

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

No. 93-4966  
Summary Calendar

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MICHAEL DEAN DeRISO,

Defendant-Appellant.

---

Appeal from the United States District Court  
for the Western District of Louisiana  
(C.A 93-457 (CR91-20044))

---

(February 10, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

Michael DeRiso appeals the denial of his motion made pursuant to 28 U.S.C. § 2255. Finding no error, we affirm.

I.

DeRiso and one co-defendant were charged in a three-count

---

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 Pursuant to that rule, the court has determined that this opinion should not be published.

indictment with conspiring to possess with intent to distribute marihuana, knowingly and intentionally carrying a firearm during and in relation to a drug-trafficking offense, and being a felon in possession of a firearm. In accordance with a plea agreement, DeRiso pleaded guilty to count one of the indictment )) conspiring to possess with intent to distribute marihuana.

Partially sustaining objections submitted by DeRiso, the district court sentenced him to forty-one months' imprisonment, three years' supervised release, and a \$50 special assessment. Although DeRiso moved for appointment of appellate counsel six months after he was sentenced, a timely notice of appeal was not filed by either DeRiso or his defense counsel. The district court denied the motion for counsel, ruling that DeRiso had not alleged sufficient grounds to permit an untimely appeal. Examining whether DeRiso should be allowed to appeal his conviction directly, this court determined that it was without jurisdiction to enlarge the time for filing an effective notice of appeal.

DeRiso subsequently filed, pro se, a motion for § 2255 relief, asserting that (1) his guilty plea was not voluntarily and intelligently entered; (2) the district court erroneously failed to advise him regarding double jeopardy; (3) the district court erroneously departed upward from the sentencing guidelines; and (4) the plea agreement was breached. DeRiso supplemented his motion, adding an ineffective-assistance-of-counsel claim.

The district court denied the § 2255 motion without conducting an evidentiary hearing. DeRiso filed a timely motion of appeal and

a request for appointment of counsel. He received permission to proceed in forma pauperis, but the court denied his request for appointed counsel.

II.

A.

DeRiso argues that his attorney was ineffective during the sentencing portion of the criminal proceeding, in violation of his Sixth Amendment rights. He contends that he would have received a lesser sentence had his attorney provided adequate assistance by objecting to the amount of drugs used in calculating his sentence. DeRiso also argues that had his attorney noted during the hearing that he had been found not guilty in state court of possession of twenty-five pounds of marihuana, the district court would not have used that amount in calculating his sentence.

To prevail on an ineffective-assistance-of-counsel claim, a defendant must show that counsel's errors were so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993). Judicial scrutiny of counsel's performance must be highly deferential, and courts must indulge in a strong presumption that his conduct falls within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668, 687 (1984).

Also, the movant must affirmatively plead the actual resulting prejudice, see Hill v. Lockhart, 474 U.S. 52, 60 (1985), and must demonstrate such prejudice by showing that counsel's errors were so

serious that they rendered the proceedings unfair or the result unreliable. Fretwell, 113 S. Ct. at 844. In addressing an ineffective-assistance-of-counsel claim in a non-capital sentencing case, the court must determine whether there is a reasonable probability that, but for counsel's errors, the sentence would have been significantly less harsh. Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993). A mere showing of deficient performance is not enough for relief; the prejudicial result must be reflected in the sentence. Id. at 90.

In this instance, DeRiso specifically argues that he was denied effective assistance of counsel because his attorney failed to object to the calculation of his sentence based upon the larger amount of marihuana found to be involved in the conspiracy. He argues, as the resulting prejudice, that he would have received a lesser sentence if the court had been advised by his attorney that he had been found not guilty of the marihuana conspiracy in state court.

During the plea colloquy, DeRiso agreed that the conspiracy involved twenty-five pounds of marihuana. The court reiterated that offense twice and noted what the government had to prove for a conviction, ensuring that DeRiso understood the nature of the charge. Additionally, DeRiso signed a factual resume and plea agreement that listed twenty-five pounds as the amount of drugs involved in the conspiracy. Therefore, DeRiso has not shown a reasonable probability that such objections would have resulted in a significantly less harsh sentence. As such, DeRiso has not shown

that he suffered prejudice. See Spriggs, 993 F.2d at 90.

B.

DeRiso challenges the district court's imposition of a sentence based upon twenty-five pounds of marihuana instead of the three pounds found in the car at the time of his arrest. DeRiso's claim does not fall within the narrow ambit of § 2255 review. "Relief under . . . § 2255 is reserved for transgressions 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. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). "A district court's technical application of the Guidelines does not give rise to a constitutional issue." Id. Therefore, DeRiso's sentence may not be challenged by this motion.

C.

DeRiso argues that he entered into the plea agreement under the assumption that the plea related to three pounds of marihuana. DeRiso further disputes the government's contention that the twenty-five pounds of marihuana constituted the offense of conviction or at the very least relevant conduct under U.S.S.G. § 1B1.3.

The government argues that a breach of a plea agreement may not be attacked collaterally unless it resulted in some constitutional infraction. A guilty plea based upon a breached plea

agreement may be subject to collateral attack under § 2255 because the defendant pleads guilty under false pretenses. United States v. Cates, 952 F.2d 149, 151 (5th Cir. 1992). "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." Id.

DeRiso has not demonstrated that the plea agreement was not fulfilled. As discussed previously, the agreement indicated that the amount of drugs involved in the conspiracy was twenty-five pounds, and nowhere in the agreement is there a mention of three pounds. DeRiso has not alleged that the government promised him that the sentence would be based upon three pounds. Thus, this argument is without merit.

AFFIRMED.