

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-7557  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES IRVIN WELCH,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
(C-86-CR-129-4;(CA-C-90-01))

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(May 19, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:\*

James Welch appeals the denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Finding no error, we affirm.

I.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

A jury found Welch guilty of conspiracy to possess with intent to distribute marihuana. He did not appeal but filed a pro se motion to reduce sentence pursuant to FED. R. CRIM. P. 35(b). The motion was denied as untimely. He then purportedly filed a motion to reconsider the denial of his rule 35(b) motion; the district court did not rule on the motion, because it was never received.

Welch filed a motion to vacate, set aside, or correct sentence, alleging that his counsel was ineffective in various respects during the trial, at sentencing, and in failing to file a rule 35(b) motion and a direct appeal. In his amended motion, Welch alleged that counsel was ineffective in the following aspects: (1) Counsel failed to refute the government's allegations that Welch had a long history of transporting drugs in his van when, in fact, he had purchased the van only ten days prior to his arrest; (2) counsel did not object to the trial judge's body language, specifically "looking bored" and leaving the bench to walk around, which implied to the jury that the evidence in support of Welch's case was "not worthy of belief"; (3) counsel failed to object to the presentence report (PSR), which was factually inaccurate and resulted in a more severe sentence; (4) counsel failed to file a notice of appeal, even though he assured Welch that he would do so; (5) after an inmate informed Welch that he could file a rule 35(b) motion, counsel agreed to file the motion on Welch's behalf but failed to do so; (6) when Welch filed the rule 35(b) motion, the district court denied the motion as untimely.

The magistrate judge determined that there was no merit to Welch's claims and that an evidentiary hearing was unnecessary. Welch failed to file objections to the magistrate judge's report and recommendation, and the district court denied relief.

Welch filed a motion for reconsideration of the dismissal of his § 2255 petition, which the district court denied. The district court denied Welch's motion for leave to appeal in forma pauperis (IFP), stating that the appeal was frivolous. This court granted Welch's motion for leave to proceed on appeal IFP, vacated the judgment, and remanded for an evidentiary hearing on the issue whether Welch had been denied any assistance of appellate counsel. The court did not address the merits of the other issues Welch wished to raise on appeal.

The magistrate judge scheduled an evidentiary hearing and appointed counsel to assist Welch. The magistrate judge then made the following determinations:

[James] Folsom was hired and paid by one of Movant's co-indictees. Folsom was paid a fee of \$5,000.00 to represent Movant through trial. There was no discussion about an appeal between Folsom and Movant. There was no promise to file a Rule 35 motion or an appeal made to Movant by Folsom. The discussion between Folsom, Movant and the probation officer took place after Movant was convicted and before the presentence report was prepared. The probation officer would have no reason to question Movant about his work history after sentencing. There was no further contact between Folsom and Movant after Movant was sentenced. While Movant's alcoholism undoubtedly hampers Movant's recollection of events up to and immediately following his conviction, he was alcohol-free from the date of his remand following conviction until ten days after sentencing. Movant offered no evidence that his alcoholism prevented him from informing the Court he wished to appeal.

Welch did not object to the factual determinations of the

magistrate judge but objected only to the magistrate judge's conclusion that he had waited until he had served four years of his five-year sentence before filing his § 2255 motion. Further, he denied that his § 2255 motion was motivated by the effect of his conviction and sentence on his parole eligibility in a subsequent conviction.

The district court adopted the report and recommendation of the magistrate judge, concluding that Welch's testimony at the hearing was "incredible." The court found that Welch had not been deprived of effective assistance of counsel and reinstated its previous decision denying Welch's § 2255 motion.

## II.

"In determining whether a claim of error is cognizable under Section 2255, `a distinction is drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other.'" United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981) (citations omitted). Section 2255 is reserved for constitutional claims and other matters that could not have been raised on direct appeal. Id. Welch raises the following eight issues on appeal: (1) The district court failed to instruct the jury on the law regarding entrapment; (2) the court erred in allowing the introduction of evidence of the use and ownership of a gun; (3) the prosecutor "lied" during closing argument concerning Welch's ownership and long-term use of a van for drug trafficking; (4) the district judge's indications of the unimportance of, or disdain

for, the testimony of defense witnesses demonstrated bias and prejudice; (5) whether the sum of all the issues raised, combined with the denial of effective assistance of counsel, constitutes a denial of due process; (6) whether the unwritten policy of the Federal Bureau of Prisons, which (as Welch asserts) extorts, coerces, or intimidates indigent inmates to pay fines and assessments, is legal; (7) he was deprived of due process on appeal; and (8) he was denied effective assistance of counsel and access to the courts on remand.

A.

We liberally construe the fifth issue as raising claims of ineffective assistance of counsel at trial. Thus the allegations of a Sixth Amendment violation properly before the court are whether counsel was ineffective in (1) not refuting the government's allegations that he had a history of transporting drugs in his van and (2) failing to object to the district judge's body language.

To demonstrate ineffectiveness of counsel, Welch must establish that counsel's performance fell below an objective standard of reasonable competence and that he was prejudiced by his counsel's deficient performance. Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993). Judicial scrutiny of counsel's performance is highly deferential, and courts must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland v. Washington, 466 U.S. 668,

687 (1984).

Welch argues that counsel failed to object when the prosecutor lied to the jury during the second round of closing arguments. The prosecutor stated that Welch owned a van-type vehicle and used it on a regular basis to transport and distribute illegal drugs. He contends that counsel was aware that he recently had bought a used van and that he did not own a van at the time of the offense.

The prosecutor made the following statement in closing argument:

What did they talk about over at the Valley Inn? The fact that the van that they had )) the van that Mr. Welch said he had driven for Mr. Smith on previous occasions )) he said he had hauled it in vans on previous occasions. They talked that the van wasn't large enough, so they were going to get something larger.

Assuming that counsel's failure to object was error, Welch has not demonstrated that the error was so serious as to render the result of the trial unfair or unreliable. See Lockhart, 113 S. Ct. at 844. Because Welch has not shown prejudice, his claim fails. Washington, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.").

Welch argues that counsel failed to object to the district court's alleged antics indicating the unimportance of, or disdain for, the testimony of the defense witnesses. He contends that "on numerous occasions, [the district judge] remove[d] himself from his chair behind the bench and in a comic bent fashion did move around the courtroom giving outward evidence of pain and or discomfort." He asserts that "[i]t was all too disturbing to all who were in the

court, jury and defense included." Implicitly, he argues that, had counsel objected, the court could have informed everyone concerned that he suffered from a serious back condition that required him to move about the courtroom. Even if an objection by counsel would have afforded the court an opportunity to explain what was happening, we are unconvinced that counsel's failure to object to the judge's movements rendered the result of the trial unfair or unreliable. See Lockhart, 113 S. Ct. at 844.

B.

To the extent that Welch's claim that he was denied effective assistance of counsel on remand is properly before the court, it lacks merit. Welch has no constitutional right to counsel in a § 2255 proceeding. See Johnson v. Hargett, 978 F.2d 855, 859 (5th Cir. 1992), cert. denied, 113 S. Ct. 1652 (1993) (no constitutional right to counsel in federal habeas proceedings).

We need not address the claims that (1) the district court failed to instruct the jury on the law regarding entrapment, (2) the district court erred in allowing the introduction of evidence of the use and ownership of a gun, (3) the unwritten policy of the Federal Bureau of Prisons concerning the payment of fines and assessments is illegal, and (4) Welch was deprived of due process on appeal. These concerns are raised for the first time on appeal, so we will not consider them. See United States v. Cates, 952 F.2d 149, 152 (5th Cir.), cert. denied, 112 S. Ct. 2319 (1992).

Welch does not address the district court's finding that he

was not deprived of effective assistance of counsel when counsel did not pursue a direct appeal or by any errors in the legal analysis. Nor does he reurge the claims that counsel was ineffective in failing to object to the presentence report and in failing to file a FED. R. CRIM. P. 35(b) motion on his behalf. These claims are deemed abandoned. See Brinkmann v. Abner, 813 F.2d 744, 748 (5th Cir. 1987). This court "will not raise and discuss legal issues that [Welch] has failed to assert." Id.

AFFIRMED.