IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7164
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WOODROW BEAMER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Mississippi
(CR W 89 39 D (WC 91 102))

(October 18, 1993)

Before SMITH, BARKSDALE, and DeMOSS, Circuit Judges.

PER CURIAM:*

Woodrow Beamer appeals the denial of his pro se federal prisoner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Finding no error, we affirm.

I.

The following facts are found in United States v. Beamer, No.

---

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 Pursuant to that rule, the court has determined that this opinion should not be published.

90-8096 (5th Cir. Nov. 27, 1990) (unpublished), in which this court affirmed Beamer's conviction:

> In October of 1988, Mississippi Bureau of Narcotics (MBN) agents, pursuant to a state search warrant, searched Beamer's residence and seized certain firearms. A few days later, another search was conducted pursuant to a federal search warrant; and additional firearms were seized. An indictment was filed charging Beamer with being a convicted felon in possession of firearms. . . .
>
> In April 1989, Beamer sold approximately .5 grams of crack cocaine to a MBN confidential informant. A few days later, Beamer was stopped in his automobile to execute a federal arrest warrant based on the original firearms indictment. A search of Beamer's automobile subsequent to the arrest revealed a revolver and two bottles containing approximately 18.6 grams of crack cocaine under the front seat, midway between the passenger and driver seats. At the time of the arrest, Isaac Bogard was riding with Beamer. After being advised of his rights, Beamer admitted that he owned the revolver but denied owning the cocaine.
>
> A superseding indictment was filed charging Beamer, in addition to the earlier gun charges (counts 1 and 2), with two counts of possession with intent to distribute cocaine (counts 3 and 4) and one count of possession of a firearm during a drug offense (count 5). Counts 1 and 2 were dismissed after a suppression hearing; a jury found Beamer guilty of counts 3, 4, and 5.

Proceeding pro se and in forma pauperis, Beamer filed a motion to vacate, set aside, or correct sentence under section 2255, raising seven issues: (1) His Fifth Amendment right to remain silent was violated; (2) he was denied effective assistance of counsel at trial, in violation of the Sixth Amendment; and (3) on appeal, (4) he suffered prejudice as a result of prosecutorial misconduct and (5) judicial misconduct; (6) his excessive sentence constituted cruel and unusual punishment in violation of the Eighth Amendment; and (7) he was denied a fair and impartial trial. Without eliciting a response from the government, the district court denied

Beamer's motion, as follows:

> This Court presided over the trial of Mr. Beamer and is of the opinion that he was very capably represented by a well qualified and experienced member of the bar of this court. The court is of the opinion that the legal issues raised in his petition were argued before this court at the trial level and before the Fifth Circuit Court of Appeals when his conviction was appealed to that court.

The district court erred, as Beamer raised only two issues on direct appeal: "(1) [T]he district court erred in not giving a requested jury instruction; and (2) there was insufficient evidence to support his conviction." This court vacated the judgment and remanded to allow the government an opportunity to respond and for further consideration of Beamer's claims.

In its responses, the government asserted that Beamer's claims of trial error were procedurally barred because they had not been raised on direct appeal. Further, the government argued that there was no merit to the claim of ineffective assistance of counsel at trial and on appeal.

In a memorandum opinion, the district court found that Beamer's claims, except the Sixth Amendment claim, were procedurally barred because he had not raised them on direct appeal. The court denied relief on the claim of ineffective assistance.

II.

On appeal, Beamer raises the same seven issues presented in his section 2255 motion. In his brief, he addresses only the question whether the district court erred in deciding his ineffective assistance of counsel claim without an evidentiary hearing and

without considering his response to the government. Rather than argue the remaining issues in his brief, he asks us to review his claims "on the original papers as attached hereto along with the other claims and issues raised . . . in his response. . . ."

Generally, claims not argued in the body of the brief are abandoned on appeal, even if the appellant is proceeding pro se. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993). Beamer presents his arguments in the body of his reply brief, however. Because there is no apparent prejudice to the government, we will address the merits of Beamer's claims on appeal. See United States v. Pierce, 959 F.2d 1297, 1301 n.5 (5th Cir.), cert. denied, 113 S. Ct. 621 (1992).

The preliminary question is whether Beamer is procedurally barred from raising these issues in a collateral challenge to his conviction. "For a collateral attack under § 2255, `a distinction is drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other.'" Id. at 1300-01 (5th Cir. 1992) (quoting United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981)). Even an alleged constitutional error may not be raised "for the first time on collateral review without showing both `cause' for [the] procedural default, and `actual prejudice' resulting from the error." United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991), cert. denied, 112 S. Ct. 978 (1992) (citation omitted). "If the alleged error is not constitutional or jurisdictional, `the defendant must show that the error could not have been raised on direct appeal, and if condoned, would result in a

complete miscarriage of justice.'" United States v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992) (quoting Capua, 656 F.2d at 1037). "To invoke the procedural bar, however, the government must raise it in the district court." Id.

Beamer's claims that counsel was ineffective at trial and on appeal are "of constitutional magnitude and satisfy the cause and prejudice standard." Pierce, 959 F.2d at 1301. "Ineffective assistance of counsel . . . is cause for a procedural default." Murray v. Carrier, 477 U.S. 478, 488 (1986). Moreover, as a general rule, ineffective assistance of counsel claims cannot be resolved on direct appeal. See United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988).

To support his claim, Beamer must prove two components: (1) that his counsel made errors that were so serious that they deprived him of his Sixth Amendment guarantee and (2) that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1948). To show prejudice, Beamer must demonstrate that counsel's errors were so serious as to render the result of the trial unfair or unreliable. Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993).

Virtually all of Beamer's claims of ineffective assistance of counsel call into question counsel's defense theory and trial strategy. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that

reasonable professional judgments support the limitations on investigation." Black v. Collins, 962 F.2d 394, 401 (5th Cir.), cert. denied, 112 S. Ct. 2983 (1992) (internal quotations and citation omitted).

A.

Beamer contends that counsel failed to file a motion to challenge the prosecution of both counts of possession with intent to distribute in the same trial, a motion to suppress evidence of the sale of drugs to the confidential informant in count three, and a motion to produce any agreement between the government and Bogard in order to impeach Bogard's credibility. "[T]he filing of pre-trial motions `falls squarely within the ambit of trial strategy. . . .'" Schwander v. Blackburn, 750 F.2d 494, 500 (5th Cir. 1985).

Beamer's assertion that counsel was ineffective because he failed to file a motion to sever pursuant to FED. R. CRIM. P. 8(a) is groundless. The district court found that there was no basis for a motion to sever the two drug counts, as "they were of the same or similar character and were parts of a common scheme. . . ." Assuming that counsel's performance was deficient in failing to file the motion, Beamer has not shown that he suffered prejudice from the alleged misjoinder. See Washington, 466 U.S. at 697 (When it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, "that course should be followed.").

As to the motion to suppress, the record indicates that counsel sought to suppress the evidence discovered in the automobile search (counts four and five) and the evidence found in Beamer's residence that pertained to the two original firearm counts (counts one and two). Counsel's success in suppressing the evidence of possession of firearms led to the dismissal of counts one and two. Beamer has failed to overcome the presumption that counsel's decision not to seek suppression of the evidence of the drug sale to the confidential informant was a sound strategic decision.

Beamer's contention that counsel subjected him to unfair surprise by failing to seek disclosure of Bogard's agreement with the government is meritless. Beamer has not demonstrated that there was an agreement or that the trial result was unfair or unreliable because of counsel's professional judgment not to file the motion.

B.

Beamer raises several instances of ineffective assistance of counsel that focus on the theory of the defense. He contends that (1) counsel failed to object to the introduction of evidence that Beamer admitted that he was the owner of the gun found in his car; (2) counsel did not challenge whether the officers advised him of his rights or the voluntariness of his confession; (3) in his closing argument, counsel corroborated the officers' testimony that the gun found in the automobile belonged to Beamer; and (4) counsel

should have allowed him to testify if the theory of the defense was that Beamer was the owner of the gun but Bogard owned the cocaine.

Counsel developed the theory that the crack cocaine found in the automobile belonged to Bogard and not to Beamer. Therefore, even if Beamer admitted ownership of the firearm, if the cocaine belonged to Bogard, Beamer could not be convicted of possession of a firearm in relation to drug trafficking. Counsel's acquiescence to evidence that Beamer owned the gun was consistent with the theory. Beamer has not shown that the plausible defense theory, as well as counsel's recommendation that Beamer not testify in his defense, was not sound trial strategy. Therefore, he has not demonstrated deficient performance.

C.

Beamer contends that counsel was ineffective on appeal because he failed to raise issues that Beamer wished to address. He argues that, as a result of counsel's decision to raise only the questions (1) whether the evidence was sufficient to support the conviction and (2) whether the district court erred in not giving a requested jury instruction, he is procedurally barred from raising his preferred issues in a section 2255 motion. Id. A claim of ineffective assistance of appellate counsel is also governed by the Washington standard. United States v. Merida, 985 F.2d 198, 202 (5th Cir. 1993).

Appellate counsel need not "raise every nonfrivolous issue requested by the client . . . if counsel, as a matter of profes-

sional judgment, decides not to present those points." Jones v. Barnes, 463 U.S. 745, 750-51 (1983). The decision to focus on the stronger arguments on appeal belongs to counsel, and reasonable professional judgments should not be second-guessed. Id. at 751-52, 754. Beamer has failed to overcome the presumption that counsel's performance on appeal was reasonable.

D.

Beamer contends that the district court erred in denying his section 2255 motion without holding an evidentiary hearing on his claims of ineffective assistance of counsel. "The question whether an evidentiary hearing is necessary to resolve charges of ineffective assistance depends on an assessment of the record. . . . If the record is clearly adequate to dispose fairly of the allegations, the court need inquire no further." United States v. Smith, 915 F.2d 959, 964 (5th Cir. 1990). Beamer's claims of ineffective counsel could be determined on the record; therefore, an evidentiary hearing was not required.

III.

Because Beamer has not shown that counsel was ineffective at trial or on appeal, he has not demonstrated cause for the procedural default. See Pierce, 959 F.2d at 1301. In his reply brief, Beamer does not argue against applying the procedural bar to his remaining five claims. Even though he attempts to advance the issues as constitutional violations, he fails to demonstrate either

cause for the procedural default or actual prejudice. Id. at 1304-05; Shaid, 937 F.2d at 232. The district court's denial of section 2255 relief is AFFIRMED.