IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5169
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEONARD ROSS HICKCOX,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(4:93-CV-69)

(March 31, 1994)

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

PER CURIAM:*

Defendant-Appellant Leonard Ross Hickcox collaterally attacked his conviction and sentence by filing a § 2255 petition in which he asserted claims that the district court incorrectly calculated his

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sentence, that he received ineffective assistance of counsel at his sentencing and on appeal, that the district court's upward departure constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution, and that the district court abused its discretion in refusing to conduct an evidentiary hearing in connection with this matter. Finding no reversible error in the district court's denial of Hickcox's motion to vacate and set aside or correct his sentence, we affirm.

I

FACTS AND PROCEEDINGS

In February 1990 a jury convicted Hickcox of one count of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). The Presentence Investigation Report (PSR) proposed an adjusted offense level of 12. Pursuant to U.S.S.G. § 4A1.1(a), the probation officer determined that a criminal history category of VI was appropriate when he assessed three points for six of Hickcox's previous convictions and two points because the instant offense was committed while Hickcox was on parole.[1] As the government had filed a notice of sentence enhancement pursuant to § 924(e)(1), the probation officer substituted the statutory minimum thereunder, fifteen years, for the guideline sentence.

In written objections and at the sentencing hearing, Hickcox argued that enhancement was improper under § 924(e)(1); and that his criminal history score was incorrect because the probation

[1] The probation officer also noted that he did not assess any points for six other convictions, which were unrelated but consolidated for sentencing purposes.

officer incorrectly determined that Hickcox was on parole at the time of the offense and the district court improperly assigned criminal history points for the six consolidated convictions. The district court imposed a sentence of imprisonment of nineteen years, which was an upward departure of four years. The court explained that the departure was appropriate because Hickcox had about "four times the number of felony convictions that it takes to have an enhancement under Section 924(e)(1)," he spent over seventeen years engaged in trafficking drugs, he had been paroled at various times but promptly returned to the same endeavor, and the sentencing guidelines do not adequately take into account Hickcox's criminal history and the likelihood that he will recidivate.

On direct appeal Hickcox challenged, inter alia, the basis for the upward departure because his sentence had already been enhanced. We affirmed and determined that the district court's explanation for the upward departure was sufficient.

In March 1993 Hickcox filed a § 2255 motion asserting that he received ineffective assistance of counsel, that the district court used inaccurate information from the PSR in sentencing him, that the district court did not use the proper methodology for upwardly departing from the guideline sentence, and that the sentence constituted cruel and unusual punishment. The district court denied Hickcox's request for an evidentiary hearing because he failed to present to the court "independent indicia of the likely merit of [his] contentions." The court also denied § 2255 relief

because (1) Hickcox failed to show that but for his counsel's errors his sentence would have been significantly less harsh, (2) there was no error in counting the six consolidated cases, as they were separate and distinct criminal offenses, (3) Hickcox neither adduced nor proffered evidence to contradict the PSR findings he challenged, (4) there was no abuse of discretion in making an upward departure from the guideline sentence, and (5) his Eighth Amendment challenge was without merit. Hickcox timely appealed.

II

ANALYSIS

A. The Sentencing Guidelines

Hickcox argues that he is entitled to § 2255 relief because the district court (1) erred in calculating his criminal history category, (2) failed to use the Guidelines properly in assessing an upward departure, (3) did not state clearly its reasons for the upward departure, and (4) failed to give adequate reasons for the upward departure. "Relief under 28 U.S.C.A. § 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 sentencing guidelines is not of constitutional dimension. Id. A nonconstitutional claim that could have been raised on direct appeal but was not may not be raised in a collateral proceeding. United States v. Shaid,

937 F.2d 228, 232 n.7 (5th Cir.) (en banc), cert. denied, 112 S.Ct. 978 (1992). Hickcox's arguments that the district court improperly calculated his criminal history category and incorrectly assessed the upward departure do not raise constitutional claims and could have been resolved on direct appeal. See United States v. Smith, 844 F.2d 203, 206 (5th Cir. 1988). Moreover, we have already considered and rejected Hickcox's challenges to the district court's upward departure and are not required to revisit those issues in a § 2255 proceeding. See United States v. Jones, 614 F.2d 80, 82 (5th Cir.) (matter need not be reconsidered on a § 2255 motion if it was determined on direct appeal), cert. denied, 446 U.S. 945 (1980).

B. Ineffective Assistance of Counsel

Hickcox also asserts that his counsel was deficient "at sentencing and at the appellate level." We review claims of ineffective assistance of counsel to determine whether counsel's performance was both deficient and prejudicial to the defendant. United States v. Gipson, 985 F.2d 212, 215 (5th Cir. 1993). To establish "prejudice," the defendant is required to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show deficient performance, the defendant must overcome the strong presumption that the attorney's conduct falls within a wide range of reasonable professional assistance. Id. at 689. If the defendant makes an insufficient

showing on either of the two components of the inquirySQcause or prejudicesQwe need not address the other. Id. at 697. In Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993), we held that "[i]n order to avoid turning Strickland into an automatic rule of reversal in the non-capital sentencing context . . . a court must determine whether there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." Accordingly, we should consider such factors as the defendant's actual sentence, the potential minimum and maximum sentences that he could have received, the placement of the actual sentence within the range of potential sentences, and any relevant mitigating or aggravating circumstances. Id. We went on to note our belief that "`prejudice' must be rather appreciable before a new trial is warranted in view of counsel's error."

Hickcox has failed to show that but for his trial counsel's errors, his sentence would have been significantly less harsh. The district court's pronounced sentence of nineteen years constituted an upward departure of four years above the mandatory minimum sentence of fifteen years,and the sentencing range under § 924(e)(1) was fifteen years to life. Moreover, as the district court noted, Hickcox failed to demonstrate that his trial or appellate counsel's performance was outside the wide range of reasonable professional assistance: Trial counsel filed written objections respecting the alleged factual inaccuracies in the PSR, which Hickcox now urges, prior to sentencing, and made further

objections during the sentencing; appellate counsel challenged the upward departure in his brief.

C. Cruel and Unusual Punishment

Hickcox also argues that his sentence constitutes cruel and unusual punishment and does not fit the crime for which he was convicted. We have determined that because § 924(e) authorizes a mandatory minimum sentence of fifteen years, but allows a sentencing court the discretion to impose a maximum sentence of life in prison when the circumstances so warrant, no Eighth Amendment violation exists. See United States v. Carpenter, 963 F.2d 736, 743 (5th Cir.), cert. denied, 113 S.Ct. 355 (1992).

D. Evidentiary Hearing

Hickcox finally contends that the district court erred in refusing to hold an evidentiary hearing because "he has stated with clarity the issues which he contends entitle him to relief" and has provided the court with an affidavit to the same effect. 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 entitled to no relief." United States v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992). We review a district court's denial of an evidentiary hearing for abuse of discretion. Id. A hearing is unnecessary if the allegations are inconsistent with the movant's behavior and the movant does not offer detailed and specific facts to support his allegations. United States v. Smith, 915 F.2d 959, 964 (5th Cir. 1990). Hickcox made only unsubstantiated, conclusional allegations respecting his allegedly ineffective

counsel. The district court did not abuse its discretion in refusing to hold an evidentiary hearing because, as it noted, Hickcox had failed to "present the court with independent indicia of the likely merit of his contentions."

Based on the foregoing reasons, the district court's denial of § 2255 relief is

AFFIRMED.