UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3320
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD DARNELL RAINEY,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 93-0274 (CR 92-165 D))

(April 5, 1994)

Before POLITZ, Chief Judge, KING and WIENER, Circuit Judges.

POLITZ, Chief Judge:[*]

Ronald Darnell Rainey appeals the denial of his 28 U.S.C. § 2255 collateral challenge to his conviction of conspiring to possess cocaine with intent to distribute. We affirm.

Background

Rainey arranged to buy a kilogram of cocaine from a government informant. He was arrested upon arrival at the agreed rendezvous and ultimately entered a plea of guilty to the charge of conspiracy

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to possess with intent to distribute an unspecified amount of cocaine in violation of 21 U.S.C. § 841(a)(1). As part of the plea agreement the government dismissed a second count charging an attempt to possess with intent to distribute one kilogram of cocaine. Rainey was sentenced to 74 months imprisonment followed by a term of supervised release.[1]

There was no direct appeal. The instant collateral attack contends that the guilty plea was involuntary because it was based on ill-informed and inaccurate advice of counsel. No hearing was had on Rainey's motion; the district court denied relief, finding that Rainey's sworn testimony at the Fed.R.Crim.P. 11 guilty plea hearing and his written plea agreement established that the guilty plea was knowing and voluntary. Rainey timely appealed.

Analysis

Rainey primarily urges ineffective assistance of counsel. We presume the competence and reasonable effectiveness of counsel.[2] To succeed in his ineffective assistance claim Rainey must demonstrate prejudice; he must "allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial."[3] Rainey first focuses on the failure of

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[1]In his brief Rainey states that he was sentenced to 72 months. Although the initial judgment and commitment order inaccurately reflected that term, Rainey was sentenced in open court to 74 months and the typographical error was corrected by the court.

[2]**Strickland v. Washington**, 466 U.S. 668 (1984).

[3]**Nelson v. Hargett**, 989 F.2d 847, 850 (5th Cir. 1993) (citation omitted).

counsel to investigate alibi witnesses, but he does not suggest the substance of the testimony they might have offered relevant to his case.

Rainey next contends that his counsel assumed in error that the government could have charged a conspiracy involving 25 kilos of cocaine. If that were an error, and if it indeed was made by Rainey's counsel, it would be manifestly harmless because Rainey's sentence was based on his one-kilo transaction for which he was arrested. Rainey asserts that he would not have entered a guilty plea if the 25-kilo quantity was not hovering in the background. The evidence of Rainey's guilt of the offense to which he pled guilty is overwhelming and irrefutable. His argument that absent the 25-kilo threat he would have insisted on going to trial simply does not persuade.[4] The remainder of Rainey's allegations of ineffectiveness of his counsel all lack merit.

Rainey next contends that his guilty plea was not voluntary because his counsel erroneously advised him about the likely sentence he would receive. The record belies the basis for this objection. In the Rule 11 allocution Rainey was told by the court that the crime to which he was entering a guilty plea had a 30-year imprisonment potential. Rainey acknowledged his understanding. He also attested to the fact that no promises had been made respecting the sentence that the court would impose. Even if the attorney's prognostication proved grossly in error, in this setting the

[4]See **Hill v. Lockhart**, 474 U.S. 52 (1985); **Young v. Lynaugh**, 821 F.2d 1133 (5th Cir.), cert. denied, 484 U.S. 986 (1987), 484 U.S. 1071 (1988).

voluntariness of the guilty plea would not be implicated.[5]

Rainey's challenge to the computation of his sentence and the court's ruling on a motion to suppress were rejected by the district court as procedurally barred because they were not asserted on direct appeal. Rainey's guilty plea waived his right to pursue the challenge on the ruling on the motion to suppress.[6] As to the guidelines claim, the district court held that Rainey could not raise the argument "for the first time on collateral review without showing both 'cause' for his procedural default, and 'actual prejudice' resulting from the error."[7] Rainey would attempt on appeal to demonstrate cause and prejudice. He may not do so.[8]

Finally, Rainey complains that the trial court erred in denying his section 2255 motion without an evidentiary hearing. A hearing is not required where, as here, all of the petitioner's claims are either contrary to law or plainly refuted by the record.[9]

AFFIRMED.

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[5]**United States v. Santa Lucia**, 991 F.2d 179 (5th Cir. 1993).

[6]**United States v. Benavides**, 793 F.2d 612 (5th Cir.), cert. denied, 479 U.S. 868 (1986).

[7]**United States v. Shaid**, 937 F.2d 228, 231 (5th Cir. 1991), cert. denied, 112 S.Ct. 978 (1992).

[8]**United States v. Madkins**, 14 F.3d 277 (5th Cir. 1994).

[9]**United States v. Green**, 882 F.2d 999 (5th Cir. 1989).