IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8079
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAVIER ROBLES-PANTOJA,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(SA-90-CV-1-1 (SA-87-CR-48))

(April 28, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

This appeal is from the denial of a § 2255 motion.

Javier Robles-Pantoja ("Robles") was convicted by a jury trial of conspiracy to distribute and distribution of cocaine. He was sentenced to a ten-year term of imprisonment for conspiracy to distribute cocaine (Count 1), a ten-year term of imprisonment for distribution of cocaine (Count 2), a four-year term of special

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

parole, and a $100 special assessment. Id. at 274; U.S. v. Robles-Pantoja, 887 F.2d 1250, 1253 (5th Cir. 1989). Because the conduct of conviction took place prior to November 1, 1987, the Sentencing Guidelines did not apply. See Robles-Pantoja, 887 F.2d at 1261 n.13.

In a direct appeal to this court, Robles challenged, inter alia, the imposition of consecutive sentences for the conspiracy and cocaine distribution convictions, and the imposition of a prison term without parole for Count 2. Id. at 1257-58, 1261. We affirmed Robles's convictions and sentences. Id. at 1261-62.

Robles, pro se, filed a § 2255 motion with the district court. In support of the motion, he filed a memorandum of law raising the same issues raised by him in this appeal.[1] Then, Robles, with counsel, filed a second memorandum of law, which addressed his ineffective assistance of counsel claim. The district court, adopting the magistrate judge's recommendation, denied the motion. Robles filed a Rule 59(e) motion, which was denied by the district court. Robles then appealed.

I

On appeal, Robles first argues that the consecutive sentences are improper because the sentence for Count 1 provides for the

[1]In the district court and in his appellate brief, Robles argued that the government exceeded its jurisdiction. He argued that the PSR contained an erroneous drug quantity. Robles concedes these two issues in his reply brief. Therefore, we need not consider them.

possibility of parole; whereas, the sentence for Count 2 is without parole.

In Robles's direct appeal, we rejected his challenge to his consecutive sentences stating that[t]his argument is foreclosed by our decision in U.S. v. Prati, 861 F.2d 82, 88 (5th Cir. 1988), in which we held that conspiracy to possess cocaine with intent to distribute it and possession of cocaine with intent to distribute it, the object offense of the charged conspiracy, were separate crimes and could support separate consecutive sentences.

Robles-Pantoja, 887 F.2d at 1261. Furthermore, in that decision, we upheld the district court's imposition of the sentence without parole for Count 2. Because Robles's present challenge was disposed of by this court on direct appeal, we will not revisit the issue in a § 2255 proceeding. See U.S. v. Jones, 614 F.2d 80, 82 (5th Cir.), cert. denied, 446 U.S. 945 (1980); U.S. v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1986).

II

Robles next argues that his sentence is substantially more onerous than the sentences of his codefendants. He contends that the disparate sentencing of the defendants indicates that the judge improperly used his (Robles's) prior criminal history as a basis for imposing sentence.

"Relief under 28 U.S.C.A. § 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." U.S. v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). A

nonconstitutional claim that could have been raised on direct appeal, but was not, may not be raised in a collateral proceeding. U.S. v. Shaid, 937 F.2d 228, 232 n.7 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 978 (1992). Because the issue argued by Robles is "not of constitutional dimension and could have been asserted on direct appeal, he has failed to bring his claim[] within the limited scope of habeas relief under Section 2255." U.S. v. Capua, 656 F.2d 1033, 1038 (5th Cir. 1981).

Even if this court were to consider the merits of Robles's contention, one co-defendant's sentence is not a "yardstick" by which to measure the sentence of another co-defendant. U.S. v. Sparks, 2 F.3d 574, 587 (5th Cir. 1993), cert. denied, 114 S.Ct. 899 (1994). A mere disparity of sentences among codefendants does not, alone, constitute abuse of discretion. U.S. v. Lindell, 881 F.2d 1313, 1324 (5th Cir. 1989), cert. denied, 496 U.S. 926 (1990).

III

Finally, Robles contends that he was denied effective assistance of counsel.

This court reviews claims of ineffective assistance of counsel to determine whether counsel's performance was both deficient and prejudicial to the defendant. U.S. v. Gipson, 985 F.2d 212, 215 (5th Cir. 1993). To establish "prejudice," the defendant is required to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668,

694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To show deficient performance, the defendant must overcome the strong presumption that the attorney's conduct falls within a wide range of reasonable professional assistance. Id. at 689. If the defendant makes an insufficient showing on one of the components of the inquiry, the court need not address the other. Id. at 697.

Robles contends that his counsel was ineffective because he failed to argue issues 1 and 2, as well as those issues he concedes in his reply brief. Because these contentions are without merit, Robles's counsel was not ineffective in failing to pursue them.

Robles further argues that his counsel was ineffective because he failed to communicate to him a plea offer. In denying Robles's motion, the district court, without holding an evidentiary hearing, determined "that the record adequately reflects that no plea bargain was offered." "[C]ontested fact issues ordinarily may not be decided on affidavits alone, unless the affidavits are supported by other evidence in the record." U.S. v. Hughes, 635 F.2d 449, 451 (5th Cir. 1981) (citations omitted). However, a § 2255 motion "does not automatically mandate a hearing. When the files and records of a case make manifest the lack of merit of a Section 2255 claim, the trial court is not required to hold an evidentiary hearing." Id. Moreover, factual issues in § 2255 cases may be decided on affidavits if those affidavits are not contradicted by record evidence. Id.

Attached to the government's response to Robles's § 2255 motion is an affidavit of Robles's former attorney, Bernie Martinez, in which Martinez states that "the government never offered any type of plea bargain . . . ." The record does not contradict the assertions made in the affidavit. Robles's argument is premised on Justice Department policy encouraging plea bargaining. This policy is not relevant to the issue of a plea offer in Robles's case. Because the district court could fairly resolve the ineffective assistance of counsel claim, no evidentiary hearing was necessary. See U.S. v. Smith, 915 F.2d 959, 964 (5th Cir. 1990). The finding that no plea offer was made was not clearly erroneous, see Hughes, 635 F.2d at 451 and, consequently, is no basis for an ineffective counsel claim.

The district court's denial of Robles's § 2255 motion is

A F F I R M E D.