

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8824
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

LAZARO PUIG-PEDROZA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(P-93-CA-027(P-89-CR-127))

(November 23, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Lazaro Puig-Pedroza appeals the denial of his federal prisoner's post-conviction motion made pursuant to 28 U.S.C. § 2255. Concluding that the record needs further development, we vacate and remand.

* Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

Puig-Pedroza was convicted of conspiracy to possess with intent to distribute cocaine and possession with intent to distribute cocaine. The convictions were affirmed on direct appeal.

Puig moved for appointment of counsel. The magistrate judge construed the motion as requesting post-conviction relief under § 2255 and recommended denial. Puig objected that his original pleading was not intended to serve as his post-conviction motion and that he had requested only appointment of counsel.

Approximately one month later, Puig filed a motion under § 2255, raising issues that were not presented in the original motion for appointment of counsel: (1) Whether the trial court erred by denying his motion to suppress evidence; (2) whether the evidence was sufficient; (3) whether trial counsel had rendered ineffective assistance by failing (a) to conduct an adequate investigation and (b) to challenge the search and seizure of Puig's automobile based upon the absence of any consent to search; and (4) whether appellate counsel had rendered ineffective assistance by failing to raise on appeal issues regarding (a) the trial court's jury instructions, (b) the denial of Puig's FED. R. CRIM. P. 12(f) motion, (c) prejudicial remarks by the trial court, and (d) the introduction of extrinsic evidence. Although an order was entered referring Puig's second motion to the magistrate judge, no new report and recommendation was issued by the magistrate judge. Instead, the district court adopted the magistrate judge's original

report and recommendation, which did not contain an analysis of the new issues raised by Puig, and denied the motion.

II.

Puig contends that the district court should not have denied his motion without considering the new issues raised after the magistrate judge issued his report and recommendation. Assuming the magistrate judge correctly construed Puig's original pleading as a § 2255 motion, Puig was entitled to amend that pleading once as a matter of course, as no responsive pleading had been filed. FED. R. CIV. P. 15(a).

Although it appears that the district court's failure to address the second pleading was inadvertent, the motion should not have been denied without addressing the additional issues. See Hart v. United States, 565 F.2d 360, 361 (5th Cir. 1978) ("[F]indings of fact and conclusions of law . . . are indispensable to appellate review."). Because Puig's second pleading contains arguments and exhibits that are pertinent to the issues raised in his original pleading, we vacate the district court's order and remand for further development. We express no view on the ultimate merits of this case.

VACATED and REMANDED.