UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7081
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

STEVEN DONALD KNEZEK,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(L-90-CR-257; L-92-CV-137)

August 11, 1993

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Steven Donald Knezek appeals, *pro se*, the denial of his 28 U.S.C. § 2255 motion to vacate his sentence for firearms transportation and possession offenses, violative of 18 U.S.C. §§ 922(k), 924, and 922(g)(1). We **VACATE** and **REMAND.**

I.

In July 1990, Knezek was convicted by a jury of knowing transportation in interstate and foreign commerce of a firearm from

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

which the serial number had been obliterated and knowing possession of a firearm by a convicted felon. That December, he was sentenced to, *inter alia*, concurrent imprisonment terms of 42 months and 15 years. In June 1992, this court affirmed the convictions. *See* ***United States v. Knezek***, 964 F.2d 394 (5th Cir. 1992). Because a detailed description of those proceedings appears in our prior opinion, we need not recite them here.

In November 1992, Knezek filed his § 2255 motion, asserting ineffective assistance of counsel and violations of ***Miranda*** and the Fifth Amendment. The district court denied the motion in January 1993.

II.

On appeal, Knezek pursues only two of the several contentions raised in his motion: (1) that two incriminating statements introduced into evidence were obtained in violation of ***Miranda*** and the Fifth Amendment, and (2) that his trial counsel provided ineffective assistance by failing to investigate the circumstances surrounding those statements and to move to suppress them. Accordingly, his other contentions are abandoned. *See* ***Fransaw v. Lynaugh***, 810 F.2d 518, 523 n.7 (5th Cir.), *cert. denied*, 483 U.S. 1008 (1987). As always, we review the district court's determinations of law *de novo*, and its findings of fact for clear error. ***Kirkpatrick v. Whitley***, 992 F.2d 491, 494 (5th Cir. 1993).

The two statements of which Knezek complains were obtained while he was detained at a secondary inspection station at the Lincoln-Juarez Bridge Port-of-Entry near Laredo, Texas. The first

was made during the initial search of his car. After finding some ammunition in a suitcase, the inspector asked Knezek, "Where are the guns?"; Knezek replied, "They're in there". The second was made when Knezek was subsequently taken to a separate search room. The same inspector then asked, "Who's the owner of the guns?"; Knezek responded, "They're mine. I bought them at a gun place".

To this point, Knezek had not been given any ***Miranda*** warnings. After the second statement was given, however, a customs special agent was called in by the inspectors; and Knezek *was* given ***Miranda*** warnings. Following those warnings, Knezek made further incriminating statements; specifically, that he had purchased the guns "at a gun shop back home", and that he knew about the obliterated serial number.

Knezek contends that he was in custody for purposes of ***Miranda*** at the time the first two statements were taken, and that his statements should, therefore, have been suppressed at trial. He further contends that the statements were coerced, alleging that he was questioned at gunpoint, "manhandled", and "interrogated with zeal".[2] Knezek's petition to the district court included a sworn statement to the same effect.[3] The government presented no evidence in opposition, and erroneously asserted that Knezek cited only the ***Miranda*** violation as the basis for his coercion

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[2] The coercion issue was deemed waived at trial by Knezek's counsel's failure to develop it. *See* ***Knezek***, 964 F.2d at 398-99.

[3] The sworn pleadings of a *pro se* prisoner are considered as evidence. *See* ***Isquith v. Middle South Utilities, Inc.***, 847 F.2d 186, 194-95 (5th Cir.), *cert. denied*, 488 U.S. 926 (1988).

allegation. Likewise, the district court did not address Knezek's coercion allegations, but held instead that there simply had been no "custody" triggering ***Miranda***.

Contrary to Knezek's assertions, a ***Miranda*** violation, standing alone, will not entitle him to § 2255 relief, in light of his post-***Miranda*** admissions that he bought the guns "back home" and that he knew about the serial number. "[A] mere violation of ***Miranda's*** `prophylactic' procedures does not trigger the fruit of the poisonous tree doctrine". ***United States v. Bengivenga***, 845 F.2d 593, 601 (5th Cir.), *cert. denied*, 488 U.S. 924 (1988); *see* ***Oregon v. Elstad***, 470 U.S. 298, 309 (1985). Therefore, the subsequent statements could still be admissible, and the prior statements thus harmless beyond a reasonable doubt. *See* ***Chapman v. California***, 386 U.S. 18 (1967).

The "derivative evidence rule" *will* operate to bar the admission of a subsequent confession, however, "when an actual constitutional violation occurs, as where a suspect confesses in response to coercion". ***Bengivenga***, 845 F.2d at 601. This court previously determined that Knezek waived the coercion issue at trial, *see* ***Knezek***, 964 F.2d at 399; but, in a § 2255 proceeding, an issue procedurally defaulted may nonetheless be examined if the petitioner establishes (1) cause excusing the default, and (2) prejudice resulting from the error. ***United States v. Bondurant***, 689 F.2d 1246, 1250 (5th Cir. 1982). Knezek assigns as "cause" his attorney's ineffectiveness, and as "prejudice" the admission of the confessions.

Of course, a § 2255 petitioner cannot meet the cause and prejudice requirements simply by making conclusory assertions of ineffective assistance; he must present evidence tending to support his claims. Here, however, and as noted, Knezek supported his allegations with a sworn statement that he had been interrogated at gunpoint. Additionally, in the underlying proceedings, there were indications that Knezek was dissatisfied with his counsel's actions with regard to the confessions. *See* ***Knezek***, 964 F.2d at 398 nn.9 & 10. Although we have serious doubts about the reliability of that evidence, it tends to support Knezek's contentions regarding the questions of custody,[4] coercion, and ineffective assistance,[5] and any credibility determinations must be made in the first instance by the district court.

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[4] A suspect is in "custody" for ***Miranda*** purposes "when placed under formal arrest or when a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement or the degree which the law associates with formal arrest". ***United States v. Park***, 947 F.2d 130, 138 (5th Cir. 1991), *vacated in part on other grounds*, 951 F.2d 634 (5th Cir. 1992). Certainly, any questioning at gunpoint would be most relevant to this inquiry.

[5] To obtain relief on grounds of ineffective assistance, Knezek must show both (1) that his counsel's performance was deficient, falling below an objective standard of reasonableness, and (2) that the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687-88 (1984). Again, it would certainly be relevant to this inquiry if Knezek had informed his attorney that he was interrogated at gunpoint and the attorney had done nothing about it.

III.

Because the district court did not address evidence of coercion, we must **VACATE** the judgment and **REMAND** for further proceedings consistent with this opinion.

VACATED and REMANDED