

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1914
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BILLY RAY MADDOX,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93-CV-208-E (4:88-CR-99-E))

(November 23, 1994)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

This Court affirmed the drug convictions and life sentence of Billy Ray Maddox. U.S. v. Maddox, No. 89-1628 (5th Cir. Jan. 8, 1991) (unpublished; copy at R. 3, 1-15). The following issues were raised by Maddox on direct appeal: the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

legality of the wiretap, the denial of severance, and challenges to Maddox's sentence.¹ See id. at 6-11 (found at R. 3, 8-13).

Maddox filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. In his motion, Maddox raised the following issues: (1) prejudicial pretrial publicity; (2) alleged bias on the part of one juror; (3) ineffective assistance of counsel for failing to strike the juror; (4) denial of equal protection and violation of the ex post facto prohibition in sentencing Maddox under the Sentencing Guidelines; (5) ineffective assistance of counsel for reliance on inapposite caselaw in moving for suppression of evidence and in moving for and appealing the denial of Maddox's release pending trial; (6) ineffective assistance of appellate counsel for filing an inadequate appellate brief; (7) impropriety of this Court's reliance on U.S. v. White, 869 F.2d 822 (5th Cir.), cert. denied, 490 U.S. 1112 (1989), in denying the ex post facto argument in the direct criminal appeal; (8) the failure of the district court to sever his trial from his codefendants; (9) the failure of the Government to charge Maddox under 21 U.S.C. § 848, continuing criminal enterprise, thus making his life sentence defective; (10) the failure of the district court to require the higher beyond-a-reasonable-doubt standard in determining sentencing issues; (11) the district court's alleged failure to make required

¹ The sentencing challenges included violation of the ex post facto prohibition, the denial of due process in light of codefendants who pleaded guilty receiving lesser sentences, and the reliance of the sentencing court upon testimonial evidence in determining the amount of heroin attributable to Maddox. Maddox, No. 89-1628 at 9-11 (found at R. 3, 11-13).

findings at sentencing; (12) the predetermination by the district court to impose a life sentence;² (13) the impropriety of this Court's reliance on certain caselaw in deciding Maddox's direct appeal; (14) the impropriety of law enforcement agents using a wired confidential informant (CI) in their investigation before Maddox's arrest; and (15) the impropriety, in light of a recent amendment to the guidelines, of a three-point increase to Maddox's total criminal history points in calculating his criminal history category.

The Government answered that several of Maddox's claims were procedurally barred because they could have been raised on direct appeal, but were not, while other issues, such as the use of a CI in criminal investigations and application of a guideline which was amended after sentencing, were not cognizable under § 2255. The Government noted that issues decided on direct appeal could not be attacked collaterally and that Maddox's claims against his attorney were insufficient to support ineffective assistance of counsel. The district court denied relief. On appeal, Maddox argues the merits of all of his claims. We affirm.

1. Issues Not Cognizable Under § 2255

"A defendant can challenge his conviction after it is presumed final only on issues of constitutional or jurisdictional magnitude" United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 978 (1992). The

² Issues 9-12 are found under the category labelled by Maddox as "vindictive prosecution."

following issues raised by Maddox are not of constitutional or jurisdictional magnitude: the defectiveness of Maddox's sentence based on the Government's failure to charge Maddox under § 848, the district court's failure at sentencing to require a higher burden of proof and to make required findings; law enforcement agents' use of a CI in their investigations; and the use of an amendment to the guidelines subsequent to sentencing to recalculate Maddox's criminal history category.³ For these alleged errors to be cognizable under § 2255, Maddox "must show that [they] could not have been raised on direct appeal, and if condoned, would result in a complete miscarriage of justice." Shaid, 937 F.2d at 232 n.7 (citing to United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981)). Maddox fails to show that these alleged errors could not have been raised on direct appeal. Therefore, they are not cognizable under § 2255. See United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992).

2. Issues that are Procedurally Barred

If an issue is constitutional or jurisdictional, then a defendant "may not raise [the] issue for first time on collateral review without showing both 'cause' for his procedural default, and 'actual prejudice' resulting from the error." Shaid, 937 F.2d at 232 (citation and footnote omitted). This procedural bar must be

³ The application of the recent amendment to U.S.S.G. § 4A1.3 could not have been raised on Maddox's direct appeal. See U.S.S.G. App. C, amend. 460 (amending § 4A1.3); see also White brief, 23-24 (Maddox's guidelines argument). However, the failure to consider this issue does not result in a miscarriage of justice because amendment 460 is not amenable to retroactive application. See U.S.S.G. § 1B1.10(d).

raised by the Government in the district court. United States v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992). The Government raised the procedural bar on the following issues: prejudicial pretrial publicity, alleged juror bias, violation of equal protection based on codefendants not receiving life sentences, and the district court's alleged predetermination of Maddox's sentence. In the district court and on appeal, Maddox does not show "cause" for not raising these issues on direct appeal;⁴ nor has he asserted that he is actually innocent so as to overcome the cause and prejudice standard. Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639. Therefore, the claims are procedurally barred on collateral attack. See Shaid, 937 F.2d at 232.

3. Issues Addressed on Direct Appeal

Several of Maddox's issues were addressed by this Court in his direct criminal appeal: the denial of equal protection and the violation of the Ex Post Facto Clause by using the guidelines in determining Maddox's sentence⁵ and the denial of severance. See

⁴ Although Maddox argues that he received ineffective assistance of appellate counsel, he does not contend, either in the district court or on appeal, that this alleged ineffectiveness is sufficient cause to overcome the procedural bar. See R. 5, 616-17 (stating that the Government's answer is unpersuasive and that he adheres to his contentions found within his § 2255 motion); White brief, 11-14, 25-30.

⁵ Maddox's counsel argued on the direct appeal criminal appeal that Maddox was denied due process because a coconspirator who pleaded guilty received a lighter sentence. Maddox, No. 89-1628 at 10 (found at R. 3, 12). In his § 2255 motion, Maddox argues that he was denied equal protection because codefendants who pleaded guilty were not sentenced under the guidelines. R. 3, 38. Liberally construed, Maddox's claim is the same issue which was raised on direct appeal. To the extent that the argument is dissimilar to the appealed issue, the claim could have been raised on direct appeal, the Government raised the procedural bar, see R. 4, 154, and Maddox failed to show the required cause and prejudice or manifest miscarriage of justice. Thus, the issue is procedurally barred.

Maddox, No. 89-1628 at 10-13. "It is settled in this Circuit that issues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 [m]otions." United States v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1986). Therefore, these issues raised by Maddox are precluded from reexamination.

Maddox challenges this Court's reliance on certain prior decisions which were cited in the opinion of Maddox's direct criminal appeal. "[I]t would not do well for the morale or credibility of the judiciary to have one panel of Circuit Judges second-guessing another panel from the same circuit on the same question of law in the same case." Falcon v. General Tel. Co., 815 F.2d 317, 319-20 (5th Cir. 1987) (footnote omitted). Maddox's challenge is precluded by the "law of the case" doctrine. See Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1150 (5th Cir. 1993).

4. Ineffectiveness of Counsel

Maddox argues that he received ineffective assistance of counsel by the failure of counsel to strike the biased juror and by counsel's reliance on inapposite caselaw to support the pretrial motions for the suppression of evidence and for Maddox's release pending trial. He also contends that counsel rendered ineffective assistance on appeal by advocating the adoption of a district court opinion which had been rejected by other circuits, by misallocating limited space within the appellate brief to discuss legislative history, by counsel's failure to raise the issues suggested by

Maddox, and by counsel's failure to file a reply brief. Maddox contends that his counsel's performance amounted to malfeasance, and he equates the filed appellate brief to an amicus curiae brief. Under the two-prong test enunciated in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), Maddox must show that counsel's assistance was deficient and that the deficiency prejudiced his defense. The second prong requires showing that the error deprived the petitioner of a fair trial. Id.; see Lockhart v. Fretwell, ___ U.S. ___, 113 S. Ct. 838, 842, 122 L. Ed. 2d 180 (1993).

"To satisfy the first Strickland prong, a defendant must demonstrate attorney performance outside the wide range of reasonable professional assistance, and must overcome a presumption of adequacy." Carson v. Collins, 993 F.2d 461, 465 (5th Cir.) (footnote omitted), cert. denied, 114 S. Ct. 265 (1993). Maddox's contentions concerning counsel's performance in handling the pretrial motions and subsequent appeal of the detention order are specifically directed at how counsel utilized citation to caselaw in briefing the issues. Maddox ignores the record indicating that trial counsel filed several pretrial motions, and participated in the lengthy hearings covering these motions. In light of this record, Maddox has not overcome the presumption of adequate assistance.

Maddox's ineffective-assistance claim that counsel failed or refused to strike the alleged biased juror is refuted by the record. Maddox attached to his § 2255 motion a letter he wrote to

counsel suggesting possible issues for appeal. In this letter, Maddox indicates that it was his decision not to object to this juror at trial. Thus, Maddox's claim lacks factual support.

In Penson v. Ohio, 488 U.S. 75, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988), the Supreme Court distinguished between two types of denial of effective assistance of appellate counsel: first, when the deficiency consists of failure to raise or properly brief or argue certain issues on appeal, and second, when there has been actual or constructive complete denial of any assistance of appellate counsel. The first type of case requires a showing of Strickland prejudice.

Sharp v. Puckett, 930 F.2d 450, 452 (5th Cir. 1991). Maddox's claims fall under the first type because he contends that counsel failed to properly brief issues by devoting too much space to legislative history, by relying on a lower court opinion rejected by other circuits, and by failing to file a reply brief. Therefore, Maddox must show prejudice, and this he fails to do.

Maddox does not argue or specify what meritorious issues, if any, counsel should have raised on appeal. See Sharp, 930 F.2d at 453 ("the key is whether the failure to raise an issue worked to the prejudice of the defendant"). Nor has Maddox shown that the issues presented on appeal, if handled in a different manner by counsel, would have changed the outcome of the appeal. Therefore, Maddox fails to meet his burden in showing the required prejudice. See Moss v. Collins, 963 F.2d 44, 48 (5th Cir. 1992).

For these reasons, the judgment of the district court is AFFIRMED.