

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-8461

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOSE MANUEL GONZALEZ-GONZALEZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(A 92 CA 125 (A 90 CR 16 (1)))

(June 4, 1993)

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Defendant, Jose Manuel Gonzalez-Gonzalez ("Gonzalez"), was convicted of aircraft piracy, in violation of 49 U.S.C. § 1472(i) (1988), and of interference with a flight attendant, in violation of 49 U.S.C. § 1472(j) (1988), after he hijacked a commercial jetliner and brutally assaulted a flight attendant in the process. Gonzalez's conviction was affirmed by this Court on direct appeal. Gonzalez then filed a motion to vacate, set aside, or correct his

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sentence, pursuant to 28 U.S.C. § 2255 (1988), which was denied by the district court. Gonzalez appeals the district court's denial of his § 2255 motion, arguing that the district court should have granted relief on his claims of ineffective assistance of counsel and excessive restitution. We affirm.

I

A

Gonzalez argues that he was denied his Sixth Amendment right to effective assistance of counsel when his trial attorney failed to argue that he was incompetent to stand trial, or to pursue a defense of insanity. Gonzalez specifically alleges that his lawyer failed to: (a) subpoena from a "charity hospital" in New Orleans all of the records indicating that Gonzalez was admitted there for treatment of mental health problems; (b) subpoena the psychiatrist who treated Gonzalez for his mental problems at the charity hospital; (c) subpoena records from Fairfax Hospital, Fairfax, Virginia, concerning a skull fracture which Gonzalez suffered; (d) subpoena physicians from a Springfield, Missouri prison hospital who examined Gonzalez pursuant to an order of the district court; (e) subpoena records from a substance abuse clinic in New Orleans, where Gonzalez was treated for drug and alcohol abuse; or (f) seek the assistance of a psychiatric consultant under 18 U.S.C. § 3006A(e) (1988). Gonzalez contends that, if his counsel had done those things, his voluntary drug addiction "would have shown a mental disease or defect bearing on [his] criminal responsibility and competence." See Brief for Gonzalez at 7, 10.

In order to prevail on his claim of ineffective assistance of counsel, Gonzalez must show that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense.¹ *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). To demonstrate prejudice, Gonzalez must show that "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 order successfully to assert an insanity defense, Gonzalez would have been required to show that, because of a mental disease or defect, he was unable to comprehend the wrongfulness of his actions when he committed the offense. *United States v. Lyons*, 731 F.2d 243, 248 (5th Cir.) (en banc), cert. denied, 469 U.S. 930, 105 S. Ct. 323, 83 L. Ed. 2d 260 (1984).

Gonzalez has not shown that, but for counsel's failure to undertake the actions listed above, counsel probably could have proven that Gonzalez was unable to appreciate the wrongfulness of his actions when he committed the offense. At trial Gonzalez testified that he knew his actions were wrong when he carried them out,² see Record on Appeal, vol. 4, at 248, and two expert witnesses testified that Gonzalez's mental health problems (drug-induced paranoia and antisocial personality disorder) did not

¹ Because Gonzalez's claim fails for lack of a showing of prejudice, we need not decide whether counsel's performance was deficient. See *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

² On appeal Gonzalez does not allege that he was unable to understand the wrongfulness of his conduct when he committed the offense.

deprive him of the ability to understand that it was wrong to hijack an airplane. See *id.* at 273, 290. Furthermore, Gonzalez does not indicate how the evidence which his attorney failed to obtain would have shown that he did not understand the wrongfulness of his conduct. As a result, it is mere conjecture to assert that Gonzalez's trial counsel, by taking the steps to which Gonzalez refers, would have unearthed evidence sufficient to refute Gonzalez's own testimony and that of two expert psychiatrists. Gonzalez has not shown a reasonable probability that, but for counsel's alleged failures, he would have been found not guilty by reason of insanity.

Furthermore, Gonzalez has not shown that he would have been found incompetent to stand trial if counsel had done what Gonzalez now argues counsel should have done. In order to be found mentally incompetent to stand trial, a defendant must prove by a preponderance of the evidence that he "is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense" 18 U.S.C. § 4241(d) (1988). Although the record shows that Gonzalez had a long history of drug and alcohol abuse, which resulted in delusional paranoia at one time, nothing in the record indicates, and Gonzalez does not allege, that his past substance abuse inhibited his ability to understand his trial or assist in his defense. Therefore, it is purely speculative to argue that Gonzalez would have been found incompetent if his trial

counsel had not made the omissions of which he complains. Gonzalez has not shown a reasonable probability that, but for his counsel's alleged errors, the outcome of the proceeding would have been different.

B

In his § 2255 motion, Gonzalez claimed that the district court's order of restitution))\$80,557.00 to America West Airlines and \$8,933.84 to Traveler's Insurance Co.))was an abuse of the district court's discretion. Gonzalez also claimed that his trial counsel was ineffective for failing to object to the district court's restitution order. The district court rejected Gonzalez's claims, explaining only that Gonzalez had waived them by failing to object to the restitution order at trial. Gonzalez now argues that the district court's finding of waiver was erroneous. Gonzalez contends that he is not bound by counsel's failure to object to the restitution order at trial because that omission amounted to ineffective assistance of counsel. Because Gonzalez is not entitled to relief, we find no reversible error.³

28 U.S.C. § 2255 offers relief for a narrow scope of trial errors. *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981). "It is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have

³ Since we affirm the district court's denial of relief on other grounds, we need not decide whether the district court correctly found that Gonzalez waived his claims by failing to raise them at trial. See *Laird v. Shell Oil Co.*, 770 F.2d 508, 511 (5th Cir. 1985) ("[W]hen the judgment of a district court is correct, it may be affirmed for reasons not given by the court . . .").

been raised on direct appeal and, would, if condoned, result in a complete miscarriage of justice." *Id.* Gonzalez's claim of excessive restitution does not allege a violation of a constitutional right. Gonzalez merely alleges that the district court abused its discretion by ordering restitution in an amount which he cannot pay. See Brief for Gonzalez at 12. Furthermore, Gonzalez could have raised that claim on direct appeal, but he did not. See Record on Appeal, vol. 1, at 169-181 (opinion of this Court on direct appeal). Therefore, the error which Gonzalez alleges is not the sort for which § 2255 affords relief, and we find no reversible error in the district court's denial of relief.

Gonzalez's ineffective assistance claim alleges violation of a constitutional right, but that claim lacks merit. Gonzalez has not shown that his trial counsel was ineffective, as defined by *Strickland*, because he has not demonstrated a reasonable probability that the district court's order would have been different if counsel had objected. See *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. As grounds for an objection to the restitution order Gonzalez points out only that he is indigent and therefore unable to make the ordered restitution. However, the indigence of the defendant at the time of the restitution order is not a bar to the requirement of restitution. See *United States v. Ryan*, 874 F.2d 1052, 1054 (5th Cir. 1989).⁴ Furthermore, it does

⁴ In *Ryan* the district court ordered the defendant and one co-defendant to make restitution of \$2,210,000.00, even though the defendant had filed for bankruptcy, had lost his real estate license, which was his primary source of income, and had two dependents. See *Ryan*, 874 F.2d at 1053. Nonetheless, we held that

not appear that an objection on the basis of Gonzalez's inability to pay would have inured to his benefit, because the record reveals that the district court considered Gonzalez's inability to pay, even though no objection was made.⁵ Consequently, Gonzalez has not established a reasonable probability that the district court's restitution order would have been different had counsel objected.

II

For the foregoing reasons, we **AFFIRM**.

"the defendant's indigency at the time restitution is ordered is not a bar to the requirement of restitution." See *id.* at 1054.

⁵ The district court's judgment states, immediately adjacent to the order of restitution: "Fine is waived or is below the guideline range, because of the defendant's inability to pay." Record on Appeal, vol. 1, at 147. Because the district court considered Gonzalez's inability to pay a fine, we can infer that the district court also considered Gonzalez's indigence, as required by 18 U.S.C. § 3664(a) (1988), when ordering restitution. See *United States v. Hagmann*, 950 F.2d 175, 185 (5th Cir. 1991) (inferring that district court considered defendant's inability to pay fine, because district court waived requirement that defendant pay interest, and because fine imposed was only a fraction of the possible fine), *cert. denied*, ___ U.S. ___, 113 S. Ct. 108, 121 L. Ed. 2d 66 (1992).