UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-8665
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD JERRY DIXON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-89-CR-106(1))

(June 10, 1993)

Before POLITZ, Chief Judge, GARWOOD and SMITH, Circuit Judges.

POLITZ, Chief Judge:[*]

Richard Jerry Dixon, proceeding *pro se*, appeals the denial of his petition for relief under 28 U.S.C. § 2255. Finding no reversible error, we affirm.

Background

In July, 1989, authorities initiated an investigation into

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Dixon's amphetamine and methamphetamine manufacturing and distribution activities. The following month, Dixon agreed to demonstrate an improved methamphetamine manufacturing process to undercover officers, who were to provide equipment and chemicals. The officers and Dixon met at a hotel in Lampasas, Texas, and departed for the laboratory site. Immediately before leaving, Dixon gave a 20-gauge shotgun to one of his associates who was to stand watch at the site. The officers arrested Dixon shortly after he began the methamphetamine manufacture process.

Dixon waived indictment and, by bill of information, he was charged with conspiracy to manufacture methamphetamine in violation of 21 U.S.C. §§ 846, 841(a)(1); possession of a firearm in connection with a drug trafficking offense in violation of 18 U.S.C. § 924(c); and possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1). In exchange for the dismissal of a previous grand jury indictment,[1] Dixon entered a guilty plea to the offenses charged in the superseding information. The district court accepted Dixon's plea, and sentenced him to concurrent 210- and 100-month imprisonment and three-year supervised release terms on the methamphetamine conspiracy and unlawful firearm possession charges, a consecutive 60-month prison term for possession of a firearm in relation to drug trafficking, a $3,000 fine, and the statutory assessments.

Dixon did not take a direct appeal. Almost two years after

[1]The indictment charged Dixon with the firearms violations alleged in the government's information, and with conspiracy to manufacture in excess of 100 grams of methamphetamine.

his conviction he filed the instant petition for postconviction relief raising numerous claims. The district court denied Dixon's application, and he timely appealed.

Analysis

On appeal, Dixon first faults the district court's ruling that his firearms convictions, although they arose from a single incident, did not violate double jeopardy. We recently held that possession of a firearm on a single occasion may, without offending the double jeopardy clause, result in conviction under both 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(c).[2] The district court correctly disposed of this contention.

Dixon next claims that the district court improperly calculated his guideline sentencing range for the drug conspiracy count on the basis of an offense involving 2.51 kilograms of contraband, even though the authorities seized only 1,505 grams of a five percent methamphetamine solution. Challenges to application of the Sentencing Guidelines which the defendant could have raised on direct appeal provide no basis for relief under 28 U.S.C. § 2255.[3] Even if cognizable in § 2255 proceedings, however, Dixon's contention lacks merit. The Sentencing Guidelines punish drug offenses on the basis of the total amount of contraband involved, rather than upon the amounts actually seized.[4] Here, the

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[2]**United States v. Berry**, 977 F.2d 915, 919 (5th Cir. 1992).

[3]See **United States v. Perez**, 952 F.2d 908, 909-10 (5th Cir. 1992).

[4]U.S.S.G. § 2D1.1, cmt. 12 (trial court may consider capacity of laboratory in determining amount of contraband involved in drug

presentence report indicated that the operation which Dixon supervised, if completed, would have produced 2.51 kilograms of methamphetamine. The district court, in the absence of rebuttal evidence or even an objection by Dixon, properly relied on the figures presented in the PSR at sentencing.[5] This point fails.

Finally, Dixon assigns as error the district court's rejection of his ineffective assistance of counsel claim, based on his attorney's failure to challenge the drug quantities set forth in the PSR and to raise an entrapment defense.[6] To obtain relief on ineffective assistance of counsel grounds, a petitioner must establish attorney conduct outside "the wide range of reasonable professional assistance," overcoming a presumption of adequacy.[7] Dixon's prior conviction for manufacture of controlled substances indicates that his attorney's failure to raise an entrapment

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offense for sentencing purposes).

[5]E.g., **United States v. Alfaro**, 919 F.2d 962 (5th Cir. 1990) (PSR ordinarily bears indicia of reliability sufficient to permit reliance thereon at sentencing); **United States v. Mir**, 919 F.2d 940 (5th Cir. 1990) (district court free to accept facts as set forth in PSR where defendant fails to submit rebuttal evidence).

[6]We also read Dixon to assert as ineffective assistance his attorney's failure to raise a double jeopardy challenge to the firearms charges. Those charges presented no double jeopardy violation.

[7]**Strickland v. Washington**, 466 U.S. 668, 689. A successful ineffective assistance claim also requires proof of prejudice flowing from deficient attorney performance. **Id.** at 691-92. Because Dixon has failed to carry his burden with regard to the first **Strickland** prong, we need not address the second. **Id.** at 697.

defense did not constitute deficient performance.[8] Further, Dixon has alleged no basis upon which his attorney should have known that the chemicals present at the methamphetamine laboratory could not have produced 2.51 kilograms of contraband. His conclusionary allegation of deficient performance in his counsel's failure to raise such an objection thus provides no basis for relief.[9]

The judgment of the district court is AFFIRMED.

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[8] See, e.g., **United States v. Pruneda-Gonzalez**, 953 F.2d 190 (5th Cir. 1992) (defendant asserting entrapment must demonstrate absence of predisposition to commit crime).

[9] See **Koch v. Puckett**, 907 F.2d 524 (5th Cir. 1990) (conclusionary allegations even by *pro se* habeas applicant, insufficient to raise valid ineffective assistance claim).