

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-3214
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

NATHANIEL LEE STARNES,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 92 3683 (CR 90 369 A))

(February 1, 1994)

Before DAVIS, JONES and DUHÉ, Circuit Judges.

PER CURIAM:¹

Starnes appeals the district court's rejection of his motion to vacate his sentence pursuant to 28 U.S.C. § 2255. We affirm.

Starnes and his co-defendants, Samuels and DeVeal, were charged in a seven-count indictment. Starnes was charged in three counts with conspiracy to import cocaine, importation of cocaine, and causing another to possess cocaine on board an aircraft intending that it be introduced into the United States, all in

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

violation of 21 U.S.C. §§ 960(a)(1), 963, 952(a) and 19 U.S.C. § 1590(a). The indictment charged that Starnes had conspired to import approximately thirteen kilograms of cocaine.

Starnes pleaded guilty to the indictment and was sentenced to 120 months imprisonment. His appeal focuses primarily on his argument that the district court improperly included three and a half kilograms of cocaine that his co-conspirator attempted to smuggle into Houston. He also argues that his counsel provided ineffective assistance for failing to challenge the quantity of drugs the court proposed to use in computing his sentence. We find no merit to either argument.

Starnes argues that he should not have been sentenced with the additional 3.5 kilos of cocaine factored into his sentence. He also disagrees with facts found within his PSR. The district court concluded that Starnes was procedurally barred from bringing a collateral attack on his sentence. "A defendant can challenge his conviction after it is presumed final only on issues of constitutional or jurisdictional magnitude . . ." **United States v. Shaïd**, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), **cert. denied**, 112 S.Ct. 978 (1992). The sentencing issues raised by Starnes are not cognizable under § 2255. **See United States v. Vaughn**, 955 F.2d 367, 368 (5th Cir. 1992).

Starnes also argues that his counsel was ineffective because he did not challenge the amount of drugs. In detailing the evidence pertaining to Starnes' charges, the prosecutor described the uncharged three and a half kilograms of cocaine that Starnes

travelling companion, Ross Johnson, had attempted to smuggle into the country in Houston. This was in addition to the 2.3 kilograms of cocaine charged in Counts 4 and 5 of the superseding indictment. The men, all from Kansas, were travelling together on the same flight and had sequentially numbered tickets and baggage claim checks. Starnes agreed with the government's factual summary and admitted that he was travelling with Johnson. Based upon Starnes' sworn admissions at arraignment, he has not met his burden of showing counsel's deficiency or resulting prejudice from the failure to challenge the three and a half kilos of cocaine Johnson was transporting.

Starnes argues that counsel was ineffective for being out of the country and sending an associate to represent Starnes at sentencing. At sentencing, Starnes explicitly declined to object to representation by associate counsel. Starnes also argues that counsel was ineffective in handling the contempt of court litigation for Starnes' refusal to testify with immunity before a grand jury, litigation subsequent to his sentencing. In the district court, Starnes' complaint with counsel was that counsel asked for more money in order to represent him in the contempt of court litigation. Starnes has failed to show how any possible impropriety by counsel in these post-sentencing events resulted in prejudice to Starnes on the three counts of conviction and sentence under collateral attack.

Starnes argues next that no one, including counsel, informed him that he had the right to appeal. Not only is this allegation

raised for the first time on appeal, it is contrary to the record. After imposing sentence, the district court informed Starnes about his right to appeal. Moreover, Starnes does not allege that he told counsel to file notice of appeal and that counsel failed to comply with the request. For the above stated reasons, Starnes has failed to meet his burden in showing ineffective assistance of counsel. **See Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984).

The district court did not err in denying relief under § 2255.²

AFFIRMED.

² We have considered Starnes' additional arguments, including the following: The district judge was too lenient in granting extensions of time to the government in responding to § 2255; the district court was biased in favor of the government at sentencing and in handling Starnes 2255 motion. We find these arguments meritless and reject them.

