IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8137
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN THOMAS JORDAN,

Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-92-CA-173(SA-90-CR-202(6))

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(October 29, 1993)

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

PER CURIAM:*

John Thomas Jordan appeals the district court's denial of his 28 U.S.C. § 2255 motion and argues that he was prejudiced because the district court erroneously sentenced him under a statute providing a more severe maximum penalty.

"[A] `collateral challenge may not do service for an appeal.'" United States v. Shaid, 937 F.2d 228, 231 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 978 (1992) (quoting United States v. Frady, 456 U.S. 152, 165, 102 S.Ct. 1584, 71

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

L.Ed.2d 816 (1982)). Relief under § 2255 is reserved for violations of a defendant's 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. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981).

If a defendant alleges a fundamental constitutional error, he may not raise the issue for the first time in a § 2255 motion without showing both "cause" for his procedural default and that "actual prejudice" resulted from the error." Shaid, 937 F.2d at 232. The Government properly invoked the procedural bar in this case. See United States. v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992). Because Jordan fails to show "actual prejudice" for reasons set forth below, we need not address the issue whether there was "cause" for his failure to directly appeal his sentence.

The parties concede that Jordan was sentenced under 21 U.S.C. § 841(b)(1)(C), which provides a maximum 20-year term of imprisonment, and that § 841(b)(1)(D) was the correct provision with only a five-year maximum term.

Jordan's argument of prejudice is based on his erroneous belief that his offense level, under the appropriate statute, would have been 20, based on a quantity of marijuana between 40 and 60 kilograms, rather than 26, based on a quantity between 100 and 400 kilograms of marijuana. His base offense level, however, would still have been based on his relevant conduct. See § 1B1.3.

"[S]o long as the information has some minimum indicium of reliability," the district court may consider the PSR and any other information when determining the sentence. United States v. Vela, 927 F.2d 197, 201 (5th Cir.), cert. denied, 112 S.Ct. 214 (1991) (internal quotation marks omitted). The PSR indicated that the conspiracy involved 400 pounds (181.5 kilograms) of marijuana. Nor is the district court bound by the quantity of drugs specified in the indictment or in the count of conviction. United States v. Sarasti, 869 F.2d 805, 806 (5th Cir. 1989). Further, "the quantity of drugs does not constitute an element of the crime; rather, quantity is a fact to consider in sentencing." United States v. Bounds, 985 F.2d 188, 194 (5th Cir.), cert. denied, ___ S.Ct. ___, 1993 WL 206981 (Oct. 4, 1993). Therefore, because Jordan's base offense level, under any sentencing scheme, would have been 26, he fails to show actual prejudice.

Nor can Jordan show prejudice by pointing to the different maximum prison terms mandated by the subsections at issue. Even though the available range of 51 to 63 months would have been limited to 51 to 60 months by the statutory limit under § 841(b)(1)(D), Jordan does not demonstrate how such a limitation would have affected the district judge's decision to downwardly depart from that range to 46 months. Cf. United States v. Garcia, 693 F.2d 412, 415 (5th Cir. 1982) (requiring a showing on direct appeal that judge relied on inaccurate information to demonstrate a due-process violation).

Jordan's failure to show prejudice undermines his invocation of the "rule of lenity," which requires the district court to

construe ambiguous criminal statutes in favor of the defendant. See United States v. Hartec Enterprises, Inc., 967 F.2d 130, 133 (5th Cir. 1992).

The only exception to the cause-and-prejudice test is when the failure to grant habeas relief would result in a "manifest miscarriage of injustice," i.e., in the "extraordinary case ... in which a constitutional violation has probably resulted in the conviction of one who is actually innocent." Shaid, 937 F.2d at 232 (internal quotation marks omitted). Because Jordan does not contend that he was "actually innocent" of the crime or offer new evidence demonstrating his innocence, failure to grant relief in this case would not result in a miscarriage of justice.

For reasons set forth above, the district court's denial of Jordan's § 2255 motion is AFFIRMED.