IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2626

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAIME CAICEDO LOURIDO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-H-92-73-2; CA H-93-2124)

(June 7, 1995)

Before KING, HIGGINBOTHAM and DEMOSS, Circuit Judges.

PER CURIAM:[*]

Jaime Caicedo Lourido appeals the dismissal of his motion under 28 U.S.C. § 2255 to vacate his sentence. We affirm.

Lourido was indicted for possession with intent to distribute and distribution of in excess of five kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(a). Lourido originally entered a plea of not guilty to the charge,

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

but thereafter he entered into a plea agreement with the Government. Lourido agreed to plead guilty in exchange for the Government recommending the minimum sentence under the applicable guideline range. In the plea agreement, the Government stipulated to Lourido's acceptance of responsibility. See U.S.S.G. § 3E1.1.

The district court accepted the guilty plea and ordered a presentence report (PSR) prepared. The Government filed a response to the PSR, noting that there was no adjustment for acceptance of responsibility in the PSR and that the Government "stands by its agreement" to stipulate to Lourido's acceptance of responsibility. The Government amended its response stating that it "stipulated to a two level reduction for the defendant's acceptance of responsibility." At sentencing, the district court noted that no objections to the PSR were filed.[1] The district court awarded Lourido a two-level reduction for acceptance of responsibility, resulting in an offense level of 32 and a criminal history category I with an imprisonment range of 121 to 151 months. The district court sentenced Lourido to a 132-month term of imprisonment. Lourido did not file a direct criminal appeal.

Lourido filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, noting that because he

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[1] Neither the PSR nor the transcript of the sentencing hearing form part of the appellate record. See Fed. R. App. P. 10(b) (appellant's duty to order transcripts).

pleaded guilty, he was not aware that he could have appealed. Lourido alleged that 1) his conviction and sentence were based on improper evidence, including hearsay and character evidence, which lacked a factual basis;[2] 2) the district court erred in failing to award him a three-level reduction to his base offense level for acceptance of responsibility pursuant to § 3E1.1; 3) his counsel was ineffective for failing to advise him that he had a constitutional right to be sentenced on the basis of proper evidence; and 4) his counsel was ineffective for failing to object to the use of hearsay evidence regarding his character as the use of this evidence by the sentencing court purportedly violated Fed. R. Evid. 404(b).

The district court summarily dismissed Lourido's motion citing only Rule 4(b) of the Rules Governing § 2255 Proceedings and providing no findings of fact or conclusions of law. This court granted Lourido's motion to proceed IFP on appeal and remanded the case to the district court for the entry of findings of fact and conclusions of law. The district court entered a supplemental order outlining its findings of fact and conclusions of law in support of its denial of Lourido's § 2255 motion.

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[2] Specifically, he argued that consideration of the following evidence by the district court was improper: "[1] [that Lourido] was involved with drugs based upon the location at the time others were involved, [2] [that he] was involved with the illegal activities in the residence and that he had prior knowledge of those activities, [3] [that he] knew about the illegal conduct that transpired in the apartment, namely, the found items related to drug activity and the money found, and [4] [that he] was associated to the found cocaine and the automobile that was used in the criminal undertaking."

Lourido argues that he erroneously was denied a three-point reduction in his base offense level for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a). "A district court's technical application of the Guidelines does not give rise to a constitutional issue." United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Thus, Lourido's contention that his sentence should have been reduced an additional level for acceptance of responsibility is not cognizable in a § 2255 motion. To the extent that Lourido raised this issue in the district court in the context of an ineffective assistance of counsel claim, he has failed to raise or brief the issue on appeal; thus, the issue has been abandoned. Evans v. City of Marlin, Tex., 986 F.2d 104, 106 n.1 (5th Cir. 1993) (issues not raised or briefed are considered abandoned).

For the first time on appeal, Lourido argues that his counsel was ineffective for failing to move to suppress evidence obtained through an illegal search and seizure in violation of the Fourth Amendment and for failing to conduct a pre-trial investigation of the purportedly illegal search and seizure. In his reply brief, Lourido argues that his counsel was ineffective for failing to argue on appeal that evidence was obtained through an illegal search and seizure.

This court does not generally address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result

in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991) (internal quotation and citation omitted). These issues are not purely legal. See United States v. Faubion, 19 F.3d 226, 228 (5th Cir. 1994) (ineffective assistance is a mixed question of law and fact). Thus, we will not consider them for the first time on appeal.

In the district court, Lourido argued that his counsel was ineffective for failing to advise him that he had a constitutional right to be sentenced upon proper evidence and for failing to object to the use of hearsay evidence regarding his character. As these arguments have not been raised or briefed on appeal, they have been abandoned. Evans, 986 F.2d at 106 n.1.

Lourido argues that the district court erred in dismissing his § 2255 petition without conducting an evidentiary hearing on his claims that his counsel was ineffective for failing to conduct a pre-trial investigation of the purportedly illegal search and seizure and for failing to move to suppress the evidence obtained during the search. As discussed above, these claims were not raised in the district court. Thus, the district court did not have an opportunity to conduct an evidentiary hearing on the merits of these claims.

In Lourido's reply brief, he asks this court to remand the case to the district court and appoint counsel for him under Rule 8(c) of the Rules Governing § 2255 Proceedings. An indigent movant is entitled to have counsel appointed for the purposes of an evidentiary hearing. Alford v. United States, 709 F.2d 418,

423 (5th Cir. 1983); Rule 8(c). In view of our conclusion that any claims requiring an evidentiary hearing were not raised in the district court, the request for appointment of counsel is denied.

The district court's dismissal of Lourido's § 2255 motion is AFFIRMED. Lourido's motion for appointment of counsel is DENIED.