UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-1084
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MARVIN L. PERRY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(5:92 CV 149 C (5:89 CR 045 02))

(April 1, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:[1]

Having been convicted and sentenced for various drug offenses, Appellant sought relief under § 2255. The district court vacated his conviction on Count 4 on double jeopardy grounds, and denied all other relief. Appellant appeals. We affirm.

Perry's claim that he should have been afford a two level reduction in offense level for acceptance of responsibility is not cognizable in this proceeding because it does not raise a constitutional issue. United States v. Vaughn, 955 F.2d 367, 368

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(5th Cir. 1992); United States v. Perez, 952 F.2d 908, 909-10 (5th Cir. 1992); United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981). His reliance on United States v. Bartholomew, 974 F.2d 39 (5th Cir. 1992), cert. denied, 113 S.Ct. 1580 is misplaced. Bartholomew dealt with failure to comply with Federal Rule of Criminal Procedure 32; this case does not.

Appellant argues that since his conviction on Count 4 was vacated, he should be resentenced because the district court made no findings regarding the quantity of drugs foreseeable to Appellant in the conspiracy. We disagree. The district court found that Perry possessed the entire 873.3 grams. He is properly held accountable for the additional 13.6 grams under § 1B1.3(a)(1) of the guidelines, and reduction of the total amount of drugs attributed to him by 13.6 grams has no effect on his offense level.

Appellant claims that the prosecutor excused some black jurors from the venire and that this violated his constitutional rights. Defense counsel made no objection at trial in which case we do not consider Batson challenges. Batson v. Kentucky, 476 U.S. 79, 89 (1986); see Thomas v. Moore, 866 F.2d 803, 804-05 (5th Cir.), cert. denied, 493 U.S. 840 (1989). He also complains that an inadequate number of blacks was included in the jury pool. To succeed, Appellant must show, among other things, that not only were blacks inadequately represented in his jury venire, but also that this was the general practice in other jury venires in the area. Timmel v. Phillips, 799 F.2d 1083, 1086 (5th Cir. 1986). He has alleged no facts from which the district court could have reached such a

conclusion. Nor has Appellant alleged facts to show that his counsel was deficient for failing to raise the Batson or jury venire issues. Counsel's performance is presumed to be within the range of competence and Appellant has not shown otherwise. Strickland v. Washington, 466 U.S. 668, 689 (1984).

Perry makes various arguments in an effort to support his claim that his conviction for Count 2 should have been vacated rather than his conviction for Count 4. He seems to claim that the Government got some unfair advantage by its seizure of a portion of the drugs he possessed and the setting up of surveillance over the remainder. He relies on United States v. Henry, 709 F.2d 298 (5th Cir. 1983) (en banc). Henry deals with upward revision upon resentencing. That is not the situation present here.

Finally, the district court's failure to conduct an evidentiary hearing is complained of. No hearing was required, however, since no evidence outside the record was needed to resolve the issues raised in the district court.

AFFIRMED.