IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8348
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LARRY GENE COBB,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-CA-91-216(W-90-CR-002))

(November 19, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Larry Cobb challenges the district court's denial of his federal habeas corpus motion filed pursuant to 28 U.S.C. § 2255. Concluding that the record needs further development, we vacate and remand.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Larry Gene Cobb pleaded guilty to the superseding information charging him with possession of methamphetamine with intent to distribute. In exchange, the government agreed to move for the dismissal of the indictment charging him with conspiracy of the substantive crime. Cobb objected to the probation officer's recommendation that the amount of drugs found at William Morgan's place of business, eighty-nine grams, be added to the amount found in Cobb's personal possession, eleven grams, in computing Cobb's base offense level. The district court adopted the recommendation, finding "that it [wa]s probable that Mr. Cobb was aware of and involved in the distribution taking place at Waco Salvage and should be accountable for the amounts found there." No notice of appeal was filed following the imposition of sentence.

Cobb filed pro se this section 2255 motion alleging ineffective assistance of counsel for his attorney's failure to file notice of appeal after assuring Cobb that he would file notice. This failure denied Cobb the opportunity to appeal his sentence. Cobb alleged that the district court erred under the sentencing guidelines by attributing to him eighty-nine grams of drugs and that "[t]he District Court erred in accepting Movant's plea bargain agreement then later use [sic] dismissed information from same."

The district court adopted the magistrate judge's report and recommendation and dismissed the case, holding that Cobb's claims regarding his sentence was meritless and that Cobb's counsel performed as a reasonable, prudent attorney. In denying Cobb's

section 2255 motion, the district court reasoned that if Cobb's sentence had been appealed, he would have lost, thus making the sentencing issue meritless. Therefore, Cobb's counsel was not deficient for failing to file notice of appeal because a reasonable, prudent attorney would not appeal a futile issue.

II.

Cobb argues that he was denied effective counsel. He alleges throughout the section 2255 record and on this appeal that he ordered his retained counsel to file notice of appeal, that his counsel assured him it would be done, that his counsel failed to file the notice, and that Cobb became aware of this after it was too late. Liberally construing Cobb's argument, he is arguing a complete denial of appellate counsel.

"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).

> In Penson, the [Supreme] Court distinguished between two types of denial of effective assistance of appellate counsel: first, those in which the deficiency consists of failure to raise (or properly brief or argue) one or more specific issues or the like; and second, those in which there has been an actual or constructive complete denial of any assistance of appellate counsel . . . . In the second type of case, prejudice is presumed, and neither the prejudice test of Strickland nor the harmless error analysis of Chapman v. California, is appropriate.

Lombard v. Lynaugh, 868 F.2d 1475, 1480 (5th Cir. 1989) (citations omitted); see Penson v. Ohio, 488 U.S. 75, 88-89 (1988). If Cobb's contentions regarding his counsel's failure to file notice of appeal are correct, he has alleged the constructive denial of

appellate counsel, and prejudice is presumed. See Sharp v. Puckett, 930 F.2d 450, 451-52 (5th Cir. 1991).

Failing to file notice of appeal)) at least without notifying the client that no appeal will be filed)) is not the action of a reasonable prudent attorney. See United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989) ("If Green had alleged that his attorney misled him into believing that a notice of appeal had been filed he might have been entitled to post-conviction relief in the form of an out-of-time appeal."); United States v. Davis, 929 F.2d 554, 557 (10th Cir. 1991). This denial of appellate counsel turns on whether Cobb instructed his attorney to file notice and whether his attorney said he would.

These facts cannot be determined from the record. Thus, we remand with instructions that the district court conduct an evidentiary hearing on why notice of appeal was not filed. See § 2255 ("unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon"). If Cobb is correct in his allegations, the district court should consider whether to grant Cobb the right to file an out-of-time appeal. See Green, 882 F.2d at 1003.

VACATED and REMANDED.