IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3636
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ALI IMITIAZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR-88-96-I)

(May 20, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Ali Imitiaz challenges the sentence imposed for possession with intent to distribute one kilogram of heroin. The challenge now takes the form of an appeal of the district court's denial of collateral relief under 18 U.S.C. § 3582(c) and 28 U.S.C. § 2255. Finding no reversible error, we affirm.

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Imitiaz filed a direct appeal challenging the sufficiency of the evidence and the constitutionality of the federal sentencing guidelines. This court affirmed his conviction and sentence. He then filed a § 2255 motion challenging the sufficiency of the evidence and contending that a search of his hotel room violated the Fourth Amendment. He filed a reply to the government's response wherein he arguably contended, inter alia, that his counsel was ineffective. The district court denied the motion. Imitiaz did not appeal that denial.

Imitiaz then filed a motion pursuant to § 3582(c), alleging that he was sentenced under the wrong statute, 21 U.S.C. § 841(b)(1)(A), rather than 21 U.S.C. § 841(b)(1)(B). He contended that the district court, at sentencing, incorrectly stated the maximum fine for his offense as $4,000,000 rather than $2,000,000. At sentencing, the court stated,

> I find the pre-sentence report to be accurate and uncontested and adopt the guidelines calculations and reasons for sentencing . . . as my own. [T]he sentencing guidelines . . . provide for a term of imprisonment of ninety-seven to one hundred twenty-one months, a period of supervised release of not more than five years, and a fine of not less than $15,000 nor more than $4 million . . . .

Solely because of the erroneous representation of the potential amount of any fine, Imitiaz reasoned that the district court had sentenced him under § 841(b)(1)(A), resulting in a sentence just above the statutory minimum of ten years, rather than § 841(b)(1)(B), which had a minimum of only five years.

The presentence report (PSR), which the district court adopted at sentencing, provided the correct ranges of imprisonment for Imitiaz's offense. Citing § 841(a)(1), the PSR provided that "[t]he maximum term of imprisonment in this case is a mandatory minimum of five years to 40 years maximum." It provided that the range of imprisonment under the guidelines was 97 to 121 months, based upon an offense level of 30 and a criminal history category of I. Imitiaz does not dispute that the PSR provided the correct ranges of imprisonment. The PSR did provide, incorrectly, that the statutory maximum fine under § 841(a)(1) was $4,000,000 and that "[t]he fine range for this offense [under the guidelines is] a minimum fine of $15,000.00 and a maximum fine of $4,000,000.00."

Imitiaz contended that the 1992 amendments to U.S.S.G. § 1B1.3 and § 3B1.2 should be applied retroactively. See U.S.S.G. app. C, amends. 439, 456 (1992).[1] He requested that the amendment to § 1B1.3 (see amend. 439) be applied retroactively, resulting in a sentence based only upon "reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." See § 1B1.3 (emphasis added). Further, he requested that he receive a reduction in his sentence pursuant to § 3B1.2 and post-sentence amendments to §3B1.2[2] (see

[1] Imtiaz does not identify amendments 439 and 456 by number. The district court assumed that these were the amendments to which he was referring.

[2] Imtiaz argued in his § 3582(c) motion and in his appellate brief that "[s]ince his incarceration the clarifying amendments now allows [sic] the sentencing court to look to `contours of the underlying scheme itself rather than the mere elements of the offense charged[.']" (citing United States v.

(continued...)

amend. 456) because he was a minimal or minor participant.

The district court denied the motion and determined that § 3582(c) did not apply to Imitiaz's claim that he was sentenced under the wrong statute. Construing the motion as a § 2255 motion, the district court held that Imitiaz was procedurally barred from raising his claims. The court determined that § 1B1.3 and § 3B1.2 did not apply retroactively. Imitiaz appeals the denial of this motion.

II.

A.

Imitiaz argues that amendments to U.S.S.G. § 1B1.3 and § 3B1.2 should be applied retroactively. He contends that he could foresee only half of the heroin possessed by his co-defendant, or 500 grams. See § 1B1.3. Imitiaz asserts that he should receive a reduction for his role in the offense pursuant to § 3B1.2. He requests that this court hold a factfinding hearing to determine his role in the larger context of his offense. Id. at 8 (citing United States v. Webster, 996 F.2d 209 (9th Cir. 1993)).

Imitiaz failed to object to the PSR, which provided that Imitiaz was in possession of one full kilogram of heroin that he

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(...continued)
Webster, 996 F.2d 209 (9th Cir. 1993)). The district court assumed that he was referring to amendment 456. See U.S.S.G. app. C, amend. 456 (1992). Amendment 456 alters the commentary only; it did not alter the text of the guideline. Moreover, that amendment limits, rather than expands, the application of a mitigating role.

placed in a travel bag in his hotel room. He is not seeking retroactive application of changes in the guidelines so much as an opportunity to relitigate the facts underlying his sentence.

Even if this court were to consider Imitiaz's contentions that the amendments should be applied retroactively, he would not prevail. When the Sentencing Commission lowers a sentencing range after a defendant has been sentenced, the district court may reduce the term of imprisonment on motion of the defendant or the Director of the Bureau of Prisons or sua sponte. § 3582(c)(2); see United States v. Watson, 868 F.2d 157, 158 (5th Cir. 1989). Section 3582(c)(2) is an exception to the general rule that the applicable guideline is that which is in effect on the date of sentencing. United States v. Crain, No. 92-3869, slip op. at 2 (5th Cir. June 22, 1993) (unpublished).

A § 3582(c)(2) motion applies only to guideline amendments that operate retroactively, as listed in the policy statement to U.S.S.G. § 1B1.10(d). United States v. Miller, 903 F.2d 341, 349 (5th Cir. 1990); Crain, slip op. at 2. That policy statement provides that "[i]f none of the amendments listed in subsection (d) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement." § 1B1.10(a). There are no provisions regarding retroactive reduction of a prisoner's term of incarceration under § 3582(c)(2) based upon amendments 439 and 456. See § 1B1.10(d). Courts should consider policy statements in sentencing defendants. See United States v. Park, 951 F.2d

634, 636 (5th Cir. 1992). Therefore, § 3582(c)(2) is unavailing.[3] See Miller, 903 F.2d at 349.

B.

Imitiaz's contentions that the amendments should be applied retroactively are not cognizable under § 2255.[4] Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be raised in a collateral proceeding. Id. "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, Imitiaz's contention that his sentence should be reduced in light of amendments to § 1B1.3 or § 3B1.2 is not cognizable in a § 2255 motion.

C.

Imitiaz contends that the district court incorrectly

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[3] Also unavailing is § 3582(c)(1), which provides that

> [t]he court may not modify a term of imprisonment once it has been imposed except that)) (1) in any case)) (A) the court, upon motion of the Director of the Bureau of prisons, may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and
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> (B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure . . . .

[4] The district court construed the motion as a § 2255 motion for purposes of evaluating Imtiaz's contention that he was sentenced under the wrong statute. The district court did not, however, consider whether Imtiaz's claims regarding the retroactivity of amendments to the guidelines were cognizable under § 2255.

sentenced him under § 841(b)(1)(A) rather than § 841(b)(1)(B). He maintains that he was prejudiced by the error. He contends that he was innocent of the statute under which he was sentenced and, therefore, that a constitutional violation resulted. He argues that he is not procedurally barred from asserting this issue in his § 2255 motion, even though he failed to raise it on direct appeal, as the cause for his procedural default was ineffective assistance of counsel. Imitiaz argues that his counsel was ineffective for failing to bring to the court's attention that it was sentencing him under the wrong statute. He also avers that his counsel was ineffective for failing to raise this issue on appeal.

The district court correctly held that Imitiaz's contention that he was sentenced under the wrong statute was not cognizable under § 3582(c). Thus, it construed the motion as a § 2255 motion to vacate, set aside, or correct sentence. See § 2255; United States v. Cates, 952 F.2d 149, 151 (5th Cir.), cert. denied, 112 S. Ct. 2319 (1992). The government properly invoked the procedural bar and abuse of the § 2255 process.

The court did not provide Imitiaz with notice that his motion could be dismissed under rule 9(b) of the Rules Governing Section 2255 Proceedings. Urdy v. McCotter, 773 F.2d 652, 656-57 (5th Cir. 1985), requires district courts to give movants notice that their motion could be summarily dismissed under rule 9(b) and the opportunity to respond. The failure of the district court to provide rule 9(b) notice was harmless error because, relying upon

United States v. Shaid, 937 F.2d 228 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 978 (1992), the district court held that the claim was procedurally barred.

"[A] `collateral challenge may not do service for an appeal.'" Shaid, 937 F.2d at 231 (quoting United States v. Frady, 456 U.S. 152, 165 (1982)). Relief under § 2255 is reserved for violations of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. Unit A Sept. 1981).

The district court implicitly recognized Imitiaz's contention as a potential constitutional claim. If a defendant alleges a fundamental constitutional error, he may not raise the issue for the first time in a § 2255 motion without showing both "cause" for his procedural default and "actual prejudice" resulting from the error. Shaid, 937 F.2d at 232.

It is unnecessary for this court to determine whether Imitiaz's ineffective assistance of counsel claims are meritorious, as he has failed to show prejudice from the alleged error. The court adopted the PSR, which accurately provided the statutory range of imprisonment for a violation of § 841(b)(1)(B) as a mandatory minimum of five years and a maximum of forty years. Thus, contrary to Imitiaz's contention, the record does not indicate that the court sentenced him to 121 months because of the ten-year minimum of § 841(b)(1)(A).

Moreover, at sentencing, as Imitiaz concedes, the court represented the correct range of imprisonment under the guidelines and sentenced Imitiaz within that range. Although the court and the PSR misrepresented the maximum fine for a violation of § 841(b)(1)(B) as $4,000,000 rather than $2,000,000, this was harmless error, as Imitiaz was not fined. Thus, he has failed to show that he was prejudiced.

The only exception to the cause-and-prejudice test is when the failure to grant relief would result in a "manifest miscarriage of injustice," i.e., in the "extraordinary case . . . in which a constitutional violation has probably resulted in the conviction of one who is actually innocent." See Shaid, 937 F.2d at 232 (internal quotation marks omitted). Imitiaz contends that he is innocent. Because he fails to offer new evidence demonstrating that, failure to grant relief would not result in a miscarriage of justice.

AFFIRMED.