

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8813
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FERNANDO CANTU,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

(A-93-CV-271(A-90-CR-131))

(May 20, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

In December 1990, pursuant to a written plea agreement, Fernando Cantu pleaded guilty to conspiracy to distribute less than 50 kilograms of marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 846. The probation officer recommended a base offense level of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

24 because the factual basis filed by the Government established that the transaction involved 200 pounds of marijuana. In written objections and at the sentencing hearing, Cantu argued that (1) he was entitled to an adjustment for acceptance of responsibility because he pleaded guilty, and (2) he was entitled to an adjustment because he was a minor or minimal participant and did not know the scope or structure of the enterprise. The district court overruled the objections, noting that although the Guidelines stipulated a sentencing range of 57 to 71 months, the statutory maximum for the offense was 60 months. The court imposed a sentence of 60 months in a judgment entered on March 29, 1991. Cantu did not file a notice of appeal until April 27, 1992, and the appeal was dismissed by this Court as untimely.

On May 21, 1993, Cantu filed a 28 U.S.C. § 2255 motion asserting that the district court sentenced him using inaccurate information from the PSR and that he was denied effective assistance of counsel. The Government answered, pleading procedural bar. The magistrate judge recommended that § 2255 relief be denied without an evidentiary hearing because (1) Cantu's claims should have been raised on direct appeal but were not, (2) Cantu failed to show that his counsel's performance was deficient or that he was prejudiced, and (3) Cantu did not prove that the district court abused its discretion by sentencing Cantu to the statutory maximum. On October 30, 1993, the district court adopted the magistrate judge's findings and denied the motion. Cantu timely appealed.

OPINION

Issue 1 - Sentencing Challenges

Cantu argues that he is entitled to § 2255 relief because the district court erred in sentencing him based on the amount of marijuana seized, 200 pounds, rather than the amount to which he pleaded guilty, 50 kilograms. "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). A district court's technical application of the sentencing guidelines is not of constitutional dimension. Id. A nonconstitutional claim that could have been raised on direct appeal, but was not, may not be raised in a collateral proceeding. United States v. Shaid, 937 F.2d 228, 232 n.7 (5th Cir.) (en banc), cert. denied, 112 S.Ct. 978 (1992). Cantu's arguments that the district court improperly calculated his guideline sentence do not raise constitutional claims and could have been resolved on direct appeal. See United States v. Smith, 844 F.2d 203, 206 (5th Cir. 1988). Moreover, Cantu's quantity argument is without merit. Section 1B1.3(a)(2) authorizes a "sentencing court to consider, for purposes of calculating a base offense level, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction." United States v. Hoster, 988 F.2d 1374, 1378 (5th Cir. 1993) (internal quotation and citation omitted); see also United States v. Moore, 927 F.2d 825,

827 (5th Cir.) (amount of drugs under negotiation in an uncompleted distribution is properly considered as relevant conduct for purposes of calculating base offense level), cert. denied, 112 S.Ct. 205 (1991). Testimony by FBI agent Michael Hanley at the sentencing hearing established that Cantu was directly involved in negotiating and arranging the sale of 200 pounds of marijuana. The district court did not err in denying Cantu's § 2255 motion as to the sentencing issue.

Issue 2 - Violation of the Plea Agreement

Cantu's argument that the district court violated the plea agreement by sentencing him using the 200 pounds of marijuana seized from the van he was driving, rather than the 50 kilograms by which he was convicted also fails. Not only is this contention procedurally barred, see United States v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992), it is factually frivolous because the plea agreement says nothing about his sentence.

Issue 3 - Ineffective Assistance of Counsel

Cantu also asserts that his counsel was deficient because he (1) failed to object to the quantity of marijuana used to calculate his sentence and (2) did not obtain an adjustment for acceptance of responsibility. This Court reviews such claims to determine whether counsel's performance was both deficient and prejudicial to the defendant. United States v. Gipson, 985 F.2d 212, 215 (5th Cir. 1993). To establish "prejudice," the defendant is required to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have

been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993), this Court held that "[i]n order to avoid turning Strickland into an automatic rule of reversal in the non-capital sentencing context . . . a court must determine whether there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." The Court noted its belief that "`prejudice' must be rather appreciable before a new trial is warranted in view of counsel's error." Id. at n.4. To show deficient performance, the defendant must overcome the strong presumption that the attorney's conduct falls within a wide range of reasonable professional assistance. Strickland, 466 U.S. at 689. If the defendant makes an insufficient showing on one of the components of the inquiry, the court need not address the other. Id. at 697.

Cantu did not adduce any specific facts to support his allegations of deficient performance or prejudice, and the record established that the district court's consideration of Cantu's relevant conduct to determine the guideline sentence was not error; accordingly, counsel's failure to object was not deficient performance. Insofar as Cantu's contention that counsel was responsible for the district court's denial of a downward adjustment for acceptance of responsibility, the record shows that counsel made a lengthy argument at the sentencing hearing advocating the adjustment, but the district court concluded that

Cantu did not "accept fully his role in the offense . . . and has sought to minimize his involvement." Cantu has failed to show that his counsel's performance was deficient and outside the wide range of reasonable professional assistance, see United States v. Cronin, 466 U.S. 648, 656 n.19, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). He has also failed to make a showing of prejudice. The district court did not err in denying § 2255 relief.

Issue 4 - Refusal to Conduct an Evidentiary Hearing

Cantu finally contends that the district court erred in refusing to hold an evidentiary hearing on his ineffective assistance claims. "The question whether an evidentiary hearing is necessary to resolve charges of ineffective assistance depends on an assessment of the record. . . . If the record is clearly adequate to dispose fairly of the allegations, the court need inquire no further." United States v. Smith, 915 F.2d 959, 964 (5th Cir. 1990). Cantu's arguments could be determined on the record, and, accordingly, no evidentiary hearing was required.

AFFIRMED.