

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-3211
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

DENNIS YOUNG,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-92-1094 (CR-88-173-M))

(November 23, 1993)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

Background

Dennis Young pleaded guilty to one count of possession with intent to distribute about 16 ounces of amphetamine. In exchange for Young's plea, the Government agreed to move to dismiss all

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

other charges and agreed to notify the court of the extent of Young's assistance without being bound to move for a departure pursuant to U.S.S.G. § 5K1.1. The district court sentenced Young to a prison term of 132 months and a three-year term of supervised release and imposed a \$50 special assessment. Young did not file a direct appeal.

Over three years after the judgment was handed down in his case, Young filed a pro se 28 U.S.C. § 2255 motion. Young argued that the district court failed to ascertain that his plea was voluntary, that there was insufficient evidence to support his guilty plea, and that he received ineffective assistance of counsel. Following the Government's response to Young's motion, and Young's reply, the magistrate judge ordered an evidentiary hearing and appointed counsel.

After Young testified at the evidentiary hearing, the magistrate judge granted Young's motion to amend his § 2255 motion and continued the hearing. In his amended complaint Young asserted that his offense level was improperly increased because the presentence report (PSR) erroneously identified him as a manager, incorrectly described him as providing his co-defendants with firearms, and overstated the amount of drugs involved; that his attorney was ineffective because he failed to review the PSR with him and thus prevented Young from alerting him to its mistakes and because counsel failed to move for a downward departure; and that the Government breached the plea bargain by failing to move for a § 5K1.1 departure.

Following the resumption of his hearing, the magistrate judge recommended dismissing Young's amended motion with prejudice because he had sufficient time to review the PSR with his attorney, including the alleged inaccuracies, and because the Government satisfied its obligation under the plea agreement by notifying the court of the extent of Young's assistance. The magistrate judge, in his oral findings, referred to the testimony of Young's defense counsel. The docket entry corresponding to the hearing indicates that the magistrate judge, by minute entry, ordered that an expedited transcript be prepared only of the oral reasons assigned on the record by the magistrate judge. The magistrate judge credited the defense counsel's version of their interaction over that provided by Young.

Over Young's objections, the district court adopted the magistrate judge's findings and recommendation and dismissed Young's § 2255 motion. The district court ruled that Young's counsel was not ineffective. The court found that Young's counsel reviewed the entire PSR with Young and that his sentence was not increased by erroneous allegations concerning Young's role in the offense that were contained in the PSR. Young appeals this determination.

Opinion

Young argues that the district court erred in determining his sentence because he was not a manager or leader; that his defense counsel was ineffective for failing to file a motion for a downward departure; and that the Government breached the plea agreement by

failing to move the court for a downward departure. Young appears to argue that he was incorrectly identified in the PSR as a manager or leader and that his defense counsel's failure to review the PSR with him resulted in an incorrect sentence.

Because Young is challenging the district court's determination concerning his role in the offense that relied upon the magistrate judge's findings and recommendations which in turn was based upon the testimony of Young's defense counsel, it was Young's obligation to include in the record a transcript of the testimony relevant to the finding in question. Fed. R. App. P. 10(b); see Alizadeh v. Safeway Stores, Inc., 910 F.2d 234, 237 (5th Cir. 1990).

Young was and is represented by an Assistant Federal Public Defender who was appointed prior to Young's evidentiary hearing. The district court granted IFP on appeal. Under 28 U.S.C. § 753(f), Young was entitled to any transcripts relating to his appeal that his counsel requested free of charge.

In Young's 20 page brief there is no mention of the evidentiary hearing testimony of Young's defense counsel. Because of Young's failure to provide this Court with a transcript of the hearing testimony, we are not in a position to resolve the question of whether the trial court erred in finding that Young's trial counsel reviewed the PSR with Young.

Alternatively, if Young is simply trying to raise the issue of whether he was a manager or a leader he is barred from challenging the district court's determination concerning his role in the

offense because section 2255 "is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on direct appeal and, would, if condoned, result in a complete miscarriage of justice." U.S. v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981) (citation omitted).

Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding. Id. "A district court's technical application of the Guidelines does not give rise to a constitutional issue." U.S. v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Thus, Young may assert that he was improperly sentenced under the guidelines only as an instance in which counsel's assistance was ineffective, and not as an independent issue. On appeal, Young does not appear to raise the manager or leader guideline issue as a grounds for asserting that his defense counsel was ineffective. If this was Young's intent, he would be prevented from doing so because of his failure to order the pertinent part of the transcript.

Young asserts that the Government breached its plea agreement by failing to file a motion for a downward departure on his behalf. The district court did not rule on this issue.

A review of Young's plea agreement reveals that the Government agreed to file a § 5K1.1 motion only if the information provided by Young warranted one. Young's reliance on U.S. v. Watson, 988 F.2d 544, 552-53, is inapposite because that case involved a factually distinguishable agreement in which the Government promised to file a § 5K1.1 motion in return for the defendant's guilty plea. Id. at

553. "In such a case a district court has authority to determine whether a defendant has satisfied the terms of his plea agreement, even if one of those terms deals with assistance to the government." Id. Young does not explain in concrete terms how his assistance was substantial or how the Government induced him into a bargain that it failed to honor. "[A] claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing." Id. at 552 (quoting Wade v. U.S., ___U.S.___, 112 S.Ct. 1840, 1844, 118 L.Ed.2d 524 (1992)). The district court's failure to rule on this issue was harmless error.

Further, to the extent that the guideline issue and a constitutional claim overlap, Young still fails to make an argument that would be cognizable under § 2255. The district court may review the Government's decision not to file a § 5K1.1 motion and grant relief only if the Government's refusal was based on an unconstitutional motive such as the defendant's race or religion. U.S. v. Urbani, 967 F.2d 106, 109 (5th Cir. 1992)). Young alleges no such unconstitutional motive.

Young asserts that his counsel was ineffective for failing to file a § 5K1.1 motion or a Rule 35 motion after he provided sufficient information to the Government and the Government breached the plea agreement by not filing a motion for a downward departure.

Under the guidelines a § 5K1.1 motion must be filed by the Government and not by defense counsel. U.S.S.G. § 5K1.1 (Oct.

1987). For the reasons set out above, we hold that the Government did not breach its plea agreement and defense counsel's performance was neither deficient nor prejudicial to Young's defense.

AFFIRMED.