

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8589

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANKLIN DELANO MOORE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-92-CV-164)(W-89-CR-41)

(June 28, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Franklin Delano Moore ("Moore") appeals from the district court's denial of his motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Finding no reversible error in the district court's disposition of the case, we affirm its judgment.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I. Background

Moore was charged in a one-count indictment with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). He entered a not-guilty plea and was tried before a jury which found him guilty on July 25, 1989. The district court sentenced Moore under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), to fifteen years imprisonment and five years supervised release and imposed a \$50 mandatory fine.

Moore appealed from the final judgment and, on October 3, 1989, while the direct appeal was pending, filed a § 2255 motion (the "first § 2255 motion"), raising the following claims: (i) that he was prosecuted under a fundamentally defective indictment based on stale prior Texas convictions; (ii) that he was denied due process in violation of the Fifth Amendment; (iii) that use of certain prior offenses to indict, convict, and sentence violated his protections against double jeopardy; and (iv) that the district court "abridged" the constitution and criminal justice system of Texas. The first § 2255 motion was stayed pending the outcome of the direct appeal.

On April 6, 1990, this court affirmed Moore's conviction on all grounds, addressing some of the issues also raised in the first § 2255 motion. Ten months after this court issued its mandate in the direct appeal, on February 26, 1991, the district court denied Moore's first § 2255 motion, ruling that the issues raised had already been considered by the Fifth Circuit on direct appeal. See United States v. Kalish, 780 F.2d 506, 508 (5th

Cir.) (holding that issues raised and disposed of in a previous appeal from an original conviction are not considered in § 2255 motions) (citation omitted), cert. denied, 476 U.S. 1118 (1986).

Almost fifteen months later)) and virtually one year after this court affirmed the conviction)) on May 4, 1992, Moore filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to set aside the court's denial of his first § 2255 motion. In this motion, Moore claimed primarily that the district court had no jurisdiction to rule upon the first § 2255 motion while the case was before the Fifth Circuit on direct appeal. Moore also filed an amended § 2255 motion (the "second § 2255 motion") which listed a myriad of additional issues including: (i) ineffective assistance of counsel; (ii) the impropriety of his sentence enhancement under the Armed Career Criminal Act; (iii) the denial of counsel of his choice; and (iv) assorted sufficiency-of-the-evidence challenges. This second § 2255 motion was originally docketed under the same case number as the prior motion. The district court ultimately denied Moore's Rule 60(b) motion on June 10, 1992, concluding that it was untimely. In the same order, the court directed the district clerk to treat the "amended" motion as a second § 2255 motion because the amended motion had followed the court's final ruling on the prior motion. Consequently, the clerk of the court assigned the second motion a new case number. The court then ordered the government to show cause why the § 2255 motion should not be granted. In its response, the government argued, inter

alia, that Moore's second motion was successive under Rule 9(b) of the Rules Governing § 2255 Motions. 28 U.S.C. § 2255, Rule 9(b). The court, ruling on the merits of the motion, did not advert to the government's Rule 9(b) plea and denied the second § 2255 motion, dismissing the claims as baseless or moot. Moore filed a timely notice of appeal from the denial of this second motion.

II. Analysis

A. The Rule 60(b) Motion

Moore argues that the district court abused its discretion in denying his Rule 60(b) motion because the court could not have considered the first § 2255 motion while it was without jurisdiction during the pendency of the direct appeal and without a full record upon which to base a ruling. The government responds that Moore failed to preserve his right to appeal the order denying the Rule 60(b) motion because his notice of appeal was untimely under Federal Rule of Appellate Procedure 4(a). We observe that the relevant notice of appeal does not even mention the 60(b) order, instead referring solely to the second habeas denial, and is thus inadequate to confer jurisdiction upon this court to consider the 60(b) ruling. See FED. R. APP. P. 3(c). Even if we assume, however, that the notice did somehow cover the 60(b) decision, we find that any appeal from the 60(b) ruling is too late. The order denying relief under Rule 60(b) was entered June 10, 1992, and Moore did not file a notice of appeal until October 26, 1992)) after the denial of his second § 2255 motion.

The time for appealing a denial either of 60(b) relief or of a § 2255 motion is 60 days. FED. R. APP. P. 4 (a)(1); see also Rule 11, Rules Governing § 2255 Motions. This time limitation is jurisdictional, and the lack of a timely notice of appeal mandates dismissal of the appeal. Robbins v. Maggio, 750 F.2d 405, 408 (5th Cir. 1985). Therefore, Moore cannot challenge the original § 2255 motion or the denial of the Rule 60(b) motion in this appeal; consequently, we address only the issues presented in the second § 2255 motion.

B. The Asserted Fourth Amendment Violations

Moore argues that the search of his residence was unlawful because (i) the warrant was issued without probable cause, (ii) the scope of the warrant violated the Texas Constitution as it permitted a boundless search of the residence, (iii) the warrant was "patently illegal" under the Texas Constitution which permits a felon to possess a weapon on his property, (iv) a justice of the peace may not issue a search warrant, (v) the residence)) located outside of the city limits)) was not within the jurisdiction of the justice of the peace who issued the warrant, and (vi) it violated Federal Rule of Criminal Procedure 41.

This court has already addressed several of these search warrant issues on direct appeal. Moore's argument in that appeal was that the evidence seized during the search of the trailer should have been suppressed because the informant, his ex-wife, was unreliable, and thus, probable cause for the issuance of the

warrant was lacking. This court rejected the argument and held that probable cause for the warrant had existed and that the seized evidence should not have been suppressed. Similarly, the alleged overbroad scope of the warrant was previously raised by Moore's trial counsel in the suppression hearing and was rejected. As noted above, issues raised and disposed of in a previous direct appeal from conviction will not be considered in § 2255 motions. See Kalish, 780 F.2d at 508. The trial court properly dismissed these claims.

Because the remaining warrant issues are not constitutional and were not raised on direct appeal, Moore must show cause for failing to raise them and that the errors resulted in a fundamental miscarriage of justice. U.S. v. Shaid, 937 F.2d 228, 232 n.7 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 978 (1992). Moreover, to obtain the requested evidentiary hearing, Moore must show that the claimed errors are contrary to law. U.S. v. Green, 882 F.2d 999, 1008 (5th Cir. 1989). He cannot do so. As will be discussed below in section II.D, we hold that the warrant and consequent search were not "patently illegal" under the Texas Constitution. Nor did they violate Texas law. Moore's assertion that the justice of the peace improperly issued the search warrant misinterprets article 18.01 of the Texas Code of Criminal Procedure. Although article 18.01(c) limits the ability to issue an evidentiary warrant to specified courts, section (a) of that article, relating to other types of warrants)) including illegal drugs)) provides that any magistrate, including a

justice of the peace, may issue such warrants. TEX. CODE CRIM. PROC. ANN. art. 18.01(a) (Vernon Supp. 1994); see also Chavez v. State, 769 S.W.2d 284, 286 (Tex. App.) Houston [14th Dist.] 1989, writ ref'd). Since the disputed warrant was issued as a result of an affidavit asserting that illegal drugs were on the premises and was a direction to search for and seize those drugs, the justice of the peace had the requisite authority to issue it.

Further, we are unable to ascertain the basis of Moore's argument that the justice of the peace was without jurisdiction because Moore did not live in the city limits as it is not briefed on appeal, and Moore does not offer any statutory or other legal basis for holding that the warrant was improper. Therefore, we conclude that he has waived any error with respect to this claim. See FED. R. APP. P. 28(a); see also Burlington Northern R.R. Co. v. Office of Inspector Gen., R.R. Retirement Board, 983 F.2d 631, 638-39 n.3 (5th Cir. 1993); Atwood v. Union Carbide Corp., 847 F.2d 278, 280 (5th Cir. 1988) ("[I]ssues not briefed, or set forth in the list of issues presented, are waived."), cert. denied, 489 U.S. 1079 (1989).

Finally, the Rule 41 argument) raised for the first time on appeal) is meritless because the warrant was issued by a state justice of the peace at the request of state law enforcement authorities; thus, it was not subject to the requirements of Rule 41. See United States v. McKeever, 905 F.2d 829, 833 (5th Cir. 1990) (en banc).

C. Ineffective Assistance of Counsel

Since Moore previously challenged the search warrant on direct appeal, filed an original § 2255 motion that did not list the warrant issue, and then filed a second § 2255 motion asserting that the evidence used against him was obtained by "unlawful arrest," Moore indirectly maintains an ineffective-assistance-of-counsel claim regarding this issue in his mention of counsel's failure to challenge the warrant on certain asserted grounds. Moore contended in his second § 2255 motion and on appeal that his defense counsel was ineffective in not challenging the search warrant on the bases that it (i) violated state law, (ii) violated the provision of the Texas Constitution permitting felons to retain guns for the protection of their residences, and (iii) failed to satisfy Federal Rule of Criminal Procedure 41. As noted above at section II.B, the warrant violated neither Texas law nor Rule 41. Nor did it offend the Texas Constitution, as will be discussed further in section II.D infra. Consequently, Moore cannot show that his counsel's failure to assert these baseless claims rendered his performance deficient nor that his defense was prejudiced; accordingly, his ineffective assistance claims must fail. See Strickland v. Washington, 466 U.S. 668, 687 (1984).

D. The Texas Constitution

Moore challenges his conviction under 18 U.S.C. § 922(g)(1), arguing that such a conviction was in contravention of Article I, Section 23 of the Texas Constitution that permits Texas citizens

to possess firearms in their homes. Moore argues that the state constitutional provision predates the federal statute; thus, it is impermissible to prosecute him for doing what the Texas Constitution allows him to do. Moore therefore concludes that he is entitled to a remand for an evidentiary hearing. Even if we construe his papers below sufficiently liberally to find that he raised this argument to the district court, we disagree with Moore's conclusion. An alleged violation of the Texas Constitution is not cognizable in a § 2255 motion because it is not a **federal** constitutional issue and it could have been raised on direct appeal. See Shaid, 937 F.2d at 232 n.7 ("If the error is not of constitutional or jurisdictional magnitude, the defendant must show that the error could not have been raised on direct appeal, and if condoned, would result in a complete miscarriage of justice.").

Moreover, the argument does not have merit. See U.S. v. Thomas, 991 F.2d 206, 213-15 (5th Cir.) (rejecting argument that Texas felon's state constitutional right to possess firearms precludes prosecution under § 922(g)(1)), cert. denied, 114 S.Ct. 607 (1993). Moore's contention that Thomas is distinguishable because it did not discuss the preemption argument he raises under 28 U.S.C. § 927 does not persuade us otherwise. In Thomas, this court addressed in depth the interplay between the § 922(g)(1) prohibition against a felon possessing firearms travelling interstate and the Texas constitutional provision allowing felons to possess guns under certain circumstances. 991

F.2d at 208-15. In holding that the felon had to prove that he fit within one of the exceptions to the federal statute)) which was based upon eligibility determinations under state law)) we necessarily assumed that the federal law controlled. Moreover, in Thomas, this court specifically noted:

In writing § 921(a)(2), however, Congress did not speak in terms of "if the State allows possession of firearms by a convicted felon, we shall not make it a crime." Rather, Congress employed the terms "civil rights" in a manner that eschews any possibility of equating the narrow concept of a state's non-prohibition of firearm possession with the infinitely broader concept of restoration of civil rights.

991 F.2d at 215. Our focus upon Congress' failure to except felons from criminal liability where their respective states allowed such possession confirms that this court presumed the federal prohibition to apply to the exclusion of a state's authorization to possess firearms.

E. Unlawful Enhancement

Moore argues that his sentence was unlawfully enhanced under the Armed Career Criminal Act as the conviction was not based on three predicate felonies because "Robbery by Assault" is not an offense under the Texas state criminal code. Therefore, Moore argues, the requisite third offense, committed at a different and separate time from the other two offenses, was not proved by the government. After careful review of Moore's pleadings, we conclude that this issue was not raised in the district court. This court does not usually review issues raised for the first time on appeal unless they are purely legal and failure to correct an error would result in manifest injustice. U.S. v.

Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). Moore does not offer any justification for his failure to bring this to the district court's attention or otherwise address the "manifest injustice" standard; instead, he argues that the government "lies." We do not find that our refusal to review this issue would result in manifest injustice.

F. Denial of Counsel

Moore next asserts that, because the government threatened to bring forfeiture proceedings against his assets if his former counsel, Lisa Bennett, entered an appearance on his behalf, he was denied the attorney of his choice. He claims that an evidentiary hearing should have been called to evaluate this claim. The only basis for his contention is his subjective belief that the government threatened Bennett. In fact, in his appellate brief, Moore argues only that he

was told by [] Bennett that she had been contacted by federal authorities, ostensibly the United States Attorney[']s office, or a representative thereof, and was told if she represented [Moore] in the federal matter, her fees could be subject to forfeiture proceedings by the Government.

Such conclusory allegations do not raise a viable issue in a § 2255 proceeding. See Koch v. Puckett, 907 F.2d 524, 529-30 (5th Cir. 1990). Moore's affidavit setting forth his subjective belief about events over which he has no personal knowledge is thus inadequate to state a claim for habeas relief. Id.; see also United States v. Woods, 870 F.2d 285, 288 n.3 (5th Cir. 1989) (per curiam) (observing that "mere conclusory allegations

on a critical issue are insufficient to raise a constitutional issue").

G. Failure To Address Certain Claims

Moore asserts that the district court failed to address all of the issues presented in his second § 2255 motion. Further, he claims that the district court erred in ruling on claims which "lay outside the record, constitute[] facts known personally to the defendant (movant), and which the files and records did not conclusively refute." Moore's argument that certain of the issues raised in his second § 2255 petition have been ignored, or summarily disposed of, by the court below is meritless as most of these issues were addressed by this court on direct appeal, and the remainder, including the first-time issues)) such as ineffective assistance of counsel and denial of counsel of his choice)) were disposed of in the subsequent ruling by the district court. Moreover, we are perplexed by Moore's argument that the court erred in making findings on controverted issues allegedly within his personal knowledge as he fails to elaborate further.

H. Failure to Appoint Habeas Counsel

Moore next asserts that the district court erred in not appointing habeas counsel to represent him during the motion proceedings given the complex nature of the action. Under the Criminal Justice Act, 18 U.S.C. § 3006A(a)(2)(B), a district court may appoint a lawyer for any financially eligible person who is seeking § 2255 relief if the court determines that "the

interests of justice so require." The decision to appoint an attorney is discretionary. See Chaney v. Lewis, 801 F.2d 1191, 1196 (9th Cir. 1986), cert. denied, 481 U.S. 1023 (1987). Thus, the court's denial of appointed counsel for Moore is reviewed for an abuse of discretion. Id. We find no such abuse in the instant case, as Moore has demonstrated that he fully comprehends the issues involved and is capable of adequately presenting his contentions. See, e.g., Reese v. Fulcomer, 946 F.2d 247, 264 (3d Cir. 1991) (holding that neither the magistrate nor district court committed any abuse of discretion in failing to appoint habeas counsel where the petitioner fully comprehended the issues involved in the case, presented his claims "forcefully and coherently," and met the court's procedural requirements), cert. denied, 112 S. Ct. 1679 (1992); accord La Mere v. Risley, 827 F.2d 622, 626 (9th Cir. 1987) (concluding that the district court did not abuse its discretion in denying request for appointed habeas counsel as petitioner's own pleadings illustrated that he had a "good understanding of the issues and the ability to present forcefully and coherently his contentions").

I. Failure to Hold an Evidentiary Hearing

Finally, Moore challenges the district court's failure to hold an evidentiary hearing on the issues presented in his second § 2255 motion. A movant is not entitled to an evidentiary hearing if the claims are either contrary to law or plainly refuted by the record. 28 U.S.C. § 2255; see also Green, 882 F.2d at 1008. As discussed above, the record established that

Moore's claims were without merit; therefore an evidentiary hearing was unnecessary.

III. Conclusion

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