

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8695

Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

FRANCES REDD,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-93-CA-157-JN(A-86-CR-04-01JN))

(September 30, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Frances Redd appeals the district court's denial of her petition for relief pursuant to 28 U.S.C. § 2255. She claims, among other things, that the government presented perjured testimony and that the introduction of certain evidence at trial unfairly surprised the defense. Finding the district court properly denied relief, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I. FACTS AND PROCEDURAL HISTORY

In August 1986, after a jury trial, Frances Redd was convicted of two counts of tax evasion in violation of 26 U.S.C. § 7201. Redd was sentenced to two three-year terms of imprisonment with the second term suspended. Redd was placed on supervised probation for five years. This Court affirmed Redd's convictions on direct appeal. The facts of the offense are set forth in detail in that opinion. Briefly, the government proved that Redd cashed checks written by customers of her employer, the Koen family jewelry business, converted those funds for her own use and failed to pay taxes on the income.

On March 22, 1993, Redd filed a motion to vacate, set aside, or correct the sentence pursuant to 28 U.S.C. § 2255. She alleged that she was convicted on the basis of perjured testimony by the complainant, William J. Koen, Jr., and that the government failed to investigate certain leads she gave regarding the source of her cash flow. Redd also contended that the trial court erred in denying her motion for a mistrial when the government introduced documents which previously had not been disclosed to the defense. Finally, Redd contended that she was not provided with the documents because she received ineffective assistance of counsel.¹

After the government responded to the motion, the magistrate judge recommended that it be denied. Redd filed objections to the

¹ Redd does not argue on this appeal that she received ineffective assistance of trial counsel. Issues not briefed are considered abandoned. Fed.R.App.P. 28(a)(4); see Marple v. Kurzweg, 902 F.2d 397, 399 n.2 (5th Cir. 1990).

recommendation, which the district court overruled after de novo review. Accordingly, the district court adopted the report and recommendation and entered judgment dismissing Redd's claims. Redd now appeals.

II. STANDARD OF REVIEW

"Relief under 28 U.S.C.A. § 2255 is reserved for transgressions of 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. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Even when a defendant alleges a fundamental constitutional error, he may not raise an issue for the first time on collateral review without showing both cause for his procedural default and actual prejudice resulting from the error. United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, ___ U.S. ___, 112 S.Ct. 978 (1992). Although Redd raised issues for the first time in this § 2255 proceeding, the government did not invoke the procedural bar in the district court. Accordingly, it is unnecessary for this Court to determine whether Redd has shown cause and prejudice. See United States v. Drobny, 955 F.2d 990, 994-95 (5th Cir. 1992).

III. PERJURED TESTIMONY

Redd contends that government witness Koen perjured himself during her trial. To prevail, she must show that the testimony was actually false, that the prosecutor knew that it was false, and that it was material to the issue of guilt. May v. Collins, 955 F.2d 299, 315 (5th Cir.), cert. denied, ___ U.S. ___, 112 S.Ct. 1925

(1992).

As previously stated, Redd was charged with failing to pay taxes on funds embezzled from her employer, Koen. At trial, Redd attempted to prove that she was falsely accused by Koen because Koen wished to conceal his own tax evasion. In her § 2255 motion, Redd argued that the following testimony given by Koen was false: "Koen stated he discovered the loss from his store and took immediate action;" and "Koen stated he was the owner of the store." The court below properly found that Redd had failed to demonstrate the materiality of the alleged false testimony.

Additionally, Redd argues that since the trial she has discovered additional evidence,² which the government "could have . . . discovered" if it had conducted an adequate investigation, and which demonstrates that Koen perjured himself before the grand jury and at trial. Of course, implicit in her contention that the government could have discovered evidence demonstrating that Koen's testimony was false is that the government was not aware that Koen's testimony was false.³ Thus, assuming arguendo that Koen perjured himself and that testimony was material, Redd has not

² Redd has presented this Court with certain evidence and contentions not presented to the court below. We will not consider factual issues not presented to the district court. See Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

³ In her § 2255 motion, Redd claimed that the government failed to investigate certain leads regarding the source of her personal cash flow. It is unclear whether she is raising that claim on appeal. In any event, because this Court rejected that claim on direct appeal, we will not now consider it. See United States v. Kalish, 780 F.2d 506, 508 (5th Cir.) cert. denied, 476 U.S. 1118, 106 S.Ct. 1977 (1986).

shown that the prosecution actually knew or believed the testimony to be false or perjured. May v. Collins, 955 F.2d at 315. The district court properly denied relief on this claim.

IV. INTRODUCTION OF EVIDENCE CONSTITUTED UNFAIR SURPRISE

Redd next contends that the government introduced 385 checks into evidence at trial that were not disclosed to her during pretrial discovery. In her § 2255 motion below, Redd argued that the trial court erred in denying her motion for a mistrial when it was determined that the defense was not given certain "vital documents." She further contended that because she did not receive "the required documents [she] was at a complete disadvantage to be able to ascertain in advance that 117 of the checks did not have a teller stamp, checks were cashed while [she] was out of state, [and] that checks did not comply with the government's schedule of monetary funds/deposits."

In the court below, it is apparent from the parties' pleadings and the magistrate judge's report that the "vital documents" referred to were the cash paid-out tickets and not the 385 checks. We therefore need not reach this contention regarding the checks because it is raised for the first time on appeal. See Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). Even assuming the contention is properly before us, it is without merit. There is no indication in the trial transcript that the defense was surprised by the introduction of the checks. When the government offered the checks into evidence, defense counsel stated as follows: "We have not had the opportunity to fully examine it, although we briefly

examined it the other day, Your Honor. But as long as he represents that it corresponds to the list--he furnished us a list before the trial--we have no objection to it." Also, the defense introduced the list of checks into evidence as Defense Exhibit D. There is no reason to believe that Redd was surprised by the introduction of the checks into evidence.

Moreover, Redd placed before the jury evidence that some of the checks did not bear teller stamps, that she was out of town or no longer employed by Koen when some of the checks were cashed,⁴ and that some checks thought by the government to be among those embezzled in fact were not. Defense counsel argued the significance of these points to the jury. Thus, Redd has not shown that she was prejudiced by the timing of the disclosure. The district court properly denied relief on this claim.

V. CONCLUSION

For the reasons set forth above, the judgment is AFFIRMED.

⁴ On direct appeal, we stated that "the inclusion or exclusion of a few checks from late February 1980 does not lessen the sufficiency of proof that Redd had failed to report a substantial amount before then."