IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8764
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL STUTEVOSS,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-93-Civil-190 (A-89-CR-107 (11))

(July 5, 1994)

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

PER CURIAM:[*]

Defendant-Appellant Michael Stutevoss, a federal prisoner, appeals the district court's dismissal of his motions under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Agreeing with the district court that Stutevoss is not entitled to habeas relief in this collateral attack on his conviction and sentence, we affirm such dismissal.

I

FACTS AND PROCEEDINGS

Stutevoss was convicted along with several codefendants on one count of conspiracy to distribute over 100 kilograms of marijuana and possession with intent to distribute more than 50 but less than 100 kilograms of marijuana. See United States v. Lokey, 945 F.2d 825 (5th Cir. 1991). The charges involved "a network of wholesale marijuana dealers centered around Richard Coulter in Austin, Texas." Id. at 828. Coulter testified at trial and "estimated that as a result of the arrangement . . . he sold a total of 150 to 180 pounds of marijuana to Stutevoss between February 1987 and May 1989." Id. at 829. "Stutevoss was sentenced to 63 months imprisonment on the first count and 60 on the second, to run concurrently, five years supervised release on each count, to run concurrently, a fine of $5000, and a special assessment of $100." Id. The conviction and sentence were affirmed on direct appeal. Id. at 840.

Stutevoss filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. Stutevoss was granted leave to file an amended motion. The government responded to the amended motion, after which the district court considered and denied Stutevoss's motion. Stutevoss timely filed a notice of appeal, and was granted leave to appeal

IFP by the district court.

II

ANALYSIS

A. Nonconstitutional Issues

The first five issues raised by Stutevoss on appeal implicate sentencing errors and a violation of Fed. R. Crim. P. 32. "The grounds for relief under § 2255 are narrower than those for relief on direct appeal." United States v. Smith, 844 F.2d 203, 205 (5th Cir. 1988). Relief under § 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. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981). Nonconstitutional claims that could have been raised on direct appeal but were not may not be raised in a collateral proceeding.[1] Id.

All five of these issues stem from the same premise, that the district court erred in finding that Stutevoss's base offense level was 26 because the conspiracy involved more than 100 kilograms of marijuana. His allegations about sentencing errors do not give rise to constitutional issues. See United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). "A district court's technical application of the guidelines does not give rise to a constitutional issue." Id. Also, "[v]iolations of Rule 32 may

[1] The government raised this procedural bar in its response to Stutevoss's amended motion.

only be raised on collateral attack if the claim could not have been raised on direct appeal." United States v. Prince, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, 493 U.S. 932 (1989). "A Rule 32 violation can be addressed in a direct appeal. . . ." Id. Thus, these claims are not cognizable in a § 2255 motion. See Capua, 656 F.2d at 1038.

Moreover, the question of the amount of marijuana used to determine Stutevoss's sentence was the subject of the direct appeal. See Lokey, 945 F.2d at 839-40. We affirmed the district court's finding that "Stutevoss was a regular customer of Coulter throughout the period listed in the indictment, purchasing between 150 and 180 pounds of marijuana in increments of 3 to 12 pounds." Id. at 840. We also upheld the district court's finding that Stutevoss was not a minor participant in the offense. Id.

B. Violation of Fed. R. Crim. P. 5(a)?

Stutevoss asserts that he should be granted habeas relief because the FBI violated Fed. R. Crim. P. 5(a) by taking him before a magistrate judge in Austin, Texas, rather than San Antonio, Texas, following his arrest. Rule 5 provides that following an arrest without a warrant the person arrested shall be taken without unnecessary delay "before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer."[2]

[2] In his amended motion, Stutevoss couched his arguments in terms of an involuntary interrogation during the trip to Austin, but does not mention that on appeal. In any event, Stutevoss has not specifically alleged any statement that he made during that trip was introduced at trial.

Stutevoss has not made any specific factual allegations to show that the magistrate judge in Austin was not the nearest reasonably available federal magistrate judge. Additionally, such a complaint should have been raised on direct appeal; it cannot be raised for the first time in a habeas proceeding. See Capua, 656 F.2d at 1037.

C. Due Process Violation?

Stutevoss asserts that his due process rights were violated because he was not included in side-bar conferences during his trial. Stutevoss cites the New York Supreme Court case of People v. Antommarchi, 80 N.Y.2d 247 (1992) as the basis for his argument. In Antommarchi, the defendant was not present at a conference in which the trial judge was discussing the possible bias of a juror. Id. at 250. In the instant case, Stutevoss has not suggested what the circumstances were surrounding the side-bar conferences that he did not attend. Further, he has not alleged that he asserted and was denied the right to be present. In United States v. Gagnon, 470 U.S. 522, 529, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985), the Supreme Court held "that failure by a criminal defendant to invoke his right to be present under Federal Rule Criminal Procedure 43 at a conference which he knows is taking place between a judge and a juror in chambers constitutes a valid waiver of that right." In this case, Stutevoss does not specify the nature of the conferences other than to say that they were conducted during the trial with his counsel present. Under the reasoning in Gagnon, Stutevoss waived his right to be present at the side-bar conferences.

D. Ineffective Assistance of Counsel

Stutevoss argues that his counsel was ineffective because he did not object to calculating the base offense level of 26 based on an amount of marijuana in excess of 100 kilograms. Stutevoss contends that his counsel did not object to consideration of a 300 pound marijuana deal that was not consummated, insisting that his counsel should have argued that the crime consisted of multiple conspiracies, not one large conspiracy, and should have demanded a ruling regarding the actual amount of marijuana involved in the offense. Contrary to these assertions, the record shows that defense counsel did object on all of these points. Counsel specifically objected to calculating the base offense level on the basis of a conspiracy that had not been completed. Additionally, counsel specifically objected to using a single conspiracy rather than a multiple conspiracy theory to calculate the base offense level. In point of fact, though, the multiple conspiracy theory was fully presented in direct appeal. See Lokey, 945 F.2d at 840.

Stutevoss also claims that his counsel was ineffective for failing to object to the prosecutor's remarks relating to evidence allegedly not admitted into the record. Although Stutevoss has not been specific in his allegation, this assertion presumably refers to the prosecutor's remarks that were the subject of a motion for mistrial. See Lokey, 945 F.2d at 837. We examined this issue carefully on direct appeal and found that the district court's instructions cured any prejudice resulting from the prosecutor's remarks. See id. at 837-38. As this specific issue was addressed

on direct appeal, it cannot be said that counsel did not preserve the error by failing to object. Stutevoss is not here entitled to relief because he has not shown that his counsel's performance fell below an objective standard of reasonable competence much less that he was prejudiced by his counsel's performance. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

AFFIRMED.