

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-7457
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

REYNALDO FUENTES ORTEGA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(CA-B-93-002(CR-B85-361))

(March 24, 1994)

Before THORNBERRY, DUHÉ, and BARKSDALE, Circuit Judges.

THORNBERRY, Circuit Judge:*

In 1979, Reynaldo Fuentes Ortega was convicted of conspiracy to distribute heroin and two counts of distribution of heroin. The district court sentenced Ortega to three-concurrent seven-year terms of imprisonment and to five years of special parole for each offense. Ortega was conditionally released in 1981, with 1461 days

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

remaining to serve, but was returned to custody shortly thereafter for violating the terms of his release.

Ortega then escaped in 1985 from a half-way house in Brownsville, Texas; he was recaptured, plead guilty to escape and was sentenced to four more years of imprisonment. This sentence was aggregated with the sentence he was already serving, resulting in a single, seven-year, 24-day term.

In 1986, Ortega filed a motion to reduce his sentence. The district court denied the motion.¹ In 1992, Ortega filed a motion for clarification of his sentence, seeking a determination whether his four-year sentence for escape was to run concurrently with, or consecutively to, the balance of his sentence that he was serving for the heroin distribution. The district court's clarification order indicates that the court intended that Ortega be released on parole within the discretion of the Parole Commission. However, the court noted that "multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently. In this case, the Court did not order the sentences to run concurrently, but deferred the sentence computation to the Parole Commission." The district court also noted that the reason that Ortega was confused about his sentence of imprisonment was that he had been released on parole several

¹ Ortega then filed a § 2255 petition claiming that his guilty plea to the escape was involuntary and his counsel was ineffective. This petition was dismissed, and no appeal was taken from the dismissal.

times and violated that parole several times and was always returned to custody.

Ortega filed the instant motion under 28 U.S.C. § 2255, alleging that the district court's order of clarification violates Double Jeopardy and the presumption that his sentences should run concurrently. The Government responded to Ortega's motion and filed a motion for summary judgment, arguing: (1) that the motion should be dismissed as an abuse of the writ; (2) that the motion should be construed as a motion under 28 U.S.C. § 2241 and that Ortega had failed to demonstrate that he exhausted his administrative remedies; and (3) Ortega's claim was not of constitutional dimension as required by § 2255.

The magistrate judge determined that Ortega's motion should not be dismissed as an abuse of the writ, rather, the motion should be dismissed because Ortega's claim was not of constitutional magnitude as required by § 2255 and that the Parole Commission had exclusive jurisdiction in determining the running of Ortega's sentence. The district court adopted the magistrate judge's recommendation. Ortega now appeals.

Discussion

Although Ortega characterized his motion under 28 U.S.C. § 2255, he challenges the execution, rather than the validity, of his federal sentence. As such, Ortega's action is not properly characterized under § 2255, and the district court should have liberally construed it as a petition for a writ of habeas corpus

under 28 U.S.C. § 2241. **See United States v. Weathersby**, 958 F.2d 65, 66 (5th Cir. 1992).

The Government argues that the merits of Ortega's claim provide him no relief because the district court issued an unambiguous sentencing order and because the order is enforceable as issued. The district court deferred computation of Ortega's sentence to the Parole Commission. Ortega's sentence was calculated according to Parole Commission regulations by aggregating Ortega's four-year sentence for the escape with the remainder of the seven-year sentence for the heroin distribution, resulting in a single, seven-year, 24 day term. We note that in the closing paragraph of the Bureau's statement to Ortega, the Bureau indicated that the escape sentence ran concurrently with the term remaining after the parole violation. This statement is apparently internally inconsistent with the other calculations in the statement which clearly indicate that the sentences were to run consecutively. However, Ortega's consecutive terms of imprisonment do not violate Double Jeopardy because Ortega committed two separate offenses--heroin distribution and escape. **See United States v. Parker**, 960 F.2d 498, 502 (5th Cir. 1992). In addition, Ortega has not shown how the calculation of his sentence was in error, and further, our review of the Bureau of Prisons' calculation of Ortega's sentence reveals no error. Therefore, Ortega has not shown that he is entitled to relief under § 2241, and we affirm the district court's dismissal of Ortega's petition. **See Sojourner T. v. Edwards**, 974 F.2d 27, 30 (5th Cir.) (court may

affirm judgment on any basis supported by the record), **cert. denied**, 113 S.Ct. 1414 (1992); **see also, Maddox v. United States Parole Commission**, 821 F.2d 997, 1000 (5th Cir. 1987)(decision by Parole Commission not disturbed absent a showing that the action was flagrant, unwarranted, or unauthorized).²

Conclusion

Based on the foregoing, we affirm the dismissal of Ortega's habeas corpus petition.

AFFIRMED.

² The Government makes other arguments supporting the district court's dismissal of Ortega's petition, but we find no merit in any of them.