

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4377

Summary Calendar

UNITED STATES OF AMERICA,

Respondent-Appellee,

versus

CLEDIS WEATHERFORD, a/k/a
Dean Bynum,

Petitioner-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(91-CV-668)

(March 18, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

I.

In 1979, Cledis Weatherford pleaded guilty to the interstate transportation of stolen property worth in excess of \$5,000, and to conspiracy to transport stolen property, violations of 18 U.S.C. §§ 371, 2314. He was sentenced to 15 years in prison. Weatherford failed to appear to start serving his sentence. In 1986,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Weatherford's time as a fugitive came to a close. He filed a motion to reduce his sentence under Fed. R. Crim. P. 35(b), which the district court denied. Weatherford did not appeal his conviction.

Weatherford filed a motion under 28 U.S.C. § 2255, arguing that (1) his counsel rendered ineffective assistance; (2) the district court impermissibly considered pending state charges which were later dismissed in determining his sentence; and (3) his sentence was unduly harsh in violation of the Eighth Amendment. In his motion, he stated that he did not appeal his conviction because he was unaware that he could do so. In an amendment to his motion, Weatherford argued that his guilty plea was invalid because it was based on an unkept plea bargain.

In response, the Government argued that Weatherford was not denied the effective assistance of counsel and that his arguments regarding his sentence were meritless. The Government's answer also stated that "[t]he Government is not aware of any other available federal remedies, including post-conviction motions under the rules governing proceedings pursuant to Section 2255 of Title 28, United States Code, used by this Defendant, except for a Motion for Modification of Sentence filed pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure[.]" In response, Weatherford argued that he was taking hallucinogenic medications at the time he pleaded guilty and that his defense counsel knew this fact. He argued that a "defendant's plea can not be considered Voluntary Where defendant's State of Mind is Altered by HALLUCINOGENIC

MEDICATIONS or Drugs." Weatherford also argued that defense counsel failed to inform him of his right to appeal.

The district court concluded that because Weatherford had failed to appeal, he could not raise issues for the first time on collateral review without showing cause for his procedural default and prejudice resulting from the error. The court addressed the merits of Weatherford's ineffective assistance of counsel claims and found them to be without merit. It also determined that Weatherford had failed to show cause and prejudice for failing to raise the plea voluntariness argument on direct appeal and declined to consider the argument. It reached the same conclusion regarding Weatherford's assertion that the trial court impermissibly considered his pending state charges at sentencing. Finally, the court determined that Weatherford's sentence did not violate the Eighth Amendment. We affirm in part and vacate and remand in part.

II.

If a defendant alleges a fundamental constitutional error, he may not raise the issue for the first time on collateral review without showing both cause for his procedural default and actual prejudice resulting from the error. U.S. v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 978 (1992). To invoke this procedural bar, the Government must raise it in the district court. U.S. v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992). The district court concluded that the Government, by certifying in its response to Weatherford's motion that there was no direct appeal in the case, raised the procedural bar.

The Government, however, answered the claims raised in Weatherford's motion on their merits rather than relying on the procedural bar. The Government's disclaimer that it was not aware of any other federal remedies, other than the Rule 35(b) motion, filed by Weatherford, is too equivocal to raise the procedural bar. The district court erred in failing to address Weatherford's constitutional contentions on their merits.

III.

Weatherford argues that his guilty plea was invalid because he was under the effect of hallucinogenic medications at the time it was entered. He argues that the medications, combined with other factors, made it impossible for him to comprehend the various waivers of his rights. Although Weatherford first made this assertion in response to the Government's answer to his § 2255 motion, it was properly before the district court. In pro se cases, we look beyond the plaintiff's formal complaint and consider as amendments to the complaint those materials subsequently filed. Howard v. King, 707 F.2d 215, 220 (5th Cir. 1983).

The district court did not address Weatherford's claim regarding the voluntariness of his guilty plea on its merits because it had determined that Weatherford was procedurally barred from raising the claim. As discussed above, however, the Government did not sufficiently raise the procedural bar. The district court erred in relying on the bar to avoid reaching the merits of the claim. Weatherford's declaration at the plea hearing that he understood the consequences of his plea carries a strong

presumption of truth. See Blackledge v. Allison, 431 U.S. 63, 74 (1977). The district court, however, did not ask Weatherford whether he was under any medications which might affect his ability to plead guilty knowingly and voluntarily. The record does not indicate conclusively that Weatherford's decision to plead guilty was not affected by the medications. We remand to the district court this issue.

IV.

Weatherford argues that his counsel rendered ineffective assistance because he (1) gave Weatherford bad advice regarding his pleading guilty; (2) was too eager to take the plea bargain and did not discuss any possible defense; (3) erroneously advised Weatherford to waive the preparation of a presentence report; and (4) failed to mention the right to an appeal. To prove ineffectiveness, Weatherford must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). To establish prejudice, Weatherford must show that counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. Lockhart v. Fretwell, 113 S.Ct. 838, 842 (1993). We recognize a strong presumption that counsel's performance was not deficient.

A.

Weatherford first argues that his counsel's suggestion that he take the Government's plea agreement was "in gross error" because the only favorable item in the agreement was the provision

regarding bail, and that counsel failed to discuss the Government's evidence against him or a possible defense. To establish ineffective assistance in connection with a guilty plea, Weatherford must show that but for counsel's deficient performance, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 57 (1985). Weatherford has not done so.

In addition, Weatherford's assertion that his attorney failed to discuss a defensive theory also has no merit. At the plea hearing, Weatherford indicated that he had sufficient time to discuss possible defenses with his attorney and that he was entirely satisfied with the services of his attorney. His allegations on appeal are in contradiction of his earlier attestation and are merely conclusional. Weatherford's allegations on this issue are insufficient to raise a constitutional issue. Koch v. Puckett, 907 F.2d 524, 530 (5th Cir. 1990); see also U.S. v. Jones, 614 F.2d 80, 82 (5th Cir.), cert. denied, 446 U.S. 945 (1980).

B.

Weatherford argues that his counsel's advice to waive preparation of the presentence report was in error because the parties agreed that the Government would seek a 15-year term of imprisonment and that Weatherford would not oppose that recommendation. It was not objectively unreasonable for counsel to waive the PSR. Counsel did express concern at sentencing that the PSR might be important in "giving a personal history of Mr.

Weatherford and his family and their location and such type of things in the hope it might be of some assistance in making the assignment as to where they put him." After the probation officer informed the court that a PSR would be prepared for Weatherford prior to incarceration, even if the preliminary PSR were waived, counsel allowed the waiver. Counsel's performance was objectively reasonable and not ineffective.

In addition, Weatherford was not prejudiced by the lack of a PSR. At sentencing, the district court indicated that a PSR was not necessary because it was inclined to sentence Weatherford to the statutory maximum. After the court indicated that it would proceed without the PSR, it asked Weatherford whether he wished to say anything before sentence was imposed. At that time, Weatherford could have informed the court of any mitigating factors he deemed important; however, he did not. Although counsel waived preparation of the PSR, the Bureau of Prisons has sufficient information from which to make administrative and parole decisions. The record reveals that two PSR's were prepared, one after Weatherford was apprehended following his failure to appear to begin serving his sentence, and one after Weatherford escaped from prison in 1989.

C.

Weatherford also argues that his counsel was ineffective for failing to inform him that he had a right to appeal. The Government argues that Weatherford raises this allegation of ineffectiveness for the first time on appeal. The record, however,

reveals that Weatherford raised this allegation in his response to the Government's answer to his § 2255 motion. In Sherman v. Hallbauer, 455 F.2d 1236, 1242 (5th Cir. 1972), we held that a memorandum in opposition to motion for summary judgment should have been construed, under Fed. R. Civ. P. 15, as a motion to amend the complaint, and that the interests of justice required that the motion to amend be granted. Weatherford raised the issue sufficiently in the district court.

We judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. Strickland, 466 U.S. at 690. At the time Weatherford pleaded guilty in 1979, there was "no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty[.]" Fed. R. Crim. P. 32(a)(2) (West 1976). In David v. Wainwright, 462 F.2d 1354, 1355 (5th Cir. 1972), and Williams v. United States, 443 F.2d 1151, 1154 (5th Cir. 1971), we held that counsel was not ineffective for failing to advise a defendant of his right to appeal because there was no necessity to advise a defendant of the right after a guilty plea. See also Barrientos v. U.S., 668 F.2d 838, 842-43 (5th Cir. 1982); U.S. v. Gipson, 985 F.2d 212, 215 (5th Cir. 1993). Viewed at the time of counsel's conduct, Weatherford's counsel was not ineffective for failing to advise him that he had the right to appeal.

D.

Weatherford argues that the district court erred in dismissing his ineffective assistance of counsel claims without conducting a hearing. A § 2255 motion can be denied without a hearing only if the motion, files, and records of the case conclusively show that the prisoner is not entitled to relief. U.S. v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992). An evidentiary hearing is not necessary to resolve charges of ineffective assistance of counsel if the record is adequate. U.S. v. Smith, 915 F.2d 959, 964 (5th Cir. 1990). Because the record was adequate for the district court to determine that Weatherford's ineffective assistance claims were without merit, an evidentiary hearing was not necessary.

V.

Weatherford argues that the district court improperly considered pending state charges for the same conduct for which he pleaded guilty in federal court. At sentencing, the Government introduced the plea agreement recommending that the maximum sentence of 15 years of imprisonment be imposed. Weatherford's counsel explained that the request for the maximum sentence was based on the fact that there were state charges for the same conduct pending and that the state prosecutors had indicated that they would "go concurrently with whatever the [federal] Court gave them, though they would obviously be happy with to go along with us on a shorter sentence." The district court indicated that it would not consider the recommendation. Weatherford argues that some of the state charges were dropped, not because of the federal sentence, but because of speedy trial violations; therefore, the

district court impermissibly considered the pending state charges in determining his sentence.

Weatherford's argument is not of constitutional dimension. Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding. United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Further, the district court indicated that it would not consider the Government's recommendation which Weatherford alleges was based on the pending state charges.

VI.

Weatherford also argues that his sentence of 15 years is grossly disproportionate to the gravity of his offense. Assuming that Weatherford is arguing that his sentence is violative of the Eighth Amendment, Weatherford has raised a claim of constitutional dimension which must be addressed on collateral review in absence of the procedural bar. See Drobny, 953 F.2d at 995. The argument, however, is without merit. In reviewing an Eighth Amendment challenge, we must make a threshold finding that the sentence is "grossly disproportionate to the offense[.]" See McGruder v. Puckett, 954 F.2d 313, 316 (5th Cir.) cert. denied, 113 S.Ct. 146 (1992) (citing Harmelin v. Michigan, 111 S.Ct. 2680 (1991)). If such a finding is made, we will then consider the remaining disproportionality factors espoused in Solem v. Helm, 463 U.S. 277, 292 (1983).

Weatherford's sentence was not disproportionate to his offense. Weatherford was sentenced prior to the enactment of the

Sentencing Guidelines. The matter and extent of his sentence was committed to the district court's discretion. See U.S. v. Lemons, 941 F.2d 309, 319 (5th Cir. 1991). For pre-guidelines sentences, as long as the district court stays within statutory bounds and respects procedural safeguards, the sentence may be reversed only for arbitrary or capricious abuse of discretion.

The district court's sentence was within statutory limits. As noted by the district court, Weatherford's crimes were not minor in nature. The interstate transportation of stolen property worth in excess of \$500 has the effect of making it more difficult for law enforcement officials to recover that property. Additionally, conspiracy to commit the above substantive offense increases the potential scope of the scheme, the resources available for the commission of the crime, and the number of potential victims. Weatherford's sentence did not violate the Eighth Amendment.

AFFIRMED IN PART and VACATED AND REMANDED IN PART.