

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4329
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES WADE,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas
(1:92-CV-138 (1:88-CR-36))

(March 16, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

I

A jury convicted James Wade of nine counts of conspiracy to manufacture methamphetamine, possession with intent to distribute methamphetamine, and distribution of methamphetamine. Wade was sentenced to 240 months of imprisonment, consisting of concurrent

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

terms, and five years of supervised release. On direct appeal, Wade argued that the district court erred when it did not grant a new trial due to the alleged bias of the trial judge, that the prosecution made improper comments during closing arguments, and that the district court improperly granted an upward departure. We affirmed his conviction and sentence. See also, U.S. v. Wade, 931 F.2d 300, 308 (5th Cir.), cert. denied, 112 S.Ct. 247 (1991).

Proceeding pro se and in forma pauperis (IFP), Wade filed a motion pursuant to 28 U.S.C. § 2255 alleging that his direct appeal was prejudiced because he was denied a full, complete, and accurate transcript of the district court proceedings, and that he was denied due process because of the court reporter's delay in filing the transcript. A magistrate judge recommended that Wade's motion be denied after he determined that not only was Wade procedurally barred from raising these issues in a collateral challenge, but that Wade had not demonstrated that any significant portion of the record was missing or that the eight-month delay in the filing of the transcript constituted a due process violation. Wade filed objections to the recommendation and stated that he did not raise the incomplete-transcript issue on direct appeal because he had been denied effective assistance of counsel. The district court considered Wade's objections, as well as his ineffective-assistance-of-counsel claim, and adopted the magistrate judge's recommendation.

II

Wade argues that he supplied the district court with specific instances of inconsistencies in the trial transcript. Specifically, Wade asserts that he provided affidavits that support his view that "there are gaps in the transcripts" and that prejudicial judicial comments, side bar conferences, and an in-chambers conference were omitted. Wade contends that he was prejudiced by the incomplete record because his counsel on appeal was different from counsel at trial.

Wade adds that he was further prejudiced by the incomplete transcript because the trial judge recused himself after Wade was found guilty, and the sentencing judge was furnished with the incomplete transcripts on which he relied for sentencing. Wade also states that at one point during the trial, his lawyer asked that the court, attorneys, and court reporter retire to chambers to make a record for appeal purposes regarding "the prejudices imposed upon Wade by the court's attitude toward the defendant's attorneys" and to record the objections to evidence and procedure. According to Wade, the omitted transcript would show the trial judge's further bias and prejudice. Last, Wade submits that he is entitled to an evidentiary hearing to determine more fully what was omitted from the trial transcript.

When a defendant's appellate counsel is other than his trial counsel, "the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error,

is sufficient to mandate reversal." U.S. v. Selva, 559 F.2d 1303, 1306 (5th Cir. 1977) (footnote omitted). The court has "eschewed a mechanistic approach requiring an automatic reversal, however, preferring . . . a case-by-case review which requires reversal only when a substantial and significant portion of the transcript is missing." U.S. v. Margetis, 975 F.2d 175, 1177 (5th Cir. 1992). Moreover, in a § 2255 proceeding, the movant must demonstrate "a fundamental defect which inherently results in a miscarriage of justice or an omission inconsistent with the rudimentary grounds of fair procedure." Id. (internal quotation marks and citation omitted). The reviewing court considers whether the missing portion of the transcript prejudiced the defendant by denying him "effective appellate review." Id. (internal quotation marks and citation omitted).

As with Margetis, the instant case does not involve an entire transcript or a major portion thereof missing. The district court ordered Wade to be more specific about what was missing from the transcript. In response, Wade attached a letter from his trial counsel to his appellate counsel purporting to show that an in camera conference was not transcribed in which Wade's trial lawyer challenged the trial judge for "chewing" him out in front of the jury. Wade also attached a copy of a letter from Wade's trial counsel to the clerk of court requesting the missing portion of the transcript. Additionally, Wade alleged that missing from the transcript was an exchange "wherein the trial judge objected to the

questioning by the defense of a prosecution witness, then overruled its own objection." Last, Wade submitted excerpts from a witness whose testimony was missing certain words.

In the instant appeal, Wade reiterates his arguments made in the district court regarding what is missing from the trial transcript. He adds that not only were the in camera proceedings omitted from the transcript, but exchanges between his trial counsel and the trial judge made in open court do not appear. Additionally, for the first time, Wade submits the affidavit of his trial counsel regarding the missing in camera proceeding. Wade further purports to show that the transcript is inaccurate by attaching excerpts of Donnie Flowers's testimony in which Flowers read from a transcript of Flowers's testimony to the grand jury. In one excerpt, the court reporter transcribed "pistol" when Flowers was asked "What was the first thing Sheriff Wade gave you out of the evidence room?"; in another excerpt, when Flowers read from the same transcript, the court reporter transcribed "pills" as the answer.

Wade fails to show how a missing transcript of in camera proceedings affected the jury's determination of his guilt inasmuch as the jury obviously would not be privy to the exchange. He also fails to show how the missing or interrupted portions of the record prejudiced the sentencing judge given that the sentencing judge was not required to rely upon trial testimony to assess punishment. Moreover, this court's opinion in Wade's direct appeal reflects

that Wade's appellate counsel raised specific points of error regarding Wade's allegations that the trial judge was biased against him because consideration of the alleged missing portions of the transcript would not have led to a different result.

Therefore, Wade has not shown that the alleged omission of portions of the transcript represents "a fundamental defect which inherently results in a miscarriage of justice or an omission inconsistent with the rudimentary grounds of fair procedure." See Margetis, 975 F.2d at 1177. Because the district court was able to resolve Wade's § 2255 claims fairly regarding the incomplete transcript using the record before it, an evidentiary hearing was not necessary. See U.S. v. Smith, 915 F.2d 959, 964 (5th Cir. 1990).

III

Wade argues that his appellate counsel rendered ineffective assistance of counsel in his direct appeal. Wade asserts that he advised his appellate counsel of the deficient transcript, but that counsel failed to contact him on this issue. To prevail on an ineffective-assistance-of-counsel claim, a defendant must show deficient performance and resulting prejudice. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As discussed above, Wade fails to show that the alleged incomplete transcript prejudiced him. Therefore, he has not demonstrated the requisite prejudice to prevail on an ineffective-assistance-of-counsel claim.

IV

Last, Wade argues that the court reporter's unreasonable delay in transcribing the trial testimony constitutes a due process violation. Wade asserts that his trial counsel requested the trial transcript on February 23, 1989. The docket sheet reflects that the transcript was filed on September 5, 1989, thus, indicating a seven-month delay between Wade's request and the transcription.

An excessive delay in furnishing a pretrial or trial transcript to be used for appeal or for post-conviction relief can amount to a deprivation of due process. Rheuark v. Shaw, 628 F.2d 297, 302 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1981). We consider four factors, identified by the Supreme Court in Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), to determine whether such a delay denies a defendant due process: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice, if any, to the defendant. Rheuark, 628 F.2d at 303 & n.8. When appellate delay is at issue, determining whether the defendant has been prejudiced entails examining the "three . . . interests for prompt appeals: (1) prevention of oppressive incarceration pending appeal; (2) minimization of anxiety and concern of those convicted awaiting the outcome of their appeals; and (3) limitation of the possibility that a convicted person's grounds for appeal, and his or her defenses in case of reversal or retrial, might be impaired." Id.

Wade alleges in his brief that Judge Justice wrote a letter in which he said that the court reporter had "been inexcusably dilatory in [his] preparation of the transcripts.'" It does appear to us, however, that a seven-month delay is not an unacceptably lengthy period of time when one considers the size of the record.¹ Secondly, the reason for any delay in transcribing a record this size is obvious. Third, after the initial request for the transcript, Wade did not make another request. And, finally, he has not demonstrated actual prejudice resulting from the delay. The district court did not abuse its discretion when it denied his § 2255 motion.

V

Wade has filed a "Motion to Compel Production of Documents and Things." In the motion, he asks that this court order the "State Bar of Texas to provide [him] with a copy of the Video tape or transcription of the investigatory hearing of July 1, 1993. . . ." Wade submits that the tape constitutes new evidence relevant to his motion and brief before the court.

The record does not reflect an investigatory hearing in the district court proceedings on Wade's § 2255 motion. Liberally construed, Wade's motion requests a copy of a transcript at government expense. An IFP appellant may receive a transcript at

¹The magistrate judge noted that the transcript consists of several thousand pages contained in forty-five bound volumes and measures 21 inches.

government expense if he raises a substantial question on appeal and demonstrates a particular need for the transcript. 28 U.S.C. § 753(f); Harvey v. Andrist, 754 F.2d 569, 571 (5th Cir.), cert. denied, 471 U.S. 1126 (1985). Wade fails to make the requisite showing and his request is denied.

VI

For the reasons stated herein, the judgment of the district court is

A F F I R M E D.