

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3278
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH M. RANDALL,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. CA-92-3627 (CR-88-261-L)
- - - - -
(December 14, 1993)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

A motion brought under 28 U.S.C. § 2255 may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits; or if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure. See Rule 9(b), Rules Governing § 2255 Proceedings. A second § 2255 motion that raises claims for the first time "is generally subject to dismissal for abuse of the motion." United States v. Flores, 981 F.2d 231, 235

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

(5th Cir. 1993). A district court's decision to dismiss a motion under Rule 9(b) of the Rules Governing § 2255 Proceedings is reviewed under the abuse-of-discretion standard. Id. at 234.

A movant's failure to raise a ground for relief in a prior motion "will be excused if he can show: (1) cause for his failure to raise the claim, as well as prejudice from the errors which form the basis of his complaint; or (2) that the court's refusal to hear the claim would result in a fundamental miscarriage of justice." Flores, 981 F.2d at 234 (citing McCleskey v. Zant, 499 U.S. 467, ___, 111 S. Ct. 1454, 1470, 113 L. Ed. 2d 517 (1991)). To establish "cause," a movant must show that some "objective factor external to his defense prevented him from raising the claim in the initial motion." Flores, 981 F.2d at 235 (citation omitted). Factors constituting "cause" include "interference by government officials, as well as the reasonable unavailability of the factual or legal basis for a claim." Saahir v. Collins, 956 F.2d 115, 118 (5th Cir. 1992). If the movant has not established cause, the court need not consider prejudice. Id.

Kenneth M. Randall provided in his second motion that he did not raise his claims earlier because of "[i]neffective counsel and lack of a law degree." He further blamed "the failure, neglect, and refusal of trial and appellate counsel, and the 'Federal Post - Conviction Specialists.'" To the extent that Randall complains of any attorney errors during his post-conviction proceedings, this claim must fail because there is no constitutional right to counsel beyond the first appeal. See

Johnson v. Hargett, 978 F.2d 855, 859 n.15 (5th Cir. 1992), cert. denied, 113 S. Ct. 1652 (1993).

The lack of a law degree, ignorance of facts and legal theories, and a movant's pro se status do not amount to cause. Flores, 981 F.2d at 236. Ineffective assistance of counsel may be cause if it is "an independent constitutional violation." Johnson, 978 F.2d at 859 & n.14. Anything less than that, however, is not. See Woods v. Whitley, 933 F.2d 321, 323-24 (5th Cir. 1991). If a movant asserts ineffective assistance of counsel but knew or "should have known" earlier about the law on ineffective assistance of counsel, he has not shown adequate cause. Saahir, 956 F.2d at 119.

Randall contends that his trial counsel was ineffective because counsel did not "professionally and effectively" cross-examine the confidential informant or present "proper" arguments to the jury. Randall also contends that trial counsel failed "to present good reason for the court to deviate from the Sentencing Guidelines." Randall, however, does not show that he did not know or could not have known the law on ineffective assistance of counsel until filing his second § 2255 motion. See Saahir, 956 F.2d at 119.

A review of the record reveals no "objective external factor" that prevented Randall from raising his claims earlier. Randall, therefore, has failed to show cause. Nevertheless, his claims can be heard if failing to do so would result in a "fundamental miscarriage of justice." See Flores, 981 F.2d at 236 (citation omitted). To do so, Randall would have to present

a colorable showing that a constitutional violation probably caused the conviction of an innocent person. See Sawyer v. Whitley, ___ U.S. ___, 112 S. Ct. 2514, 2518-19, 120 L. Ed. 2d 269 (1992). Randall, however, does not allege innocence or make such a showing. He merely challenges the computation of his sentence. That, alone, does not suffice. See Flores, 981 F.2d at 236. This Court, moreover, has already ruled that sufficient evidence supports Randall's convictions. See United States v. Randall, 887 F.2d 1262, 1267-68 (5th Cir. 1989).

An analysis of the merits of the ineffective-assistance-of-counsel claim also fails to help Randall. To prove ineffective assistance of counsel, a defendant must affirmatively show that (1) his counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In determining prejudice, a reviewing court must examine "whether the result of the proceeding was fundamentally unfair or unreliable." Lockhart v. Fretwell, ___ U.S. ___, 113 S. Ct. 838, 842, 122 L. Ed. 2d 180 (1993). A review of this Court's opinion in Randall's direct appeal reveals that the result of Randall's trial was not fundamentally unfair or unreliable. This Court went as far as to determine that the evidence of Randall's guilt was "overwhelming." 887 F.2d at 1270. Randall's ineffective-assistance-of-counsel claim, therefore, appears to be meritless.

Randall has shown neither cause for failing to raise his claims earlier nor a colorable showing that a constitutional

violation probably caused the conviction of an innocent person. It is unnecessary to address the merits of his claims because the district court's determination that the motion is abusive under Rule 9(b) is correct. The dismissal of Randall's § 2255 motion is therefore AFFIRMED.