IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-8519

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RALPH R. GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-92-CV-283 (SA-90-CR-286-1))

(February 18, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Proceeding pro se and in forma pauperis, Ralph R. Garcia appeals the district court's denial of relief under 28 U.S.C. § 2255. Finding no error, we affirm.

I.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Ralph R. Garcia was indicted by a federal grand jury on October 18, 1990, and charged with two counts of drug trafficking: distribution of cocaine on or about June 27, 1990, in violation of 21 U.S.C. § 841(a)(1) (Count I); and distribution of heroin on or about July 4, 1990, in violation of 21 U.S.C. § 841(a)(1) (Count II). Pursuant to a written plea agreement, Garcia pleaded guilty to Count II in exchange for the government's agreement to dismiss Count I and not to oppose Garcia's request for credit in sentencing for his acceptance of responsibility.

On March 15, 1991, the district court sentenced Garcia to a 75-month term of incarceration and a five-year term of supervised release. Garcia was also ordered to pay a $50 special assessment. Garcia appealed, arguing that the district court erred in failing to grant him credit for acceptance of responsibility. This court affirmed the district court's judgment. United States v. Garcia, No. 91-5586 (5th Cir. Sept. 25, 1991) (unpublished opinion), cert. denied, 112 S. Ct. 1214 (1992).

On March 24, 1992, Garcia filed in federal district court a motion to vacate or correct his sentence pursuant to 28 U.S.C. § 2255. Garcia made numerous arguments in his motion: (1) that the district court had failed to advise him of the five-year maximum term of supervised release; (2) that the district court had misapplied the United States Sentencing Guidelines (the Guidelines) in determining his sentence; (3) that the district

court had failed to rule on his objections to his pre-sentence investigation report (PSI); (4) that he had been wrongfully denied credit at sentencing for having accepted responsibility; (5) that his guilty plea had been involuntary; (6) that the district court had breached the plea agreement and thus had violated Federal Rule of Criminal Procedure 11(e)(3); (7) that the district court had violated 28 U.S.C. § 851(a)(1) because he had not been informed that the court would rely on his prior convictions to "enhance his sentence"; and (8) that he had received ineffective assistance from his appellate counsel on direct appeal.

The magistrate judge to whom Garcia's case was referred recommended that Garcia's motion be denied in all respects except that his five-year term of supervised release should be reduced to a three-year term because the district court had failed to advise Garcia of the five-year maximum term of supervised release. Garcia objected to the magistrate's recommendation concerning the denial of his motion. After a de novo review, the district court accepted the magistrate's recommendations and entered judgment accordingly. This appeal ensued.

II.

Garcia first argues that the district court misapplied § 1B1.3 of the Guidelines by relying on conduct which occurred after the date on which he sold heroin to a federal undercover

agent, thus improperly calculating the amount of drugs to be used for sentencing. This argument, however, is without merit.

This court has made it clear that 28 U.S.C. § 2255 provides recourse only for "transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." United States v. Perez, 952 F.2d 908, 909 (5th Cir. 1992) (quoting United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981)); see United States v. Prince, 868 F.2d 1379, 1382 (5th Cir.), cert. denied, 493 U.S. 932 (1989). "A district court's technical application of the Guidelines does not give rise to a constitutional issue." United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992).

Garcia has not made a constitutional argument or suggested any reason why affirmance of the district court's denial of his motion would result in a miscarriage of justice. Further, this issue could have been raised on direct appeal. Garcia has thus stated no grounds for § 2255 relief on this issue.

III.

Garcia next asserts that the district court failed to address and make findings regarding his objections to information in his PSI and to correct allegedly erroneous information in the PSI. Nonetheless, because this is a non-constitutional issue which could have been raised on direct appeal, it is not cognizable in a § 2255 motion.

IV.

Garcia further contends that the district court erred in not granting him credit in sentencing for his acceptance of responsibility. However, Garcia previously raised this contention on direct appeal, and this court rejected it. See United States v. Garcia, No. 91-5586 (5th Cir. Sept. 25, 1991) (unpublished opinion), cert. denied, 112 S. Ct. 1214 (1992). An issue raised and disposed of in a previous appeal from an original judgment of conviction cannot be considered in a § 2255 motion. United States v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1986). Garcia's argument is thus without merit.

V.

Garcia also argues that the district court violated Federal Rule of Criminal Procedure 11(e)(3) and the Constitution by breaching the plea agreement into which Garcia entered. He asserts that the district court assessed a sentence greater than the 18-to-24-month term he alleges was part of his plea agreement. If we construe his brief most liberally, he also argues that his plea was unlawfully induced because he had pleaded guilty under the assumption that the 18-to-24-month term discussed during plea negotiations was the sentence he was to receive and that thus his conviction was invalid. We address Garcia's claim concerning his allegedly unlawful guilty plea first.

Garcia's constitutional claim that his plea was unlawfully induced could have been raised on direct appeal. To raise this issue for the first time on collateral review under § 2255, a petitioner must show both "cause" for his procedural default and "actual prejudice" resulting from the perceived error. United States v. Drobny, 955 F.2d 990, 994-95 (5th Cir. 1992) (citing United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 978 (1992)). If the petitioner fails to meet his burden of showing cause and prejudice, he is procedurally barred from attacking his conviction or sentence. Id. at 995. To invoke this procedural bar, however, the government must raise it in district court. Id. Because the government failed to do so in this case, we can thus consider this issue in Garcia's § 2255 motion. See United States v. Pierce, 959 F.2d 1297, 1301 n.7 (5th Cir.), cert. denied, 113 S. Ct. 621 (1992); Drobny, 955 F.2d at 995.

A guilty plea is valid if it is made knowingly and voluntarily. Harmason v. Smith, 888 F.2d 1527, 1529 (5th Cir. 1989). If a defendant understands the nature of the charges against him and the consequences of his plea and still chooses voluntarily to plead guilty, the plea should be upheld. See Bonvillain v. Blackburn, 780 F.2d 1248, 1250-51 (5th Cir.), cert. denied, 476 U.S. 1143 (1986). As long as Garcia understood the possible length of his sentence, he was aware of the consequences of his plea. Hobbs v. Blackburn, 752 F.2d 1079, 1082 (5th Cir.), cert. denied, 474 U.S. 838 (1985). Moreover, a defendant's

solemn declaration in open court that he is aware of the consequences of his plea but that he still chooses to plead guilty carries a strong presumption of veracity. Blackledge v. Allison, 431 U.S. 63, 74 (1977). A defendant generally may not recant sworn testimony made at a plea proceeding. United States v. Fuller, 769 F.2d 1095, 1099 (5th Cir. 1985).

Garcia offers no support for his claim that his guilty plea was constitutionally infirm. The signed, written plea agreement into which he entered specifically states that Garcia's sentence was "to be imposed . . . in accordance with the United States Sentencing Guidelines." The agreement also states that it was "understood between the parties that the promises made by the Government regarding application of the guidelines and imposition of sentence, set forth above, do not bind the sentencing court." Further, in the agreement the government made "no prediction concerning the actual term of imprisonment." The agreement also states that the parties to the agreement recognized that any estimates made regarding sentencing during plea negotiations were "not binding on the court and [were] not intended to induce and [did] not induce [Garcia] to enter into the plea bargain agreement and to plead guilty."

Garcia testified in open court at his plea hearing that he understood the contents of the plea agreement and that the maximum possible punishment he could receive was "up to twenty years in jail," "a million dollar fine," and "a mandatory three-year term of supervised release." Garcia also testified that he

understood that his sentence would be calculated under the Guidelines. When asked if he had any questions about the Guidelines, he responded negatively. He further testified (1) that he was pleading guilty "freely and voluntarily, and knowing full well what [could] happen to [him] by being found guilty"; (2) that he had not been threatened, coerced, or forced into pleading guilty; and (3) that he had not been made any promises as to what his sentence would specifically be.

Garcia has offered no evidence to overcome the strong presumption of truth which accompanied his testimony. His claim that he was unaware that his sentence could exceed an 18-to-24-month range is directly contradicted not only by his testimony but also by his signature on the plea agreement. Further, he does not contend that he is not guilty but rather only that his sentence should be reduced. We thus cannot determine that his guilty plea was involuntarily and unknowingly made.

Garcia also argues that the district court violated Federal Rule of Criminal Procedure 11(e)(3) in breaching the plea agreement. This argument, however, is without merit because the district court was not bound by the plea agreement and, as such, did not breach it.

VI.

Garcia additionally contends that the district court violated 21 U.S.C. § 851(a)(1) because he had not been informed in writing before entry of his plea that prior convictions would

be relied upon for sentencing and that his probation officer used prior convictions to "enhance" his sentence. This argument is also without merit. Garcia's sentence was not "enhanced" based on his prior convictions. Perhaps Garcia mistakenly refers to the calculation of his criminal history category, which relied upon four prior convictions. Regardless, he has not shown any error on the part of the district court.

VII.

Moreover, Garcia asserts that the district court failed to conduct a de novo review of the record and improperly delayed ruling on his § 2255 motion. The record belies his assertions.

The district court's order of June 28, 1993, states that the court "conducted a de novo review of the Magistrate's Memorandum and Recommendation and finds that the Petitioner's objections to the Magistrate's Recommendation are without merit." Garcia offers no evidence to controvert the district court's statement. Further, although Garcia contends that the district court needlessly delayed its ruling, he has neither alleged nor shown that any delay was purposeful or that any of his constitutional rights were violated. His argument is thus without merit.

VIII.

Garcia finally contends that he received ineffective assistance from his appellate counsel on direct appeal because counsel failed to include in the appellate brief all the issues

which were contained in his objections to the PSI. He makes bald assertions that a United States Attorney told his appellate counsel that an appeal on all the issues would work a revocation of Garcia's plea agreement and would lead to the filing of additional charges. He also states that his appellate counsel denied his request to file an amended brief.

To support a claim for ineffective assistance of counsel, Garcia must show that counsel's performance was deficient and that the deficient performance prejudiced him so as to deprive him of a fair appeal. See Strickland v. Washington, 466 U.S. 668, 687 (1985). We first note that Garcia does not have a constitutional right "to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Jones v. Barnes, 463 U.S. 745, 751 (1983) (emphasis added); see Mayo v. Lynaugh, 882 F.2d 134, 139 (5th Cir. 1989), cert. denied, 112 S. Ct. 272 (1991). Further, Garcia fails to establish not only which issues his appellate counsel failed to raise on direct appeal but also that he was prejudiced in any way by counsel's failure to do so. He is thus not entitled to relief on his claim of ineffective assistance of counsel.

IX.

For the foregoing reasons, we AFFIRM the judgment of the district court.