

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5421
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH R. RISINGER,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Louisiana
(CA-93-0502(CR 91-50036-03))

(June 29, 1994)

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

PER CURIAM:*

The petitioner appeals the district court's denial of his request for habeas relief. Petitioner alleges that his trial counsel's ineffectiveness deprived him of his right to appeal. Further, petitioner alleges various errors regarding his sentence. Because we find that the petitioner's claim that he was denied his right to appeal is refuted by the record and because the remainder

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

of his contentions are not suitable for collateral review, we affirm the district court's denial of habeas relief.

I

On April 24, 1991, a grand jury charged Kenneth R. Risinger with one count of conspiracy to distribute methamphetamine, one count of conspiracy to manufacture methamphetamine, and two counts of distributing methamphetamine. On July 26, Risinger pled guilty to the two counts of distributing methamphetamine¹ in return for the government's dismissal of the conspiracy charges. On October 30, the district court sentenced Risinger to two terms of forty-one months imprisonment, to run concurrently, and three years supervised release. Risinger failed to file a direct appeal.

II

On March 23, 1993, Risinger petitioned for habeas relief under 28 U.S.C. § 2255. Risinger alleged, inter alia, that: (1) his counsel was ineffective because he deprived Risinger of his right to appeal; (2) the sentencing court erred by not making specific written findings with regard to Risinger's objections to the presentence report as required by Federal Rule of Criminal Procedure 32(c)(3)(D); (3) the government provided its objections to the presentence report to defense counsel moments before the sentencing hearing and thus deprived Risinger of the ability to respond to those objections; (4) the sentencing court improperly

¹The controlled substance was later determined to be amphetamine.

considered sugar, which Risinger claims was mixed with the amphetamine, in determining the weight of the controlled substance for sentencing purposes; (5) the sentencing court improperly attributed that handling of drugs by another defendant to Risinger as "relevant conduct"; (6) the sentencing court improperly found that Risinger had a supervisory role in the illegal scheme; (7) two prior convictions, for which Risinger claims he was not represented by counsel, were erroneously included in his criminal history category; and (8) the sentencing court made an upward departure from the Sentencing Guidelines on its motion without giving reasonable notice to the parties specifically identifying the grounds for the upward departure.

The district court did not hold an evidentiary hearing to review Risinger's habeas petition and neither side offered affidavits from Risinger's defense counsel or others tending to prove or disprove Risinger's assertion. Based on the pleadings and the record before it, the district court denied Risinger's section 2255 motion. The district court held that Risinger was not denied effective assistance of counsel because "there was no evidence that [Risinger] informed his attorney of his desire to appeal" and the sentencing court advised him of his right to appeal. The district court also held that Risinger's allegations of Rule 32 violations and misapplication of the sentencing guidelines were not cognizable under section 2255.

III

A

On appeal, we first address whether Risinger is entitled to an evidentiary hearing on his claim that his counsel's ineffective assistance denied him his right to appeal. "A motion brought under 28 U.S.C. § 2255 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 first note that we construe pro se habeas petitions liberally, and that the petitioner need only set forth facts that give rise to a cause of action in order to avoid dismissal of his petition. Guidroz v. Lynaugh, 852 F.2d 832, 834 (5th Cir. 1988).

Risinger's petition to the district court merely stated that he failed to file a timely notice of appeal because his "counsel erroneously informed him, he could not appeal from a sentencing resulting from a plead [sic] of guilty." In effect, Risinger alleges that he did not pursue a direct appeal because he believed--because of the erroneous advice of counsel--that he had no right to appeal his sentence. The record, however, reveals that the district court informed Risinger, in unambiguous language, that he did have the right to appeal his sentence. At the sentencing hearing, the district court stated to Risinger:

. . . Mr. Risinger, you are notified of your right to appeal and if you appeal or an appeal is filed on your behalf, the clerk will transmit this pre-sentence report

and the other documents along with it to the Court of Appeals under seal.

Further, Risinger's written judgment expressly stated that he had the right to appeal. Risinger's written judgment provides:

The defendant is notified of his right to appeal. If a Notice of Appeal is filed under 18 U.S.C. [§] 3742 (Review of Sentence), the Clerk is ordered to transmit the presentence report, under seal, to the Court of Appeals.

Accordingly, we hold that the petitioner's unsupported assertion that his counsel said he did not have the right to appeal is insufficient to warrant remand for an evidentiary hearing on the claim that his counsel deprived him of the knowledge of his right to appeal when the uncontroverted record shows that the district court, both orally and in writing, informed Risinger--in the plainest possible terms--that he did, in fact, have this very right.² See Byrne v. Butler, 845 F.2d 501, 504-507 (5th Cir. 1988) (denying certificate of probable cause to habeas petitioner without remanding for an evidentiary hearing in part because the trial record refuted the petitioner's allegations); Patterson v. Stynchcombe, 440 F.2d 787 (5th Cir. 1971) (denying habeas relief

²On appeal, Risinger makes a new allegation in a vain attempt to salvage his claim for collateral relief. He now contends that he knew that he had the right to appeal, but that his counsel refused to file an appeal for him and failed to inform him that he could appeal himself. We need not consider a new unsupported allegation for the first time on appeal. See Pin v. Texaco, Inc., 793 F.2d 1448, 1452 n.6 (5th Cir. 1986) (refusing to consider allegations asserted for the first time on appeal). We note, however, that the district court plainly informed Risinger that he could file an appeal on his own behalf.

where petitioner's allegations were refuted by state records); Burris v. United States, 430 F.2d 399, 401-02 (7th Cir. 1970) (affirming district court's denial of habeas relief without remanding for an evidentiary hearing where petitioner offered no evidence in support of his bald assertions and trial record did not support petitioner's claims). The record shows that Risinger knowingly and voluntarily waived his right to appeal.³ Norris v. Wainwright, 588 F.2d 130, 137 (5th Cir.), cert. denied, 100 S.Ct. 93, 62 L.Ed.2d 60 (1979) ("A defendant properly informed of his appellate rights may not `let the matter rest'. . . and then claim that he did not waive his right to appeal.") (internal citations omitted).⁴

³Because we hold that Risinger, through his own inaction, waived his right to appeal, United States v. Gipson, 985 F.2d 212 (5th Cir. 1993), is inapposite. In Gipson, id. at 213-14, the petitioner was fully aware of his right to appeal and, pursuant to a conversation with his attorney, was in the process of obtaining funds to pay for the appellate services when he learned that the time for filing an appeal had lapsed. Thus, Gipson's attorney's failure to inform him of the time period within which an appeal must be filed caused Gipson to miss the filing deadline. In stark contrast, Risinger merely alleges that he did not know of his right to appeal--an allegation refuted by the record--not that his attorney agreed to file an appeal and failed to take action to see that the appeal was filed on time. Accordingly, Risinger cannot construe Gipson to command relief in his case.

⁴Risinger also argues that his counsel was ineffective because he failed to object to the sentencing court's use of relevant conduct and failed to object to counting sugar that was mixed with drugs in the quantity of drugs upon which the sentence was based. These claims are meritless. The record shows that Risinger's counsel did object to the presentence report's use of relevant conduct. Further, the sentencing guidelines provide that nonnarcotic substances mixed with illegal drugs may be counted for sentencing purposes. See U.S.S.G. § 2D1.1(c), Note (Nov. 1, 1990)

B

Risinger also alleges a violation of Rule 32 and various sentencing errors. It is well-settled, however, that relief under section 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. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981). See United States v. Smith, 844 F.2d 203, 205 (5th Cir. 1988) ("The grounds for relief under § 2255 are narrower than those for relief on direct appeal."). Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be raised in a collateral proceeding. Capua, 656 F.2d at 1037. "A district court's technical application of the [Sentencing] Guidelines does not give rise to a constitutional issue." United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Accordingly, Risinger's alleged violations of Rule 32 with respect to his sentencing and the other alleged

(stating that the weight for a controlled substance in the Drug Quantity Table "refers to the entire weight or mixture or substance containing a detectable amount of the controlled substance"). Thus, any objection to the amount of controlled substances used to determine sentences would have failed as a matter of law. Consequently, because any error by counsel in failing to object to the quantity of drugs could not have prejudiced Risinger, such omission will not support an ineffective assistance of counsel claim. See Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984) ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.").

sentencing errors could have been raised on direct appeal and are not of constitutional magnitude. United States v. Perez, 952 F.2d 908, 910 (5th Cir. 1992). Thus, these claims are not cognizable under section 2255. Capua, 656 F.2d at 1038.⁵

⁵We note, however, that even if we were to address Risinger's sentencing claims, we would find them without merit. First, Risinger's claim that the district court violated Federal Rule of Criminal Procedure 32(c)(3)(D) by failing to append written findings concerning the factual accuracy of the presentence report fails. Because Risinger failed to provide evidence to rebut the presentence report, the sentencing court correctly adopted the presentence report that was supported by evidence concerning the amount of drugs involved and Risinger's supervisory role in the illegal scheme to sell the drugs. United States v. Rodriguez, 897 F.2d 1324, 1327-28 (5th Cir.), cert. denied, 498 U.S. 857, 111 S.Ct. 158, 112 L.Ed.2d 124 (1990). Second, Risinger's claim that he had insufficient time to respond to the government's objections to the presentence report is refuted by the record that contains his response. Third, Risinger's challenge of the calculation of the amount of drugs used to sentence him fails even if his contention that two ounces of amphetamine were mixed with one ounce of sugar. As discussed previously, the Sentencing Guidelines provide that the amount of the controlled substance includes that total amount of the whole mixture. U.S.S.G. § 2D1.1(c), Note (Nov. 1, 1990). Fourth, Risinger's assertion that the sentencing court improperly considered the relevant conduct of another defendant arrested at the same time when Risinger was not convicted of conspiracy is ineffectual. The guidelines provide that the other defendant's conduct and the drugs found on him can be used to sentence Risinger. See U.S.S.G. § 1B1.3, Note 1 (Nov. 1, 1990) (providing that when "criminal activity [is] undertaken in concert with others, whether or not charged as a conspiracy, [relevant conduct] also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity . . ."). Fifth, Risinger's contention that the sentencing court erred in finding that he exercised a supervisory capacity in the illegal scheme fails because the sentencing court's finding on this issue was not clearly erroneous. The record reflects that the other defendant sold the drugs, delivered the money to Risinger, and identified Risinger as his source. Sixth, Risinger's unsupported contention that his criminal history category was wrongly computed because of the unconstitutionality of two prior convictions--due to a lack of representation by counsel--is flawed. Because Risinger was not imprisoned as a result of either of his prior convictions,

IV

For the foregoing reasons the judgment of the district court
is

A F F I R M E D.

his convictions were not unconstitutional even if he had no counsel. See United States v. Follin, 979 F.2d 369, 375-76 (5th Cir. 1992) (holding that uncounseled criminal convictions which did not result in sentences of imprisonment were constitutionally valid). Finally, Risinger's assertion that the sentencing court erred in making an upward departure from the guidelines in sentencing him fails simply because the record shows that no such upward departure was made.