

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5420
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEVE J. GARNER,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(3:92-CV-2321 (90-R-30017-1))

(April 27, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.*

PER CURIAM:

Steve J. Garner received a life sentence after a trial before a jury for the 1990 kidnapping and transport in interstate commerce of his estranged wife, Janet Garner, in violation of 18 U.S.C. § 1201(a)(1). The kidnapping ended in Garner's shooting his wife in the head when she attempted to escape. The conviction was affirmed on direct appeal. Garner's arguments for habeas relief lack any merit. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Testimony at trial revealed that Garner appeared at his wife's residence with a gun, threatened to kill a visitor in her home, and forcibly abducted her in his truck by taking her from Tallulah, Louisiana, to Natchez, Mississippi. While the truck was stopped at a gas station in Natchez, Janet Garner attempted to escape. Steve Garner pursued and shot Janet Garner inside the quickstop and subsequently fled hastily from the scene. Janet Garner testified that as a result of the shooting, she was unable to see or walk and that she experienced difficulty talking. The appellant says that Janet Garner is now deceased. The defense rested after the Government's case-in-chief.

This Court affirmed the conviction on direct appeal. Garner filed, pro se, a § 2255 motion asserting that he was denied effective assistance of counsel during trial and during the sentencing hearing in violation of the Sixth Amendment, and that the trial court erred by relying on inaccurate information in the PSR in violation of the Fifth Amendment. The district court denied the § 2255 motion.

Liberally construing Garner's brief, he asserts, inter alia, that his attorney was ineffective by failing to object to any action taken by the Government, by failing to place him on the stand or subpoena any witnesses or telephone records, and by failing to refute the information contained in the PSR during the sentencing hearing.

In reviewing the denial of a § 2255 motion, this Court reviews the district court's findings of fact for clear error.

Questions of law are reviewed de novo. U.S. v. Gipson, 985 F.2d 212, 214 (5th Cir. 1993).

To obtain § 2255 relief based on ineffective assistance of counsel, a defendant must show not only that his attorney's performance was deficient, but that the deficiencies prejudiced the defense. U.S. v. Smith, 915 F.2d 959, 963 (5th Cir. 1990). In evaluating such claims, the Court indulges in "a strong presumption" that counsel's representation fell "within the wide range of reasonable professional competence." Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988). To prove deficient representation, a defendant must show that his attorney's conduct "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To demonstrate prejudice, Garner must show that counsel's deficient performance caused the result of the trial to be unreliable or rendered the proceeding fundamentally unfair. Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993).

Garner has failed to meet either the deficient-performance or prejudice prongs. Smith, 915 F.2d at 963.

Regarding the alleged ineffectiveness for failing to subpoena any phone records, Garner argues that the phone records would have rebutted Janet Garner's testimony that he and Janet communicated over the phone only once and Joanne Williamson's testimony that they communicated three or four times while they were living apart. Counsel was not ineffective for failing to

produce the telephone records because this proof would have had no bearing on whether Garner kidnapped his wife, the offense at issue.

Garner argues that Robert Tew, defense counsel, was ineffective by not calling any witnesses in his defense. To demonstrate the requisite prejudice, Garner must name the witnesses and show that the alleged testimony not only would have been favorable, but also that the witness would have been available to testify at trial. Alexander v. McCotter, 775 F.2d 595, 602 (5th Cir. 1985). Garner has not named any persons nor identified what favorable testimony they could have presented. In the context of the inaccuracies of the PSR, Garner mentions a letter written by Wanda Hubbard, implying that she could have testified that he was in Brent, Alabama, instead of Alexandria, Louisiana, at the time of the offense. The letter actually states that Garner was in Alabama from October 15, 1990, through October 24, 1990, which would not have disproved his presence in Louisiana on September 29, 1990, the night of the kidnapping.

Garner argues that counsel was ineffective by failing to place him on the stand. In light of the record evidence and the fact that he has not demonstrated how his testifying would have aided his defense, Garner's assertion is unavailing.

Garner asserts that Tew was ineffective for his "failure to object to anything the Government did." Garner has failed to indicate what objections should have been made. Moreover, counsel is not required to make futile objections. Koch v. Puckett, 907 F.2d 524, 527 (5th Cir. 1990). Garner did not demonstrate

prejudice or deficiency by his attorney's alleged failure to object to the information in the PSR. Counsel argued successfully that Garner should not receive an increase for his presence outside of Janet Garner's hospital room, and counsel was prepared to call witnesses who could corroborate that objection. Thus, the statement that Garner's counsel failed to challenge the information in the PSR is factually inaccurate.

Furthermore, Garner participated in the colloquy regarding the challenged contents of the PSR and the other contested factors surrounding his trial. The court exercised its discretion to discredit these unsubstantiated challenges. Garner raised the factually-inaccurate-PSR issue on direct appeal in challenging his criminal history category, and it was rejected by this Court. Issues raised and disposed of in previous appeals from an original judgment of conviction cannot be considered in § 2255 motions. U.S. v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1986). Garner has not shown ineffectiveness or prejudice. See Strickland, 466 U.S. at 697.

For the first time on appeal, Garner argues that he is entitled to a reasonable bond for the purposes of gathering more evidence, requests a full investigation of the district court judge and the prosecutor, and asserts that the probation officer "framed" evidence to prevent his receiving bond and that the trial transcript was unlawfully changed. Because these issues were not raised in the district court, they are not properly before this Court. Beck v. Lynaugh, 842 F.2d 759, 762 (5th Cir. 1988).

The denial of habeas relief is **AFFIRMED**.