IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-1116

Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BONNIE BURNETTE ERWIN,

Defendant-Appellant.

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Appeal from the United States District Court
for the Northern District of Texas
(3:91-CV-2626-P(CR3-0168-P))

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(July 28, 1994)

Before HIGGINBOTHAM, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Bonnie Burnette Erwin was convicted of various offenses relating to a drug conspiracy, including conspiracy, racketeering, continuing criminal enterprise, possession and distribution of drugs, counterfeiting, firearm violations, and income tax evasion. In 1991 he filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. A magistrate judge recommended denying Erwin's § 2255 motion. The district court

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

adopted the findings and conclusions of the magistrate judge and denied Erwin's motion. We affirm.

I.

Erwin challenges two jury instructions given at his trial. He first argues that the district court erred in failing to instruct the jury that it must find a nexus between the racketeering enterprise and the pattern of racketeering activities committed by the defendant. To meet RICO's nexus requirement, the Government must prove beyond a reasonable doubt that the defendant has committed at least two of the racketeering acts alleged, that the defendant's association with the enterprise facilitated his commission of the racketeering acts, and that the predicate acts had some effect on the enterprise. United States v. Carlock, 806 F.2d 535, 546 (5th Cir. 1986), cert. denied, 480 U.S. 949 (1987), cert. denied, 480 U.S. 950 (1987). In its charge to the jury, the district court stated that the Government must prove beyond a reasonable doubt that Erwin was associated with an enterprise, that Erwin committed at least two of the racketeering acts alleged, that the racketeering acts were connected with each other, and that "through the commission of the two or more connected offenses, the defendant conducted or participated in the conduct of the enterprise's affairs." The district court's instruction stated the law correctly.

Second, Erwin argues that the district court erred by not instructing the jury on the tax evasion counts of his indictment that it must find that venue was proper in the Northern District of

Texas. The matter of venue was waived, however, because it was not asserted prior to trial. United States v. Greer, 600 F.2d 468, 469 (5th Cir.), cert. denied, 444 U.S. 902 (1979).

Further, Erwin could have filed the tax returns in Dallas because Tyler, Erwin's legal residence and principal place of business, was in the Dallas district of the I.R.S. See 26 U.S.C. § 6091(b)(1)(A). Venue was thus proper. See DeCesare v. United States, 356 F.2d 107, 108 (5th Cir. 1966), vacated on other grounds, 390 U.S. 200 (1968).

II.

Erwin raises four claims beyond the limited scope of a habeas proceeding. He first argues that the Government was not entitled to forfeiture of his property under 21 U.S.C. § 848(a)(2)(A). This issue does not affect the validity of his conviction or sentence and is not a proper ground for a § 2255 motion. See United States v. Cates, 952 F.2d 149, 151 (5th Cir.), cert. denied, 112 S. Ct. 2319 (1992).

Second, he argues that he was prejudiced by evidence showing his involvement in murder and kidnapping that was introduced to establish predicate acts of racketeering, noting that the underlying state charges were ultimately reversed. Erwin's claim is not cognizable under the limited scope of section 2255 because it is not of constitutional dimension, could have been raised on direct appeal, and Erwin has not shown why it was not. See United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). In any event, 18 U.S.C. § 1961(1)(A) provides that "racketeering activity"

includes murder and kidnapping so long as it is punishable under State law by more than one year's imprisonment, making the subsequent reversals irrelevant.

Erwin next alleges that the government used its peremptory challenges to exclude blacks from the jury. Erwin raised this issue on direct appeal, and this court held that "Batson does not provide [him] with a ground for reversal or remand." See United States v. Erwin, 793 F.2d 656, 667 (5th Cir.), cert. denied, 479 U.S. 991 (1986). Issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in section 2255 motions. United States v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1986).

Finally, Erwin argues that the district court's order denying his motion for discovery of the procedures followed by investigating and indicting grand juries compromised his right to challenge the grand jury effectively. Assuming that this claim has any constitutional import, it may not be raised for the first time on collateral review without showing cause for the procedural default and actual prejudice resulting from the error. United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 978 (1992). Erwin demonstrates neither. The government invoked the procedural bar before the district court and argued it in its brief, so we do not consider this claim.

III.

Erwin argues that he received ineffective assistance of counsel because his attorney failed to make a timely motion to

strike the jury panel based upon the government's use of peremptory challenges to exclude blacks, failed to challenge the district court's instruction to the jury on the RICO count, and failed to request a jury instruction stating that the Government must prove venue. Erwin's argument about the jury panel relies on Batson v. Kentucky, 476 U.S. 79 (1986). Erwin's trial took place in December 1984, while Batson was not decided until April 30, 1986. Counsel's failure to anticipate Batson, approximately two years before it was announced, does not meet the first element of Strickland v. Washington, 466 U.S. 668, 689 (1984).

Erwin's argument about the RICO instruction does not show a reasonable probability that the jury would have had a reasonable doubt about his guilt if it had received the instruction he wanted. See Strickland, 466 U.S. at 694; Gray v. Lynn, 6 F.3d 265, 269-70 (5th Cir. 1993). This court has noted that Erwin "headed" the "multi-faceted criminal enterprise" and "provided the brains, muscle and contacts for the Erwin Organization." Erwin, 793 F.2d at 659. The evidence was sufficient for the jury to find beyond a reasonable doubt a link between Erwin's conduct, the enterprise, and the racketeering activity. See United States v. Cauble, 706 F.2d 1322, 1348 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984).

As to the allegation that Erwin's attorney failed to request a jury instruction about the venue for the tax evasion counts of his indictment, our earlier discussion of venue shows that Erwin has not demonstrated that any error was so serious as to render the

result of the trial unfair or unreliable. See Lockhart v. Fretwell, ___ U.S. ___, 113 S. Ct. 838, 842 (1993). We do not consider several other arguments in his brief that he did not raise before the district court. United States v. Carvajal, 989 F.2d 170, 170 (5th Cir. 1993); United States v. Armstrong, 951 F.2d 626, 630 (5th Cir. 1992).

IV.

Erwin's motion to expedite this case is denied as moot. Erwin's motion to reconsider our order giving the government extra time to file its brief is denied as moot because the brief is already filed. The fact that we granted more time moots Erwin's motion to dismiss the brief as untimely filed. Erwin's petition for a writ of mandamus is denied because he has not shown a clear and indisputable right to the issuance of the writ. See In re Willy, 831 F.2d 545, 549 (5th Cir. 1987).

AFFIRMED.