise this issue on appeal. Consequently, we need not address it. *See Morrison v. City of Baton Rouge*, 761 F.2d 242, 244 (5th Cir. 1985).

Moreover, although his counsel cross-examined Rodriguez, Leon fails to provide any substantiation for his conclusory allegations that the government unlawfully induced Rodriguez to testify.[3] *See United States v. Valdez*, 861 F.2d 427, 432-33 (5th Cir. 1988) (stating that conclusory assertions do not establish error), *cert. denied*, 489 U.S. 1083, 109 S. Ct. 1539, 103 L. Ed. 2d 844 (1989). Accordingly, we reject Leon's contention that the district court by allowing Rodriguez to testify.

V

Leon further argues that the presentence report ("PSR") contained inaccurate information regarding the content of a printed advertisement distributed in Mexico by his company. Leon contends that the PSR incorrectly stated that the advertisement contained the word "amnesty." Leon, however, misreads the PSR. Instead, the PSR stated that the advertisement "named a company in Laredo, Texas, that obtained and completed documents for the amnesty program." As Leon does not contend that the PSR's translation of the advertisement is incorrect,[4] the district court did not err in

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[3] Although we reject Leon's assertions for this reason, we further note that they appear to be without merit. *See Sparks*, 2 F.3d at 580 (noting that there is nothing inherently invidious about a plea agreement requiring one person to testify against another); *United States v. Osum*, 943 F.2d 1394, 1405 (5th Cir. 1991) (stating that "a conviction may be based even on uncorroborated testimony of . . . someone making a plea bargain"); *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (holding that "an informant who is promised a contingent fee by the government is not disqualified from testifying in a federal criminal trial"), *cert. denied*, 484 U.S. 1026, 108 S. Ct. 749, 98 L. Ed. 2d 762 (1988).

[4] The advertisement was written in Spanish.

relying on the PSR's findings. *See United States v. Rodriguez*, 897 F.2d 1324, 1328 (5th Cir.) (stating that "the defendant has the burden of showing that the information upon which the district court relied in sentencing was materially untrue"), *cert. denied*, 498 U.S. 857, 111 S. Ct. 158, 112 L. Ed. 2d 124 (1990).

VI

Leon next's claim is that the district court denied him his right to confront witnesses during sentencing. Leon argues that because the district court upwardly departed from the sentencing guidelines based on the large number of illegal aliens involved in Leon's unlawful scheme, he had the right to confront and question each alien.[5] "However, a defendant's confrontation rights at a sentencing hearing are severely restricted." *Rodriguez*, 897 F.2d at 1328. Accordingly, the district court may rely upon both uncorroborated hearsay testimony and out-of-court statements by unidentified informants, "at least where there is good cause for not allowing confrontation and there is some additional corroboration of the statement." *Id.* Here, the government had good cause to deport the aliens,[6] and Leon fails to demonstrate

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[5] The government deported most of the aliens shortly after they were arrested, but before Leon could interview them.

[6] In *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872-73, 102 S. Ct. 3440, 3449 (1982), the Supreme Court noted that

> the responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution. The mere fact that the Government deports such witnesses is not sufficient to

what material, favorable testimony the aliens would have provided for his defense. Moreover, the evidence adduced at trial and during sentencing supports the district court's finding that Leon unlawfully transported at least sixteen aliens. Consequently, we reject Leon's contention that the district court denied him his right to confront witnesses.

VII

Leon's final contention is that his appellate counsel furnished constitutionally ineffective assistance by failing to brief on Leon's direct appeal the issues Leon now raises. To prevail on this claim, Leon must demonstrate that counsel's performance both "fell beneath an objective standard of reasonable professional assistance," *Stokes v. Procunier*, 744 F.2d 475, 483 (5th Cir. 1984), and prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Prejudice occurs if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. In reviewing an ineffective assistance claim, we "give great deference to counsel's assistance, strongly presuming that counsel has exercised reasonable professional judgment." *Ricalday v. Procunier*, 736 F.2d 203, 206 (5th Cir. 1984). As we have found all the claims of error raised by Leon to be without merit, it

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establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense.

necessarily follows that Leon was not denied effective assistance of counsel on his direct appeal. *See United States v. Merida*, 985 F.2d 198, 202 (5th Cir. 1993).

VIII

For the foregoing reasons, we AFFIRM the judgment of the district court.