

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-7307
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LEONARD BOBBY ORTEGA,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Texas
USDC No. B-92-CV-40;(CR-B-87-350)
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(March 24, 1994)

Before KING, DAVIS, and DeMOSS, Circuit Judges.

PER CURIAM:*

Leonard Bobby Ortega was convicted for being a felon in possession of a firearm, in violation of 18 U.S.C. app. § 1202(a)(1). Ortega appeals the dismissal of his 28 U.S.C. § 2255 motion challenging the validity of his conviction.

Ortega contends that the trial court failed to charge the jury regarding the term "affecting commerce." Ortega did not object to the jury charge at trial. Although the Court's opinion on direct appeal was primarily concerned with the adequacy of the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

jury instruction, Ortega did not raise an issue on direct appeal with respect to the trial court's interstate nexus instruction. United States v. Ortega, 859 F.2d 327, 329-33 (5th Cir. 1988), cert. denied, 489 U.S. 1027 (1989).

Relief under § 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). Even when a defendant alleges a fundamental constitutional error, he may not raise an issue for the first time on collateral review without showing both cause for his procedural default, and actual prejudice resulting from the error. United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 978 (1992). The Government properly invoked the procedural bar in the district court. See United States v. Drobny, 955 F.2d 990, 994-95 (5th Cir. 1992). Ortega makes no effort on appeal to demonstrate cause and prejudice. Therefore, Ortega is barred from raising the jury charge issue in a § 2255 proceeding.

Ortega contends for the first time in this appeal that he was re-sentenced to serve a 15-year sentence of imprisonment under 18 U.S.C. § 924(e), which was not in effect at the time the offense was committed, in violation of the Ex Post Facto Clause. Ortega's argument is apparently based upon the magistrate judge's erroneous citation to 18 U.S.C. § 924(e) in his report and recommendation. Ortega was resentenced because the original sentence of imprisonment was less than the statutory minimum

sentence of imprisonment of 15 years. See Ortega, 859 F.2d at 335; see also 18 U.S.C. app. § 1202(a). Both the original judgment and amended judgment recite that the conviction was for a violation of 18 U.S.C. app. § 1202(a)(1). Ortega was not resentenced under 18 U.S.C. § 924(e).

Ortega contends that he was subjected to double jeopardy because his conviction was based on a 1960 juvenile conviction for burglary, the propriety of which was not proven at trial. Ortega did not raise this issue in his direct appeal. Nevertheless, we address the merits of the issue because the Government did not clearly invoke the procedural bar as to this issue. See Drobny, 955 F.2d at 994-95.

Section 1202(a) did not exclude from consideration felonies committed by juveniles. The statute applied to "[a]ny person who--(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . ." 28 U.S.C. app. § 1202(a) (emphasis added). Although Ortega invokes the Double Jeopardy Clause, he does not suggest why he thinks the use of the 1960 conviction subjected him to double jeopardy. Instead, his main complaint is that the conviction was too remote. The statute unambiguously prohibited any convicted felon from receiving, possessing, or transporting a firearm, see 18 U.S.C. app. § 1202(a), and imposed a lifetime disability. See generally, Lewis v. United States, 445 U.S. 55, 60-64, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980). The Government was not required to prove the validity of the prior conviction, and Ortega could not have asserted its invalidity as a defense. Id. at 63.

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AFFIRMED.