

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-8640  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOHN C. MUELLER,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
A 92 CA 262 & A 88 CR 128

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June 2, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

John Mueller appeals, on various grounds, the denial of his prisoner's motion for relief under 28 U.S.C. § 2255. Finding no error, we affirm.

I.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

Mueller, a "speed" addict, was charged with manufacturing methamphetamine and conspiring to manufacture and possess with intent to distribute the same, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and with possession of a firearm in connection with the offense, in violation of 18 U.S.C. § 924(c)(1). Mueller entered a plea of not guilty, then filed a variety of pretrial motions, including a "Motion for Disclosure of Exculpatory Evidence" and a "Motion To Suppress Illegally Obtained Evidence and the Fruits Thereof and Requesting 'Franks' Hearing."

Mueller later signed a plea agreement in which he agreed to enter a conditional plea of guilty to the substantive count, manufacturing methamphetamine, in exchange for the government's agreement to dismiss the conspiracy and firearms count in the event the district court accepted Mueller's conditional plea. Mueller reserved the right to appeal the district court's order denying his motion to suppress and could withdraw his guilty plea if he prevailed on appeal.

The district court denied Mueller's motion for discovery pretrial motions as either moot or as "not applicable to this case." After an evidentiary hearing on pretrial motions filed by Mueller and a codefendant, Joe Seiglar, the district court denied Mueller's motion to suppress and for a Franks hearing.

Mueller pleaded guilty in accordance with the plea agreement at arraignment proceedings. At the plea hearing, the district court addressed the core concerns of Fed. R. Crim. P. 11 and the factual allegations in the indictment. See United States v.

Bernal, 861 F.2d 434, 436 (5th Cir. 1988), cert. denied, 493 U.S. 872 (1989). Initially, Mueller admitted that he only ran errands at a location where, pursuant to the execution of a search warrant, authorities found a drug laboratory. Subsequently, he admitted that he was "involved with" or assisted in the manufacture of methamphetamine, after the district court took issue with his initial claim that he "never manufactured any speed."

The prosecutor read the government's evidence that included the following: (1) the defendant's presence at a homesite where he was engaged in the manufacture of methamphetamine, involving, inter alia, the use of the kitchen oven to dry the product; (2) the existence of precursor chemicals on the property; (3) Mueller's fingerprints on equipment used in the manufacturing process; and (4) finished product found in the house where Mueller resided and in an outhouse on the property. Mueller agreed that the prosecutor's factual summary was "what [he] did" and Mueller persisted with his plea.

The district court accepted Mueller's guilty plea, finding that it was freely and voluntarily made, that Mueller understood the charges, penalties, and his waiver of statutory and constitutional rights, and that there was a factual basis for the plea. The court sentenced Mueller to 240 months' incarceration, a supervised release term of three years, and a fine of \$25,000.

We affirmed Mueller's conviction in United States v. Mueller, 902 F.2d 336 (5th Cir. 1990), rejecting, inter alia, his argument that (1) the district court erred when it denied his motion to

suppress and for a Franks hearing and (2) the district court committed various errors in sentencing, including enhancing his sentence for possession of a firearm during the offense. See id. at 340-45.

Mueller filed a section 2255 motion, alleging that (1) there was no factual basis for his guilty plea as required by rule 11, (2) the district court erred when it imposed a two-level increase in his offense level for use/possession of a firearm during the offense, (3) the \$25,000 fine imposed by the district court violated 18 U.S.C. § 3572 because he is a pauper, (4) the district court's denial of his "motion for discovery of exculpatory evidence" was an abuse of discretion, and (5) counsel was ineffective. The magistrate judge recommended that Mueller's § 2255 motion be denied. The district court, noting that Mueller failed to file timely objections to the magistrate judge's report, denied Mueller's section 2255 motion after de novo review.

## II.

### A.

Mueller suggests that the district court was always late in ruling on his motions and was always "eager" to rule on the government's motions, pointing only to the district court's failure to consider his written objections to the magistrate judge's report and recommendation before denying his section 2255 motion. This argument is frivolous.

The district court did not consider Mueller's objections

because they were filed late. The magistrate judge warned Mueller that failure to file objections within ten days of receipt of the report would preclude de novo review by the district court of his findings and recommendations. See Nettles v. Wainwright, 677 F.2d 404, 408-10 (5th Cir. Unit B 1982) (en banc). Muller received the report on October 7, 1992. He therefore had until October 19, 1992, to file his objections, because the tenth day after receipt was a Saturday. Mueller did not prepare his objections until October 28.

B.

Mueller argues that, because there was no factual basis for the guilty plea, it is invalid pursuant to rule 11. The government counters that the district court's rule 11 colloquy was "more than adequate" to support a finding that Mueller's plea had a factual basis.

Relief under section 2255 is reserved for violations of a defendant's 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. Capua, 656 F.2d 1033, 1037 (5th Cir. Unit A Sept. 1981). Because Mueller failed to raise this non-constitutional issue on direct appeal, he cannot raise it in a section 2255 motion.

C.

Mueller argues that the increase in his offense level resulting from the seizure of a firearm under the seat of a vehicle not owned by him was error because he never used or owned the firearm. We will not reconsider issues raised and determined on direct appeal in a section 2255 proceeding. See United States v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1986). Because this argument was raised on direct appeal and rejected, see Mueller, 902 F.2d at 345, Mueller cannot raise it again in a section 2255 motion.

D.

Mueller argues that the district court's fine of \$25,000 was an abuse of discretion because it never made specific findings set forth under 18 U.S.C. § 3572(a), including his ability to pay the fine, his financial resources, and the effect of the fine on his family. This argument involves the district court's technical application of the sentencing guidelines and does not raise a constitutional issue. See United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Because Mueller failed to raise this issue on direct appeal, he cannot raise it in a section 2255 proceeding. See Capua, 656 F.2d at 1037.

E.

Mueller argues that the district court erred when it denied his motion for discovery of exculpatory evidence. Mueller argues

that the Due Process Clause and constitutional guarantees of equal protection require discovery in criminal trials. Id.

Mueller's discovery argument, mooted by his guilty plea, see Barrientos v. U.S., 668 F.2d at 838, 842 (5th Cir. 1982), does not state a federal constitutional violation. Because Mueller failed to raise this non-constitutional issue on direct appeal, we will not review it. See Capua, 656 F.2d at 1037.

F.

Mueller appears to argue that counsel was ineffective, because he "[t]he trial attorney failed to (in collusion with the prosecutor) to [sic] obtain the exculpatory evidence." This argument lacks merit.

A claim that counsel has been ineffective will prevail only if the defendant proves that such counsel was not only objectively deficient, but also that the defendant was thereby prejudiced. Strickland v. Washington, 466 U.S. 668, 687 (1984). In the context of a guilty plea, in order to satisfy the "prejudice" part of the test, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985); United States v. Smith, 915 F.2d 959, 963 (5th Cir. 1990).

Although Mueller fails to state any facts that support his argument that counsel conspired with the prosecutor to withhold exculpatory evidence, see Koch v. Puckett, 907 F.2d 524, 530 (5th

Cir. 1990), Mueller's argument fails on a more fundamental basis. Mueller does not argue that, but for counsel's errors, he would not have pleaded guilty. See Hill, 474 U.S. at 59. The foundation for Mueller's argument thus collapses as he does not plead prejudice under Strickland and Hill.

AFFIRMED.