UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1799
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GARY MARVIN MORRIS,

Defendant-Appellant.

Appeal from the United States District Court for the
orthern District of Texas
(CA3:92-1228-R (CR3 (91-077-R))

(May 24, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

By a series of motions that the district court construed as a motion for relief under 28 U.S.C. § 2255, defendant-appellant Gary Marvin Morris (Morris) alleges errors in his sentencing and in the section 2255 proceedings below, that the government breached the plea agreement, and that his counsel was constitutionally

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

ineffective in failing to file a notice of appeal and in other respects. The district court denied all relief. We conclude that, based on Morris's allegations, the district court acted prematurely in determining that Morris's trial counsel was not constitutionally ineffective in not filing a notice of appeal. We vacate and remand as to this aspect of the case. In all other respects, we affirm.

Facts and Proceedings Below

On March 26, 1991, Morris and two others were indicted in the Northern District of Texas on two counts of interstate transportation of stolen livestock and aiding and abetting the transportation of stolen livestock in violation of 18 U.S.C. §§ 2316 and 2. Morris subsequently entered into a plea agreement with the government and, on May 10, 1991, pleaded guilty to count 1 of the indictment. Based on a total offense level of 15 and a criminal history category of VI, Morris was subject to a Sentencing Guidelines' range of 41 to 51 months in prison. Noting Morris's extensive criminal record, on August 9, 1991, the district court sentenced him to 51 months in prison and 3 years of supervised release. Morris did not file a notice of appeal within the prescribed 10-day period, nor within the 30-day extension period for late filings based on excusable neglect. Fed. R. App. P. 4(b)

On February 6, 1992, Morris filed a motion styled "Motion for Leave to File Out of Time Notice Of Appeal Due to Excusable Neglect," alleging a variety of claimed errors in the computation of his sentence and the procedures followed at his sentencing hearing. In that motion, Morris alleged that his counsel was ineffective and that, although he had "indicated to his appointed

Counsel . . . that he did want to appeal from [the] pre-sentence Investigation [report] . . . [counsel] did not file the Notice of Appeal as was his client's wishes and argued against it . . . ." On that same day, Morris also filed a "Motion in the Alternative," asking the district court, if it could not grant an out-of-time appeal, to construe his motion as one for section 2255 relief. On March 12, 1992, Morris filed "Petitioner's Brief in Support of Pleadings in Particular the Plea Agreement," alleging many of the same asserted errors as were contained in his earlier motion and requesting an evidentiary hearing. Finally, on May 15, 1992, he filed "Petitioner's Brief in Support of Fifth Amendment Implicate [sic] Guideline Sentence," arguing that the district court erred at sentencing in not granting him a two-point reduction for acceptance of responsibility.

Pursuant to 28 U.S.C. § 636(b), the district court referred Morris's motion to file an out-of-time appeal to a magistrate judge on March 23, 1992, and his "Brief in Support of Pleadings" on March 26, 1992. On April 8, 1992, the magistrate judge denied Morris's motion for leave to file an out-of-time appeal because Morris had not filed within the forty-day excusable neglect window of Federal Rule of Appellate Procedure 4(b). On April 28, 1992, noting that Morris's "Brief in Support of Pleadings" could only be construed as a motion for appellate, and not habeas, relief, the magistrate judge denied the claims set forth in this motion for the same reasons it had denied relief on Morris's earlier motion.

On May 6, 1992, Morris filed a "Motion to Set Aside" the magistrate judge's April 8 order, noting that his initial motion

for an out-of-time appeal had also included a motion in the alternative for section 2255 relief and arguing that the magistrate judge erred in not construing his motion accordingly. Pursuant to this motion, the magistrate judge vacated her April 8 and April 28 orders and agreed to construe Morris's various motions together as a section 2255 motion. Considering Morris's claims under this standard, the magistrate judge filed a report on July 15, 1993, recommending that relief be denied. The district court adopted the magistrate judge's recommendations and entered judgment against Morris on July 26, 1993.[1] Morris timely appealed to this Court.

Discussion

I. Claims Related to Sentencing and the Plea Agreement

Morris raises several claims related to his sentencing and his plea agreement. Regarding sentencing, he argues that the district court erred in not informing him that the term of supervised release was part of the maximum possible penalty to which he was subject, in violation of Federal Rule of Criminal Procedure 11; in denying him a two-point reduction for acceptance of responsibility; and in increasing his sentence for being in the business of receiving and selling stolen goods. With respect to the plea agreement, Morris argues that the government violated the plea agreement by presenting witness testimony concerning disputed

[1] Morris filed objections to the magistrate judge's report on August 6, 1993. Under 28 U.S.C. § 636(b)(1), a party has ten days from the date he is served with a copy of the magistrate judge's report to file written objections. It is not clear from the record when Morris was served with a copy of the report, and therefore unclear whether he timely filed his objections. Nevertheless, the district court considered Morris's objections and denied them on August 17, 1993.

issues in the presentence report (PSR) and that he was erroneously convicted of violating both 18 U.S.C. § 2316 and § 2 when he only pleaded guilty to a violation of section 2316. None of these claims has merit.

Morris argues for the first time on appeal that the district court violated Rule 11 during sentencing by failing to inform him that the term of supervised release was part of the maximum possible penalty to which he was subject. We may review issues raised for the first time on appeal only if (1) there has been an error, (2) the error has not been waived, (3) the error is plain, (4) the error affects substantial rights, and (5) the Court elects to exercise its discretion to correct the error. *United States v. Calverley*, 37 F.3d 160, 162-164 (5th Cir. 1994) (en banc), *cert. denied*, 115 S.Ct. 1266 (1995). The record clearly demonstrates that, at the hearing in which the district court accepted Morris's plea agreement, the government clearly stated that "there is a term of supervised release of not more than three years and if the terms of supervised release are violated the Defendant can be imprisoned for the remainder of the term." Immediately thereafter, Morris's attorney affirmed that he had discussed these penalties with Morris, and Morris himself stated that he understood the maximum penalties involved. Morris demonstrates no basis for relief in this connection.

As all of Morris's remaining arguments regarding his plea agreement and sentencing are neither jurisdictional nor constitutional and could have been raised on appeal, they are not cognizable in section 2255 proceedings. *United States v. Segler*,

37 F.3d 1131, 1133 (5th Cir. 1994). In any event, all or most of these claims are wholly without merit. For example, Morris argues that the government breached the plea agreement by calling a case agent to testify at sentencing; the plea agreement stated that, in return for Morris's cooperation in the investigation, it would "advise the Court, via the Probation Department, of the extent of MORRIS'S cooperation." Reasonably understood, this provision does not preclude the government from offering additional testimony at the sentencing hearing regarding Morris's cooperation, and the district court did not err in so holding. *See United States v. Valencia*, 985 F.2d 758, 761 (5th Cir. 1993).

Morris's claim that he was erroneously convicted of aiding and abetting when he did not plead guilty to that offense is wrong both as a matter of fact and as a matter of law. Although the plea agreement only referenced 18 U.S.C. § 2316, Morris pleaded guilty to count 1 of the indictment, which specifically charged a violation of both 18 U.S.C. § 2316, the substantive offense, and section 2, the aiding and abetting statute. Moreover, "[a]iding and abetting is not a separate offense, but is an alternative charge in every indictment, whether explicit or implicit." *United States v. Neal*, 951 F.2d 630, 633 (5th Cir. 1992). The inclusion of the aiding and abetting charge did not subject Morris to greater punishment than he already faced as a result of the substantive conviction, *see* 18 U.S.C. § 2(a) (defendant found guilty of aiding and abetting is subject to punishment to same extent as one found guilty as a principal), nor did it affect his Guideline range. No error occurred in this respect.

Lastly, Morris argues that he should have been given a two-point reduction for acceptance of responsibility and that he should not have been subject to a four-point increase for being in the business of trafficking in stolen goods. The district court found that Morris was not entitled to the acceptance of responsibility reduction because he would not reveal the origin of the cattle involved in the offense. Morris claims that he could not be more explicit because he feared incriminating himself in other criminal proceedings pending against him in Kansas. This Court has held, however, that a defendant may not rely on the Fifth Amendment privilege against self-incrimination in order to avoid accepting responsibility for all his relevant criminal conduct, which is required for the defendant to be eligible for the acceptance of responsibility reduction. *United States v. Kleinebreil*, 966 F.2d 945, 953-54 (5th Cir. 1992). In any event, this claim is not cognizable in a section 2255 proceeding.

As to the four-point increase for being in the business of trafficking in stolen goods, the district court accepted the PSR's determination that the increase was warranted by the facts. "We have held that a presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the sentencing guidelines." *United States v. Alfaro*, 919 F.2d 962, 966 (5th Cir. 1990) (footnote omitted). Moreover, we only review a district court's factual findings for clear error. *United States v. Carreon*, 11 F.3d 1225, 1230 (5th Cir. 1994). Given that Morris was on parole on a cattle theft charge stemming from a 1984

conviction in Missouri when he was arrested for the instant offense, that the PSR found that he had lacked permanent employment since the time of his release from jail in 1990, and that he was indicted on a second count of transporting stolen livestock in connection with a transaction that occurred soon after the conduct alleged in count 1, the district court's determination that Morris was in the business of cattle stealing was not clearly erroneous.

II. Claims Related to Section 2255 Motion

Morris also makes several arguments related to the section 2255 proceedings in the court below. He first argues that the magistrate judge improperly "self-referred" determination of his motions. The record, however, clearly shows that the district court referred each of Morris's motions to the magistrate judge in accordance with 18 U.S.C. § 636(b). This claim is frivolous.

Morris further alleges that the district court failed to conduct an independent review of the record and merely adopted the magistrate judge's report and recommendation. The district court's July 26, 1993, order, however, clearly states that the district court adopted the magistrate judge's report and recommendation only after conducting "an independent review of the pleadings, files and records in this case." This claim must therefore also fail.

III. Ineffective Assistance of Counsel Claim

Morris's remaining claims involve various alleged errors by his trial counsel that he claims rendered counsel's assistance constitutionally ineffective. He also claims that the district court erred in not conducting an evidentiary hearing on this issue.

Most of Morris's claims in this regard are without merit.[2] One, however, gives us pause. This is Morris's claim regarding his counsel's failure to file a notice of appeal from the original judgment.

We have held that an attorney's failure to file a notice of appeal may rise to the level of ineffective assistance of counsel when the client makes known his desire to appeal and the attorney either promises to file an appeal and does not or misleads the client by intimating that he has filed an appeal when he has not. *Arrastia V. United States*, 455 F.2d 736, 740 (5th Cir. 1972); *Kent v. United States*, 423 F.2d 1050, 1051 (5th Cir. 1970); *Atilus v. United States*, 406 F.2d 694, 698 (5th Cir. 1969). At the very least, counsel must inform the indigent defendant of his right to appeal,[3] *Martin v. State of Texas*, 737 F.2d 460, 462 (5th Cir. 1984), and notify him of the time limits in which to appeal, *United States v. Gipson*, 985 F.2d 212, 215 (5th Cir. 1993). A defendant

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[2] Morris's remaining ineffective assistance of counsel claims are that his counsel (1) failed to object to the introduction of hearsay evidence during the sentencing hearing, (2) failed to object to materially inaccurate evidence in the PSR, (3) failed to confront and cross-examine witnesses at the sentencing hearing, and (4) failed to prevent Morris's conviction for aiding and abetting. The first three of these alleged errors are factually unsupported by the record; Morris's attorney did object to the introduction of hearsay evidence, did object to inaccuracies in the PSR, and did cross-examine the government's witness at sentencing. (Moreover, hearsay testimony is admissible for purposes of sentencing. *United States v. Mir*, 919 F.2d 940, 943 n.3 (5th Cir. 1990)). As to the claim that counsel was ineffective for failing to prevent Morris's conviction for aiding and abetting, there was no error because, as discussed above, Morris was not convicted of a separate aiding and abetting offense.

[3] It is clear from Morris's various filings in this case that he knew of his right to appeal.

who expressly makes known his desire to appeal a conviction does not waive the right to appeal,[4] *Gipson,* 985 F.2d at 216-17, unless it is clear that the attorney will not appeal on the client's behalf. *Id.* at 217 n.7 (citing *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989)). When the defendant shows that his attorney's lapse resulted in the denial of an appeal, he need not show prejudice.[5] *Childress v. Lynaugh*, 842 F.2d 768, 772 (5th Cir. 1988) ("Prejudice resulting from the denial of a defendant's right to appeal is presumed because a criminal conviction can be attacked on numerous procedural and substantive grounds and thus, given the likelihood of prejudice, a case-by-case inquiry is not worth the cost."). Where counsel's failure to file a notice of appeal rises to the level of ineffective assistance, as by misleading the defendant into thinking that a notice of appeal has been filed or

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[4] By contrast, when the client has been informed of his right to appeal and has not made known to the attorney his desire to pursue an appeal, he has waived his right to appeal, and a claim of ineffective assistance of counsel will not lie. *Childs v. Collins*, 995 F.2d 67, 69 (5th Cir.), *cert. denied*, 114 S.Ct. 613 (1993).

[5] However, simply because the attorney does not file a notice of appeal does not evidence any denial of a defendant's rights. The key is whether the defendant relied on the attorney to file the notice of appeal. Our decision in *United States v. Green*, 882 F.2d 999 (5th Cir. 1989), makes this distinction clear. In *Green*, the defendant had apprised his attorney of his desire to appeal his conviction, but the attorney stated that he would not file a notice of appeal unless he was paid more money. *Id.* at 1003. We held that the defendant could not claim to have been misled by the attorney into thinking that the attorney would file a notice of appeal on his behalf. *Id.* The defendant was not therefore entitled to the presumption of prejudice that attaches when the defendant has reasonably relied on the attorney's representations, *see Childress*, 842 F.2d at 772, and we found that the defendant had failed to demonstrate prejudice. *Green*, 882 F.2d at 1003.

promising to file a notice of appeal but failing to do so, the remedy is the granting of an out-of-time appeal.[6] *Gipson*, 985 F.2d at 216 (citing *Mack v. Smith*, 659 F.2d 23, 25 (5th Cir. 1981) and *Perez v. Wainwright*, 640 F.2d 596, 599 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1759 (1982)); *see also Atilus*, 406 F.2d at 698.

In this case, although the reasons Morris's counsel did not file a notice of appeal are not entirely clear, Morris has clearly stated that he did inform counsel of his desire to appeal[7]: "Counsel was told [by] his client . . . that he wanted to file direct appeal and Counsel failed to do so." Moreover, Morris specifically alleges that his attorney did not inform him of the time limits in which to appeal.[8] This alleged dereliction, if

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[6] The defendant, however, is not "entitled to have his plea vacated, as his decision to plead guilty was not affected by a later failure to file a notice of appeal." *Green*, 882 F.2d at 1003.

[7] In his first motion to file an out-of-time appeal, Morris alleged that he had "indicated to his appointed Counsel . . . that he did want to appeal from [the] pre-sentence Investigation [report]," but that "[counsel] did not file the Notice of Appeal as was his client's wishes and argued against it . . . ." That counsel managed to talk Morris out of appealing would not in itself be sufficient under our cases to constitute ineffective assistance of counsel. *See United States v. Faubion*, 19 F.3d 226, 231 (5th Cir. 1994) (defendant claiming ineffective assistance of counsel based on attorney's advice not to appeal must show that counsel's performance was deficient and that defense was prejudiced by counsel's inadequacy); *see also supra* note 3. Elsewhere, Morris alleged that counsel "ignored filing notice."

[8] For example, in his objections to the magistrate judge's report, Morris claimed that his "Counsel did not advise of the strict time limitations required by FRAP 4(b)." He made similar claims in earlier filings with the district court: "Defendant asserts that he had ineffective assistance of Counsel in that he was not advised of the fact that he had only ten (10) days to file his notice . . ."; "Plaintiff's counsel never told this plaintiff he had ten days in which to file notice."

true, could, in appropriate circumstances, amount to ineffective assistance of counsel under our prior case law if this caused Morris's notice of appeal to be late. *See Gipson*, 985 F.2d at 215.

Aside from Morris's pleadings, there is no other evidence in the record regarding the circumstances surrounding the failure to file a notice of appeal in this case. We do not know whether Morris's counsel indicated to him that he would file a notice of appeal and neglected to do so, in which case Morris would be entitled to an out-of-time appeal, or whether the attorney made clear to Morris that he would not appeal, in which case Morris would be required to show how he was prejudiced by counsel's actions (at least assuming that Morris was notified or aware of the time limits for filing). A district court may deny a section 2255 motion without a hearing or further proceedings "only if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." *United Stats v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992). We cannot say that the record in this case demonstrates conclusively that Morris is not entitled to relief. The district court should have conducted further proceedings to determine the merits of Morris's claim that his counsel was constitutionally ineffective for failing to file a notice of appeal despite his express wishes. We therefore vacate the judgment as to this aspect of the case and remand for further proceedings in accordance with this decision.

Conclusion

For these reasons, we affirm the judgment of the district court in all respects except only as to Morris's claim of

ineffective assistance of counsel with respect to filing of the notice of appeal, as to which the judgment is vacated and the cause is remanded for further proceedings not inconsistent herewith.

AFFIRMED IN PART and VACATED AND REMANDED IN PART.