

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-1471
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ENRIQUE EMILIO RAMIREZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas

(3:92 C 114 H (3:88 CR 236 H))

(October 25, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

A jury convicted Enrique Emilio Ramirez of conspiracy to possess with intent to distribute, and distribution of, more than one kilo of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(count 1), and aiding and abetting possession with intent to distribute approximately 1/4 kilo of cocaine, in violation of 21 U.S.C. §§ 2 and 841(a)(1) (count 2). He was sentenced to 96 months imprisonment, a five-year term of supervised release, and a \$100 special assessment. Ramirez appealed his conviction, alleging that the Government's evidence was insufficient, and this Court affirmed. United States v. Ramirez, No. 90-1015 (September 20, 1990) (unpublished).

Ramirez filed a 28 U.S.C. § 2255 motion on January 17, 1992. With leave of court, Ramirez filed an amended § 2255 motion on May 18, 1992, and a traverse to the Government's response. The magistrate judge filed a report recommending denial of § 2255 relief, to which Ramirez filed objections. After review, the court adopted the magistrate judge's report and denied Ramirez's motion to vacate.

OPINION

Ramirez contends that the district court erred in imposing a mandatory minimum sentence because, at the time of his crimes, a conviction for violation of conspiracy under 21 U.S.C. § 846 did not require a mandatory minimum.

"Relief under 28 U.S.C.A. § 2255 is reserved for transgressions of 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. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). A nonconstitutional claim that could have been raised on direct

appeal, but was not, may not be raised in a collateral proceeding.
Id.

Ramirez's claim does not give rise to a constitutional issue and could have been raised on direct appeal. The indictment alleged that the conspiracy began from at least July of 1987, and continued to on or about October 24, 1988. At the time of his offenses, § 846 did not set a mandatory minimum.¹ See United States v. Brown, 887 F.2d 537, 541 (5th Cir. 1989). Thus, the district court erred in stating at the sentencing hearing that a five-year mandatory minimum applied.² Nevertheless, Ramirez's sentence was not affected by the court's mistaken belief. Rather, the court imposed the 96-month sentence based on its determination that the applicable range under the sentencing guidelines was 87-108 months. A district court's technical application of the guidelines is not of constitutional dimension. Vaughn, 955 F.2d at 368. Accordingly, this claim does not constitute grounds for § 2255 relief.

Ramirez also contends that district court sentenced him under the mistaken belief that a nonparolable sentence was required. His argument, liberally construed, is that, since the guidelines do not

¹ Effective November 18, 1988, Congress amended § 846 to provide that conspiracies carry the same minimum punishments as the underlying substantive offense.

² Although the district court stated that "[t]he statutory maximum is not less than five years nor more than forty years" for the conspiracy count, the court clearly meant to refer to a five-year mandatory minimum.

apply to the offense he committed, he should not have received a term of supervised release.

Ordinarily, if a defendant alleges a fundamental constitutional error, he may not raise the issue for the first time in a § 2255 motion "without showing both `cause' for his procedural default, and `actual prejudice' resulting from the error." United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991), cert. denied, 112 S. Ct. 978 (1992) (citation omitted). However, because the Government did not invoke the procedural bar in the district court, this Court should address the merits of Ramirez's contention. United States v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992).

Conspirators may be sentenced under the guidelines without violating the Ex Post Facto Clause so long as the conspiracy offense continued after the effective date of the guidelines. United States v. White, 869 F.2d 822, 826 (5th Cir.), cert. denied, 490 U.S. 1112 (1989). Ramirez's offense continued well after the effective date of the guidelines, and thus was an offense committed after the effective date. Thus, the district court correctly imposed sentence under the guidelines. The imposition of a term of supervised release was also proper. United States v. Badger, 925 F.2d 101, 105-06 (5th Cir. 1991).

Ramirez also alleges that his counsel was constitutionally ineffective for failing to make "proper objections" to inaccuracies in the presentence report (PSR).

To prevail on his claim of ineffective assistance, Ramirez must show that his counsel's performance fell below an objective

standard of reasonable competence and that he was prejudiced by his counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to show prejudice, Ramirez must demonstrate that his counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. Lockhart v. Fretwell, ___ U.S. ___, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180 (1993). A failure to establish either deficient performance or prejudice defeats the claim. Strickland, 466 U.S. at 697.

As support for his ineffective-assistance claim, Ramirez makes speculative reference to "the court's record, transcripts and files." However, he fails to identify any specific acts and omissions by his attorney that had an impact on his sentence. See id. at 17-18. Accordingly, Ramirez has failed to make any showing that he was prejudiced by his counsel's alleged ineffective assistance.

Finally, to the extent Ramirez is alleging Rule 32 violations, this claim is not cognizable for the first time in a § 2255 proceeding. See United States v. Weintraub, 871 F.2d 1257, 1266 (5th Cir. 1989).

AFFIRMED.