IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8568
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM EUGENE MERRITT,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-93-CA-113 (W-88-CR-021))

(May 24, 1994)

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

PER CURIAM:*

Defendant-Appellant William Eugene Merritt collaterally attacked the sentence imposed following his jury conviction on firearms charges, filing a motion pursuant to 28 U.S.C. § 2255. He

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

now appeals the district court's dismissal of that motion. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

In a superseding indictment, Merritt was charged with three counts of being a convicted felon in possession of a firearm transported in interstate commerce. A jury found him guilty of all three counts. The district court sentenced him to three concurrent prison terms of thirty years. On direct appeal we affirmed the judgment against Merritt. See United States v. Merritt, 882 F.2d 916, 921 (5th Cir. 1989), cert. denied, 496 U.S. 907 (1990) (Merritt I).

Proceeding pro se and in forma pauperis, Merritt subsequently filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. He proffered nine grounds for such relief: (1) his conviction was the result of prosecutorial misconduct; (2) his right to possess a firearm had been restored under state law: (3) there was insufficient evidence to convict him because the government had failed to prove that his civil rights had not been restored; (4) the Sixth Amendment right to compulsory process of witnesses was violated because subpoenas were never issued for one of his witnesses; (5) the statutes under which he was convicted are unconstitutional; (6) the court erred by admitting the penitentiary packets of his prior state convictions; (7) his sentence was improperly enhanced because one of the underlying state convictions, a burglary conviction from 1978, was invalid; (8) his

trial counsel was ineffective; and (9) his appellate counsel was ineffective. The district court dismissed Merritt's action. Continuing to proceed pro se, Merritt timely appealed, again raising the nine grounds of error that he had raised in district court.

II

ANALYSIS

There are four separate grounds upon which a federal prisoner may move to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255: The sentence was imposed in violation of the Constitution or laws of the United States; the court was without jurisdiction to impose the sentence; the sentence exceeds the statutory maximum sentence; and the sentence is "otherwise subject to collateral attack." 28 U.S.C. § 2255; see United States v. Cates, 952 F.2d 149, 151 (5th Cir. cert. denied, 112 S.Ct. 2319 (1992). A person who has been convicted and has exhausted or waived his right to appeal is presumed to have been "`fairly and finally convicted.'" United States v. Shaid, 937 F.2d 228, 231-32 (5th Cir. 1991) (en banc) (citation omitted), cert. denied, 112 S.Ct. 978 (1992). "[A] `collateral challenge may not do service for an appeal.'" Id. at 231 (citation omitted).

On direct appeal, Merritt asserted numerous grounds of error, e.g., (1) a prior conviction from 1971 being used for enhancement purposes, (2) the language in the superseding indictment, (3) the admission of certain testimony regarding the interstate nexus of the weapons, (4) the admission of three guns into evidence, (5) the

alleged denial of his right to a speedy trial, (6) the addition to a search warrant, and (7) a warrantless search that took place in a motel room. Merritt I, 882 F.2d at 918-21. Merritt now raises an entirely new set of complaints.

A. Penitentiary Packets

Allegations of error that are not of constitutional or jurisdictional magnitude and that could have been raised on direct appeal may not be asserted on collateral review in a § 2255 motion. United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. Unit A Sep. 1981). Such errors will be considered only if they could not have been raised on direct appeal, and, if condoned, would result in a complete miscarriage of justice. Shaid, 937 F.2d at 232 n.7. There is no allegation or indication from the record that Merritt's claims regarding the allegedly improper admission of the penitentiary packets or the trial court's failure to conduct an evidentiary hearing regarding those convictions could not have been raised on direct appeal. We therefore need not address these claims because they could have been raised on direct appeal. See Capua, 656 F.2d at 1037. Neither then need we address the miscarriage-of-justice prong of the standard. Shaid, 937 F.2d at 232 n.7.

B. Ineffective Assistance of Counsel

Issues that implicate matters of constitutional or jurisdictional magnitude, raised by Merritt for the first time on collateral review, need not be addressed unless he shows "both `cause' for his procedural default, and `actual prejudice'

resulting from the error." Shaid, 937 F.2d at 232 (citation omitted). The only exception to the cause-and-prejudice test is the "extraordinary case . . . in which a constitutional violation has probably resulted in the conviction of one who is actually innocent." Id. at 232 (internal quotations and citation omitted).

In this case, Merritt does not address the cause-and-prejudice test. Nevertheless, he raises two grounds of error regarding the allegedly defective performances of his trial and appellate counsel. As constitutionally ineffective assistance of counsel can operate as cause for procedural default, we must examine that issue. See Murray v. Carrier, 477 U.S. 478, 488-92, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (federal habeas petition).

To prove ineffective assistance of counsel, a defendant must affirmatively show that (1) his counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In evaluating such claims, we indulge in "a strong presumption" that counsel's representation fell "within the wide range of reasonable professional competence." Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988). To prove deficient representation, a defendant must show that his attorney's conduct "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. In determining prejudice, a reviewing court must examine "whether the result of the proceeding was fundamentally unfair or unreliable." Lockhart v. Fretwell, _____ U.S. _____, 113 S.Ct. 838, 842,

122 L.Ed.2d 180 (1993).

1. Appellate Counsel

Merritt states that his appellate counsel "fail[ed] to research the law in relation to the facts of the case and apply the law accordingly, fail[ed] to raise issues on appeal that rose to the level of plain error, fail[ed] to bring issues on appeal that were objected to by trial counsel, and fail[ed] to bring issue of ineffective assistance of counsel." He further asserts that appellate counsel was ineffective by failing to research 28 U.S.C. § 921(a)(20).

Merritt's appellate counsel raised numerous issues on appeal, and there is no indication that he did not research the law or the facts corresponding to this case. See Merritt I, 882 F.2d at 918-21. Merritt's suggestion that 18 U.S.C. § 921(a)(20) could have helped his case is unavailing. That section defines "crime punishable by imprisonment for a term exceeding one year," which appears in § 922(g)(1), one of the statutes Merritt was charged with violating. See 18 U.S.C. § 922(g)(1). Based upon a reading of his § 2255 motion, Merritt appears to be arguing on appeal that the government did not prove that he had been "convicted" as defined by § 921(a)(20) and that the jury had not been instructed of the definition of "conviction." Section 921(a)(20) expressly indicates that "[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." In this case, Dennis Tynes of the Waco Police Department testified regarding Merritt's

penitentiary packets. These exhibits reflect that: on August 13, 1971, Merritt was convicted of burglary; on May 9, 1978, Merritt was convicted of burglary of a habitation; and on August 10, 1982, Merritt was convicted of burglary of a building. Merritt's argument is frivolous; his attorney's failure to raise it on appeal does not amount to ineffective assistance of counsel.

Although Merritt asserts on appeal that his appellate counsel failed to "raise issues on appeal that rose to the level of plain error and fail[ed] to bring issues on appeal that were objected to by trial counsel," Merritt does not specify what theses issues are. As they have not been briefed, these assertions need not be examined. See Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987) (explaining that issues listed but not briefed are deemed abandoned). In any event, "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." The Constitution guarantees criminal defendants a competent attorney; it does not guarantee that counsel will recognize or raise every conceivable complaint. Murray, 477 U.S. at 486. The Sixth Amendment, moreover, does not require counsel to raise an issue just because the defendant specifically requests that it be presented to the court. Jones v. Barnes, 463 U.S. 745, 750-54, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

Merritt's argument that his appellate counsel was ineffective by failing to assert on appeal that trial counsel was ineffective

is unavailing. As a general rule, ineffective-assistance-of-counsel claims cannot be resolved on direct appeal. See United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988).

2. Trial Counsel

Merritt contends on appeal that "the errors and omissions of defense counsel reflect a failure to exercise the skill, judgment, and diligence of a reasonably competent criminal defense attorney and denied appellant his right to effective assistance of counsel." He states that there was hearsay testimony and repeated questioning about Merritt "being a dope dealer." But Merritt does not provide further specifics. To the extent that he alludes to the arguments set forth in his original motion, they are abandoned because they are not presented in the text of his brief. See Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993). Although we liberally construe the brief of pro se appellants, arguments must nevertheless be briefed to be preserved. Id.

In any event, Merritt has not shown "prejudice" under Strickland because, even if Merritt's counsel should have objected to references to Merritt's involvement with controlled substances, a review of the evidence indicates that the result of Merritt's trial was not rendered "fundamentally unfair or unreliable." See Fretwell, 113 S.Ct. at 842. John Yates of the Waco Police Department testified that, while working as an undercover agent in November 1986, he was contacted by Roger Craig, who expressed an interest in introducing Yates to Merritt. On November 14, 1986,

Agent Yates met Merritt and Paul Chapman at 3818 Windsor. While inside, Agent Yates noticed, among other things, a rifle atop a freezer. In light of the large number of persons who were in the house at the time, Yates requested to return later. When Yates and Craig returned, Merritt was sitting on a bed in the back bedroom holding a Mossberg pump shotgun. Not knowing Merritt's intentions, Agent Yates drew his own gun, whereupon Merritt dropped the shotgun. The meeting continued; Merritt even offered to sell to Agent Yates the shotgun for $85, and the agent accepted the offer.

Sergeant Holly Holstien of the Waco Police Department testified that on November 14, 1986, he received a call for assistance. Equipped with a search warrant, a police platoon proceeded to Windsor Street. Upon entering Merritt's house, Sergeant Holstien saw Merritt emerge from the bedroom with a fully loaded and cocked Sturm Ruger, Blackhawk, .357 magnum revolver in his hand. After being ordered to release it, Merritt dropped the revolver onto the floor.

Officer Gary Harrison of the Waco Police Department testified that on December 23, 1986, he received information that Merritt was staying at the Motel 6 in Bellmead. Upon arriving at the motel, agents telephoned room 116 and asked Merritt to come out. Five minutes later, Merritt emerged from room 116 and was taken into custody. Harrison and another officer entered the room to ensure that no one had remained inside. There they found an open suitcase with a Raven Arms .25 automatic pistol. After his arrest, Merritt requested that his property be placed in his Lincoln Continental,

which was parked out front. According to Officer Harrison, Merritt was concerned that he would lose his property.

Robert Alley, a supervisory special agent for the Bureau of Alcohol, Tobacco and Firearms (BATF), testified that the Mossberg shotgun, the Sturm Ruger .357-caliber revolver, and the Raven Arms .25-caliber pistol had moved in interstate commerce. Earl Dunagan, an BATF special agent, testified that the Mossberg shotgun, the .357 magnum, and the Raven .25 were operable firearms. Officer Dennis Tynes of the Waco Police Department testified regarding Merritt's penitentiary packets from the Texas Department of Corrections. As noted, these exhibits reflect that: on August 13, 1971, Merritt was convicted of burglary; on May 9, 1978, Merritt was convicted of burglary of a habitation; and on August 10, 1982, Merritt was convicted of burglary of a building.

The defense presented testimony from Ronald Edward Regian, a friend of Merritt's. Regian testified that on December 22, 1986, he arrived at room 116 of the Motel 6. Inside the room was one Frankie Brown; one Harry Barak arrived later. The following morning Regian left. During his stay in room 116, Regian watched television, but he did not notice any luggage or weapons.

Lisa Renae Yoder, another defense witness who knows Merritt through her husband, testified that she was arrested on November 14, 1986, at 3818 Windsor. At the house were Yoder, her husband, her daughter, a man named Paul, a man named Clay, a woman, and Merritt. Mrs. Yoder testified that during the two hours she remained at 3818 Windsor, she noticed no weapons.

Defense witness James Yoder, Lisa's husband who was a friend of Merritt's, testified that on the night of November 14, 1986, he stopped by 3818 Windsor. While he was gone, renting a video, the police raided the house. Yoder testified that during his stay in the house he noticed no weapons.

Merritt testified that on November 14, 1986, he resided at 3818 Windsor with Roger Craig, Paul Chapman, and Renae Henry. He denied possessing any of the guns found in the house. Merritt explained that he would buy pawn tickets from "dope friends" because they needed money to get "dope," he would retrieve the merchandise, which he then would re-sell. On the night of November 14, 1986, the police rang the doorbell, but before Renae Henry had a chance to open the door, the police kicked it in. Merritt denied holding a gun or pointing one at Officer Holstien, and also denied holding the Mossberg shotgun when Officer Yates entered his bedroom. According to Merritt, he showed Yates some stereos, a television set, and jewelry. Merritt further stated that the motel clerk had lied about his registration at the Motel 6. Merritt asserted that the room was Harry Barak's, that the suitcases belonged to Barak, and that he (Merritt) had nothing but some clothing in the room.

"So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." Murray, 477 U.S. at 488; see

Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Merritt has not demonstrated cause for not having raised on direct appeal the issues he now raises in his § 2255 motion. As cause has not been established, we need not address prejudice.

Nevertheless, if a constitutional violation has probably resulted in the conviction of a person who is actually innocent, the cause-and-prejudice test does not end the inquiry. Shaid, 937 F.2d at 232. On appeal, however, Merritt does not assert his actual innocence; neither does the record support his suggestions to the district court and to the jury that he did not commit the crimes for which he is currently imprisoned. As set forth above, the ample evidence against Merritt indicates that an actually innocent person was not convicted. Merritt's argument that he is innocent of the offense because his right to possess weapons had been restored fails. See United States v. Thomas, 991 F.2d 206, 215 (5th Cir.), cert. denied, 114 S.Ct. 607 (1993). The following constitutional claims, therefore, need not be addressed: (1) Merritt's conviction was the result of prosecutorial misconduct; (2) his right to possess a firearm had been restored under state law; (3) there was insufficient evidence to convict him because the government had failed to prove that his civil rights had not been restored; (4) the Sixth Amendment right to compulsory process of witnesses was violated because subpoenas were never issued for one of his witnesses; (5) the statutes under which he was convicted are unconstitutional; and (6) his sentence was

improperly enhanced because one of the underlying state convictions, a burglary conviction from 1978, was invalid.

Moreover, as ineffective-assistance-of-counsel claims cannot generally be resolved on direct appeal, a motion under § 2255 is the proper procedural vehicle for such claims. United States v. Pierce, 959 F.2d 1297, 1301 (5th Cir.), cert. denied, 113 S.Ct. 621 (1992). Merritt's claims of ineffective assistance of counsel, therefore, are properly examined in this § 2255 action even if his other claims are not. Nevertheless, as indicated in the cause-and-prejudice analysis above, Merritt has not shown ineffective assistance of counsel by either his trial or appellate counsel.

CONCLUSION

For the foregoing reasons, the district court's dismissal of Merritt's § 2255 motion is

AFFIRMED.