**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

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No. 92-8519
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DONNY JOEL HARVEY,

Defendant-Appellant.

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Appeal from the United States District Court
For the Western District of Texas
(W 91 CA 175 (W 88 CR 035))

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(April 26, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Appellant Donny Joel Harvey, represented by Attorney Walter M. Reaves, Jr., was convicted by a jury of possession of a firearm by a convicted felon, 18 U.S.C. §§ 922(g)(1) and 924(a). Harvey received the maximum 60-month prison term, three years' supervised

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

release, and a $1,000 fine. On direct appeal, wherein Mr. Reaves also represented Harvey, the judgment was affirmed. United States v. Harvey, 897 F.2d 1300 (5th Cir.), cert. denied, 111 S. Ct. 568 (1990).[1]

After Harvey filed a § 2255 motion in June 1991, he moved for a change of venue and recusal of the trial judge. The magistrate judge denied the motion and the district court denied Harvey's appeal of the ruling. The magistrate judge allowed Harvey to file two supplements to his § 2255 motion, but denied his applications to file a third and a fourth supplement. Those later supplements are not in the record.

The magistrate judge filed a lengthy report recommending denial of § 2255 relief. Harvey filed objections. The district court, adopting the magistrate judge's report and stating additional reasons, dismissed the action. The district court found that Harvey is a pauper but that there was no "probable cause" for an appeal. Because the district court did not find that Harvey lacked "good faith," this Court docketed the appeal in forma pauperis (IFP).

The Government contends that relief on most of Harvey's § 2255 grounds (appellate issues 3-6 and 9) is barred by his failure to raise them at trial or on direct appeal. A convicted

[1] We note that this Court's recent en banc opinion in United States v. Lambert, 984 F.2d 658 (5th Cir. 1993) (en banc), criticized this decision. Lambert states that our decision on Harvey's direct appeal misapplied U.S.S.G. § 4A1.3. Id. at 662. Harvey does not challenge the propriety of his sentencing in this proceeding.

person ordinarily "may not raise an issue for the first time on collateral review without showing both `cause' for his procedural default, and `actual prejudice' resulting from the error." United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc) (citing United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)), cert. denied, 112 S. Ct. 978 (1992). "To invoke the procedural bar [in a § 2255 case], however, the government must raise it in the district court." United States v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992). The Government did not do so in this case, and the district court did not raise the bar sua sponte. See Wiggins v. Procunier, 753 F.2d 1318, 1321 (5th Cir. 1985).

Harvey contends that he "has been denied a fair and impartial judge" by the trial judge's failure to recuse himself. He argues that the judge has a personal interest in the outcome of this § 2255 proceeding because his pending civil rights action names the judge as a defendant and alleges the judge's involvement in the filing of an inaccurate and incomplete record in Harvey's direct appeal.

Since "[a] motion for recusal is committed to the sound discretion of the trial judge," its denial will be reversed only if the judge has abused his discretion. United States v. Merkt, 794 F.2d 950, 960 (5th Cir. 1986), cert. denied, 480 U.S. 946 (1987). Both 28 U.S.C. § 144 and § 455 authorize such motions. See United States v. Miranne, 688 F.2d 980, 984 (5th Cir. 1982), cert. denied, 459 U.S. 1109 (1983).

A recusal motion which alleges personal bias or prejudice, such as Harvey's, must be accompanied by a "timely and sufficient affidavit" which sets out the alleged bias or prejudice. 28 U.S.C. § 144. In order for the affidavit to be legally sufficient, "(1) the facts must be material and stated with particularity; (2) the facts must be such that, if true, they would convince a reasonable person that bias exists; and (3) the facts must show that the bias is personal, rather than judicial, in nature." Merkt, 794 F.2d at 960 n.9.

Harvey's affidavit was filed after the magistrate judge ruled on his recusal motion, but before the trial judge ruled on it. Thus, it may have been timely. However, it is legally insufficient because it does not allege any personal bias of the trial judge. As a matter of law, the trial judge has no personal interest in Harvey's § 1983 action naming him a defendant, because the judge has absolute immunity from liability for § 1983 damages. See Stump v. Sparkman, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).

Harvey suggests that the trial judge has a personal interest in the outcome of this § 2255 proceeding because he faces prosecution if it be shown that he was implicated in filing an inaccurate record. This Court will not consider this argument because it was not asserted in Harvey's recusal affidavit. See Merkt, 794 F.2d at 961.

Harvey contends that the district court's (initially, the magistrate judge's) refusal to allow him to review the electronic tape of the March 10, 1989, pretrial hearing constitutes a denial

of due process. Harvey avers that the electronic tape would show that as he was being dragged from the courtroom, he demanded the right to proceed pro se. The written transcript states only: "THE DEFENDANT: (Continuing to talk.)" as the marshal removed Harvey from the courtroom.

On request of the Court, the Clerk's office has had the relevant portion of the tape filed as an exhibit. Our review of the tape satisfies us that Harvey did not make any remark by which he indicated that he desired to waive counsel and proceed pro se. Thus, the tape supports the district court's finding that the transcript was not inaccurate, and it does not support Harvey's contention.

Harvey contends that the district court erred by finding that he did not waive his right to counsel and request to proceed pro se upon his criminal trial. He relies solely on his assertion that he demanded the right to proceed pro se at the March 10, 1989, hearing.

The defendant in a criminal case, "in the exercise of a free and intelligent choice, and with the considered approval of the court, may ... waive his Constitutional right to assistance of counsel." Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 63 S. Ct. 236, 87 L. Ed. 268 (1942). However, the defendant's expression of his desire to proceed pro se must be clear and unequivocal. Faretta v. California, 422 U.S. 806, 835-36, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Accordingly, a court "cannot infer both a waiver of counsel and a demand by the defendant to

represent himself from ... general statements of dissatisfaction with counsel." Moreno v. Estelle, 717 F.2d 171, 175 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984).

Harvey did not even make "general statements of dissatisfaction with [his] counsel" at the pretrial hearing. This is shown both by the transcript and the tape. After the court took a recess, Harvey was brought back into the courtroom for the remainder of the hearing. The court allowed him to confer with his counsel once, off the record, and the attorney continued to perform as such for the rest of the hearing. At no time thereafter did Harvey ask for leave to proceed pro se; and after sentencing, he requested that Mr. Reaves be appointed to represent him on direct appeal.

Harvey contends that he is entitled to § 2255 relief on grounds that the prosecutor impermissibly and prejudicially commented to the jury on his remaining silent following his arrest. This refers to the prosecutor's eliciting police officer Raymond Moore's trial testimony that after Harvey was detained, he remained silent when Moore asked if he possessed any weapons. The prosecutor elicited similar testimony from Harvey on cross-examination, after Harvey had testified on direct that he had been threatened and followed. There was no defense objection to these questions.

The prosecutor's actions were not improper because Harvey's Fifth Amendment right to remain silent was never implicated. On direct appeal, this Court held that Harvey was legally "Terry-

stopped" when Moore questioned him; therefore, it was not necessary to determine whether he was under arrest when he was later searched. United States v. Harvey, 897 F.2d at 1303-04. This is the law of the case. See Lynn v. Fisher, 888 F.2d 1071, 1074 (5th Cir. 1989), cert. denied, 495 U.S. 948 (1990). It is constitutionally permissible for the prosecution to impeach "a testifying defendant by reference to his pre-arrest silence." United States v. Cardenas Alvarado, 806 F.2d 566, 572 (5th Cir. 1986). That is what happened at Harvey's trial.

Harvey contends that the district court erred by finding that the evidence was sufficient for the jury to find that he had a prior felony conviction for purposes of 18 U.S.C. § 922(g). Harvey relies on 18 U.S.C. § 921(a)(20), which provides in relevant part that "[w]hat constitutes a conviction of [a "crime punishable by imprisonment for a term exceeding one year," § 922(g)] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." The subsection provides further that a conviction as to which a person has had his civil rights restored shall not be considered a § 922(g) conviction unless the restoration expressly prohibits activities involving firearms.

Harvey asserts that the underlying felony alleged in the indictment was his 1975 burglary conviction, for which he received a 10-year sentence. He reasons that he would have completed this sentence in 1985 and the alleged § 922(g) offense occurred more than two years later. He argues that Tex. Elec. Code Ann. § 11.002 (West Supp. 1993) automatically restored his right to vote two

years after the time expired on his 1975 sentence, and that this shows that his right to bear arms also was restored.

Section 11.002 of the Election Code provides in relevant part that a convicted felon becomes qualified to vote two years after he receives a certificate of discharge from the Board of Pardons and Paroles. Harvey does not allege that he ever received such a discharge relative to his 1975 conviction. Moreover, the underlying burglary conviction alleged in his § 922(g) indictment actually was his 1979 conviction of burglary of a church, as to which he received a 30-year sentence and was on parole at the time of his federal firearm offense. Presentence report 6. Thus, Harvey's right to vote was not restored by operation of § 11.002 or any other state law. See Shepherd v. Trevino, 575 F.2d 1110 (5th Cir. 1978), cert. denied, 439 U.S. 1129 (1979).

Harvey argues that the right to bear arms is protected by Tex. Const. art. 16, § 2, which does not limit the right to those who have not committed a felony. He asserts that the only fire-arm restriction found in Tex. Penal Code Ann. (West 1974) is § 46.05, which prohibits possession of a weapon away from the home by one who has been convicted of a violent felony. These provisions are irrelevant to whether a defendant has been convicted of a state felony for purposes of 18 U.S.C. § 922(g), as set forth in § 921(a)(20).

The cases which Harvey relies on, which involve express restoration of civil rights to felons under the law of other states, are not relevant to Harvey's case. Under Texas law, the

only provision for release from disabilities resulting from conviction of a felony, other than pardon and § 11.002 of the Election Code, is for probationers who satisfactorily fulfill the conditions of probation. Tex. Crim. Proc. Code Ann. art. 42.12, § 23 (West Supp. 1993); see Payton v. State, 572 S.W.2d 677 (Tex. Crim. App. 1978)(en banc). Thus, Harvey's 1979 burglary conviction was a valid predicate conviction relative to his prosecution for the violation of § 922(g).

Harvey contends that Mr. Reaves failed to represent him effectively at trial and on direct appeal. He presents no argument except to list his § 2255 grounds which were not presented by his counsel, who represented him in both courts, and he has failed to cite any supporting authorities except that he briefly refers to Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In order to obtain § 2255 relief on grounds of ineffective assistance, Harvey would have to show both (1) that Mr. Reaves's performance was deficient, falling below an objective standard of reasonableness, and (2) that there is a reasonable probability that the deficient performance prejudiced his defense, i.e., that but for the errors, "the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. at 687-88, 694. Because Harvey's brief fails to present argument on the crucial question whether Mr. Reaves's performance was deficient, we reject his ineffectiveness-of-counsel claims. See Thompkins v. Belt, 828 F.2d 298, 302 (5th Cir. 1987).

Harvey contends that his three-year supervised-release term is illegal, citing United States v. Allison, 953 F.2d 870 (5th Cir.), cert. denied, 112 S. Ct. 2319 (1992). Allison, at 875, states that "no supervised release is allowed under the punishment provisions of 18 U.S.C. § 924," whereunder Harvey was sentenced. The district court refused to allow Harvey to supplement his § 2255 motion to allege this ground for relief. In any event, this contention lacks merit because this Court recently recognized that the prior opinion of this Circuit in United States v. Van Nymegen, 910 F.2d 164, (5th Cir. 1990) is the controlling authority as to supervised release being an available part of punishment for violations of 18 U.S.C. § 924. United States v. Wangler, ____ F.2d ____, (5th Cir. 1993) citing United States v. Langston, No. 92-1528 (5th Cir. Feb. 19, 1993)(unpublished opinion).

**Pending Motions**

Harvey has filed motions for the appointment of (1) an audio expert to determine whether the tape copy is authentic and (2) counsel to assist him in overseeing and retrieving the results of the audio expert's investigation. Harvey also requests that the original tape be produced and made available to the audio expert. It is not clear whether he is requesting permission to listen to the tape himself. Harvey asserts that the members of the judicial panel cannot determine whether the tape has been altered.

The copy of the tape does not produce any sounds which even remotely indicate that Harvey requested leave to waive counsel and proceed pro se. Nor has Harvey suggested any reason why the court

reporter would falsify the tape copy. In our view, no valid purpose would be served by allowing Harvey to listen to the tape personally. We deny his pending motions.

The judgment of the trial court is AFFIRMED.