IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8174
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE JOSEPH TROUTMAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-90-CA-058(W-89-CR-108))

(February 14, 1994)

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

PER CURIAM:[*]

Defendant-Appellant George Joseph Troutman, a federal prisoner, appeals the dismissal of his habeas petition, filed under 28 U.S.C. § 2255. With the exception of Troutman's contention that

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

substitute counsel at sentencing was ineffective in failing to object to inclusion of convictions based on uncounseled pleas of guilty in calculating Troutman's sentence, we find his appeal to be unmeritorious and affirm the district court's rejection of his arguments. We are constrained, however, to recognize the potential merit of his said ineffective assistance claim grounded in the matter of uncounseled pleas of guilty and therefore vacate and remand for reconsideration of that issue.

I

FACTS AND PROCEEDINGS

In 1989, Troutman was convicted by a jury of being a convicted felon in possession of a firearm. He was sentenced to 180 months of imprisonment pursuant to 18 U.S.C. § 924(e)(1).

Proceeding pro se, Troutman appealed, and we affirmed his conviction and sentence. United States v. Troutman, No. 90-8237 (5th Cir. Aug. 14, 1991) (unpublished). The following facts, set forth in that opinion, are pertinent to the present appeal. Troutman was stopped by the Chief of Police of Lorena, Texas, Thomas Frost, after Frost observed Troutman operating his vehicle in a manner consistent with drunk driving. Chief Frost determined that Troutman was too intoxicated to be operating a motor vehicle and arrested him for driving while intoxicated. Troutman was handcuffed and placed in Chief Frost's patrol car. When Chief Frost radioed in the information on Troutman's driver's license, he was informed that Troutman was wanted on a federal parole violation for bank robbery and was possibly armed and dangerous. Chief Frost

then searched Troutman's car. When Chief Frost opened the front passenger door, he saw what appeared to be a box of cartridges protruding from beneath the passenger seat. When he leaned over to retrieve the box, he saw a Ruger .44 caliber pistol lodged between the passenger seat and the center console.

Troutman filed two motions pursuant to 28 U.S.C. § 2255; one prior to sentencing, and one while his direct appeal was pending.[1] The district court made no ruling on the motions until after the appeal was completed, at which time the court ordered the government to answer Troutman's motion and to show cause why the motion should not be granted. The government responded to Troutman's motions and Troutman filed a rebuttal. The district court determined Troutman's claims to be without merit and denied his motion. This appeal followed.

II

ANALYSIS

A. Ineffective Assistance of Counsel

Troutman argues that the district court erred in rejecting his claim that his counsel rendered ineffective assistance. He posits that the district court should have intervened when it became apparent that his court-appointed counsel, B. Dwight Goains, was incompetent and that the court erred in dismissing the claims without conducting an evidentiary hearing.

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[1] Although Troutman's second motion was entitled "SUPPLEMENT IN SUPPORT OF PRO-SE MOTION FOR A NEW TRIAL," it was filed after the district court had already denied the motion for a new trial. The district court properly construed the untimely motion as a motion pursuant to § 2255.

To prove that counsel was ineffective, a petitioner must show that counsel's performance was deficient (cause) and that the deficient performance prejudiced his defense (prejudice). See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts indulge a strong presumption that counsel's performance was not deficient. Id. at 689. To establish prejudice, a petitioner must show that counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. Lockhart v. Fretwell, ____ U.S. ____, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993).

Troutman suggests that he was framed. He states that, on the day of his arrest, a person named Curtis Stallard, who was previously unknown to him, was riding in his car. Troutman alleges that Stallard, either with or without Chief Frost's knowledge, "planted" the pistol in Troutman's car. He argues that Attorney Goains was ineffective because he failed to (1) call potential favorable witnesses at trial; (2) go to the scene of the arrest where he could have determined information that would have impeached Chief Frost's testimony; and (3) effectively investigate and cross-examine Frost and Stallard to establish that the gun was planted. He also argues that both Goains and Walter M. Reaves, Troutman's substitute counsel at sentencing, were ineffective for failing to challenge as uncounseled his prior convictions used to enhance his sentence under § 924(e).

1. Failure to Call Witnesses

Troutman argues that Goains was ineffective for failing to

call potential favorable witnesses, including other officers at the jail "who could have testified to Troutman's state of intoxication," Chief Frost's ex-wife, and a man named Jack Golding, both of whom would have testified to Frost's propensity for falsifying statements and reports. He also faults counsel's failure to call patrons of the bar Troutman left shortly before being arrested, who would have testified that he was not intoxicated. Troutman acknowledges that, through an investigator, his counsel interviewed at least eight witnesses, but argues that he should have interviewed 55.

We view with great caution claims of ineffective assistance of counsel when the only evidence of a missing witness's testimony is from the defendant. United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1993), cert. denied, 467 U.S. 1251 (1984). Troutman provided no evidence, other than his own conclusional allegation, to suggest that any witness would testify that he was not intoxicated or to suggest that Frost's ex-wife would testify that Frost would falsify reports.[2]

As for the testimony that Troutman insists would have been supplied by Jack Golding, Troutman included in his pleadings the investigator's report which indicated that Golding had stated that Frost would lie and falsify reports to make his cases stronger. Troutman alleges that Goains discounted Golding as a potential witness, stating that "Old Jack is just out to get Frost." Thus,

[2] The only evidence Troutman offers relative to Frost's ex-wife is a complaint filed by the woman against Frost for physical assault and a newspaper article reporting the event.

Goains' refusal to call Golding as a witness was a strategic decision. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" Strickland, 466 U.S. at 690. Troutman's assertion that counsel was ineffective for failing to call witnesses is insufficient for post-conviction relief.

2. Failure to Impeach Frost Effectively

Troutman argues that if Goains had visited the scene of the arrest he would have discovered the information that could have been used to impeach the credibility of Chief Frost. He argues that such information would have refuted Frost's testimony regarding the distance that he had followed Troutman before stopping him, the speed limit, and the direction of the road.

In cross-examining Frost, Goains demonstrated inconsistencies between Frost's report, prior statements made by Frost, and Frost's trial testimony. He also raised the suggestion that Stallard had possession of the gun. Even assuming that Goains was ineffective for failing to investigate the scene of the arrest, however, Troutman must allege with specificity how the result of the investigation would have altered the outcome of the trial. See United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1909). The information that Troutman suggests would have been gleaned from such an investigation was not directly relevant to the issue of Troutman's guilt. Further, it is unlikely that the information would have had any significant effect on the jury's determination regarding Frost's credibility.

3. Failure to Implicate Stallard

Troutman argues that Goains failed to investigate properly to determine whether Stallard framed Troutman by putting the gun and ammunition in his car. He argues that Goains should have attempted to trace the gun to Stallard and should have investigated more thoroughly to refute Stallard's trial testimony that he did not "have anything to do with guns." Troutman also argues that Goains should have investigated to determine if Stallard had a motive for disavowing the gun, such as whether he were on parole or probation.

The trial record indicates that Goains vigorously cross-examined Stallard and attempted to impeach Stallard's credibility. Goains established inconsistencies between Stallard's testimony and his earlier statement concerning the possession of the firearm. Id. He also raised the possibility that it was Stallard, rather than Troutman, who had possessed the gun. In his summation, Goains also raised the possibility that Stallard had planted the gun in the car. The investigator's report indicates that Stallard was on probation for driving while intoxicated.

With the exception of offering extrinsic evidence, Goains covered most of the defensive areas suggested by Troutman. Goains' performance in investigating and attempting to impeach Stallard meets that required by Strickland, 466 U.S. at 690-91.

4. Failure to Challenge Prior Convictions

The record reveals that Attorney Reaves challenged the prior convictions used for the enhancement under § 924(e) by arguing, inter alia, that the government did not sufficiently prove three

prior convictions and that Troutman's simple burglary convictions were not "crimes of violence" for purposes of § 924(e). Troutman re-argued the claims on appeal without success. He also argued on appeal that the prior convictions were constitutionally infirm because they were uncounseled. We declined to consider the argument, noting that it had not been raised in the district court.

In the present appeal, Troutman argues that Reaves was ineffective for failing to determine that the prior convictions, obtained through uncounseled guilty pleas, were invalid for purposes of enhancement.[3] The government argues that Troutman raised this ground regarding ineffective assistance for the first time in his rebuttal to the government's answer to his § 2255 motion; therefore, the district court did not err in not addressing the claim. On the contrary, though, a review of the record reveals that Troutman raised the claim in his memorandum of law supporting his motion for summary judgment. In Sherman v. Hallbauer, 455 F.2d 1236, 1242 (5th Cir. 1972), we held that a memorandum in opposition to motion for summary judgment should have been construed, under Fed. R. Civ. P. 15, as a motion to amend the complaint, and that the interests of justice required that the motion to amend be granted. Similarly, the district court should

[3] Troutman also argues that Attorney Goains was aware that the prior convictions were 33 years old and that they were not crimes of violence, but failed to obtain his records, thereby causing him to suffer the enhanced sentence. The record reveals that both of these arguments were raised and rejected at Troutman's sentencing and on appeal; therefore, even assuming that Goains was ineffective for failing to obtain the records, Troutman was not prejudiced.

have construed Troutman's memorandum as a motion to amend his complaint and should have addressed the claim he raised in that memorandum.

If Troutman's allegation that he advised his attorneys that his prior convictions were uncounseled is true, he may state a facially valid claim that his counsel's performance was deficient. See United States v. Tucker, 404 U.S. 443, 449, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). Thus, we are compelled to vacate the judgment of the district court dismissing Troutman's motion, and remand his case so that the district court may determine this issue. The other grounds of ineffective assistance urged by Troutman are without merit.

B. Enhancement of Sentence

Troutman argues that his sentence was improperly enhanced under § 924(e)(1) because his conviction for being a felon in possession of a firearm is not a "crime of violence" which would allow enhancement of his sentence as a career offender under Sentencing Guidelines § 4B1.1(2), and because convictions more than 15 years old cannot be used for enhancement purposes under Guidelines § 4A1.2(e). As noted by the district court, Troutman raised these arguments in this court on direct appeal and we thoroughly addressed them at that time. In so doing, we determined that Troutman's sentence was not enhanced based on the provisions of the Guidelines, but under the statutory provision of § 924(e)(1), which does not require that the offense triggering the application of § 924(e) be considered a crime of violence and which

does not contain a time limit beyond which prior convictions may not be used for enhancement.

"[I]ssues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 Motions." United States v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1986). Our prior finding in Troutman's direct appeal constitutes the "law of the case" and forecloses Troutman's current challenge based on the same claim. United States v. McCollom, 664 F.2d 56, 59 (5th Cir. 1981), cert. denied, 456 U.S. 934 (1982).

Troutman argues that "clarifying amendments" have been made to the Guidelines, mandating reversal of our prior determination. The "amendments" to which Troutman refers were apparently made prior to Troutman's sentencing in 1990 and were therefore in effect when we rejected Troutman's arguments previously. Even assuming that the Guidelines which Troutman asserts to be relevant had been amended subsequently, however, his sentence was not enhanced based on the Guidelines, but on § 924(e). Thus, the amendment would not affect our prior determination.

Troutman also argues that amendments to § 924(e)(2)(B)(i)(ii) (defining "crime of violence"), made prior to his sentencing, when read in conjunction with the Guidelines, dictate that convictions over 15 years old cannot be counted for enhancement under § 924(e). Troutman's argument is merely another challenge to our interpretation of § 924(e) and are foreclosed under the "law of the case" doctrine.

C. Perjured Testimony

Troutman argues that Stallard and Frost committed perjury and that the trial court, the government, and defense counsel knew of the perjury. In his reply brief, Troutman argues that the record, including the arrest report, the prior statements of Stallard and Frost, the investigator's report, the trial testimony of the Alcohol Tobacco and Firearms agent,[4] and the affidavits provided in support of his rebuttal to the government's answer to his § 2255 motion, all support his allegations of perjury. To prevail on a claim that perjured testimony entitles one to post-conviction relief, the defendant must prove that the testimony was actually false, that the prosecutor knew that it was false, and that it was material to the issue of guilt. See May v. Collins, 955 F.2d 299, 315 (5th Cir.), cert. denied, 112 S.Ct. 1925 (1992).

The evidence of perjury that Troutman refers to is merely evidence conflicting with Troutman's assertion that he was framed. Troutman's allegations are based solely on his conclusion that any testimony inconsistent with his defensive theory must have been perjured. He points to no specific evidence to support his claim that testimony was perjured and that the government used it knowingly. Troutman's allegation is without merit.

D. Evidentiary Hearing

Finally, Troutman argues that the "district court erred when

[4] In his rebuttal to the government's answer to his § 2255 motion, Troutman argued that the ATF agent had committed perjury. Insofar as Troutman is re-urging this claim, it is without merit. As noted by the district court, the allegedly perjurious statement made by the agent is not in the trial record.

it denied and dismissed the Section 2255 without holding an evidentiary hearing to establish a record for appeal on the factual issues tendured [sic] to it." Specifically, he argues that the court could not find that the deficiencies of defense counsel were "trial strategy" without conducting a hearing.

A § 2255 motion can be denied without hearing only if the motion, files, and records of the case conclusively show that the prisoner is not entitled to relief. United States v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992). An evidentiary hearing is not necessary to resolve charges of ineffective assistance of counsel if the record is adequate. United States v. Smith, 915 F.2d 959, 964 (5th Cir. 1990).

With the possible exception of the ineffective assistance claim based on his uncounseled prior convictions, which we are remanding, none of the claims raised by Troutman required an evidentiary hearing. The record was adequate for the district court to determine that Troutman's claims were without merit.

Finally, Troutman lists as an issue, but does not argue, that the district judge "should have recused self from hearing 2255 in light of complaint filed by Troutman." Troutman does not refer to this claim again in his brief. Thus, we decline to consider it on appeal. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993).

AFFIRMED in part; VACATED and REMANDED in part.