

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8131
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CARLIE MACKENZIE DAVIS,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. A-90-CA-375-(A-90-CR-166)
- - - - -
(October 29, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

PER CURIAM:*

Carlie MacKenzie Davis filed a motion to vacate sentence pursuant to 28 U.S.C. § 2255 asserting that the district court erred by: 1) ordering him to pay a fine although he had been deemed indigent; 2) imposing consecutive sentences in violation of the Double Jeopardy Clause; and 3) relying on information contained in the PSR.

Davis's argument regarding the propriety of a fine is a matter relative to sentencing that should have been raised on

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

direct appeal and not for the first time in a § 2255 proceeding.

United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992).

Davis's challenges to the court's reliance on information contained in the PSR also are not cognizable under a § 2255 petition because those issues also could have been raised on direct appeal. See United States v. Perez, 952 F.2d 908, 910 (5th Cir. 1992). Similarly, the other issues, whether Davis's sentence was improperly based on the fraudulent acquisition of 15 homes instead of 7 and the calculation of the loss at the full market value of the homes, are sentencing issues that should have also been presented on direct appeal and not for the first time in a § 2255 proceeding. Id.

Davis's argument concerning the applicability of a November 1991 amendment to the commentary of the sentencing guideline is frivolous. The amendment took effect after Davis was sentenced. The general rule in this Circuit is that guidelines in effect on the date of sentencing apply. Guideline changes ought not generally be applied in cases in which the defendant was sentenced before the amendment took effect. United States v. Windham, 991 F.2d 181, 183 (5th Cir. 1993).

To decide whether two statutory offenses may be punished cumulatively, this Court must apply the test enunciated in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). See United States v. Galvan, 949 F.2d 777, 781 (5th Cir. 1991). In doing so, this Court must determine whether each statute requires proof of a fact that the other does not. See Galvan, 949 F.2d at 781. Davis pleaded guilty to counts one

and two of the indictment which separately charged offenses in violation of 12 U.S.C. § 1709-2 and 42 U.S.C. § 408(g)(2). Each count charged Davis with conduct occurring on different occasions which comprised separate and distinct offenses under the offense statutes and the sentencing guidelines. Therefore, the imposition of the consecutive sentences was not a violation of the Double Jeopardy Clause.

Davis argues that a different assistant U.S. attorney should have been assigned to brief the appeal. This Court, however, has no authority over work assignments in the U.S. Attorney's Office. Nor is Davis entitled to a "second opinion" from the appellee; he is entitled only to appellate review by this Court. Davis also reurges his motion for appointment of counsel. Since his issues are meritless, counsel's assistance is not necessary.

The district court's denial of the § 2255 motion is
AFFIRMED.