

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8841
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALTA LEE KEMPER,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CA-730(SA-92-CR-13(1)))

(December 7, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Appellant Alta Lee Kemper is serving a life sentence as a career offender after being found guilty of possession with intent to distribute cocaine base. He filed two § 2255 petitions in close succession during 1993, and they were handled more or less in tandem by the magistrate judge. Nevertheless, we consider on appeal only the second petition, arising from Case No.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

SA-93-CA-0730 in the district court, because that is the only one on which the district court has yet ruled. Finding no error, we affirm.

In the second § 2255 petition, Kemper complained that he was unlawfully held in state custody by a federal magistrate judge from January 10 through July 1, 1992 preceding his conviction. The United States Judge recommended that this complaint be summarily dismissed because it stated neither an issue of constitutional dimension nor any issue that could not have been raised in Kemper's direct appeal. The district court adopted the magistrate judge's report and recommendation but did not conduct a de novo review, because he believed that no objections to the magistrate judge's report and recommendation had been timely filed. Nevertheless, the district court found no clear error of fact or error of law in the magistrate judge's report.

Technically, the district court made a mistake by not waiting a few days longer for Kemper's objections to the magistrate judge's report. The ten-day period for filing objections was extended by virtue of (1) a delay in serving Kemper with the magistrate judge's report, (2) the three-day addition when service is made by mail, and (3) the fact that intermediate Saturdays and Sundays are excluded from the calculation of ten days. Kemper did in fact file a response on November 3, and that response was timely under the circumstances.

The district court's failure to consider Kemper's objections is harmless error, however, if Kemper raised no factual

objections to the report and recommendation and merely reurged the legal arguments he raised in his petition. Smith v. Collins, 964 F.2d 483, 485 (5th Cir. 1992). Kemper's objections to the magistrate judge's report are highly confusing. Both in those objections and in his appellate brief, Kemper seems to be suggesting that the federal agents had no bona fide reason to investigate him and their search of his automobile was improper. The latter contention was disposed of on Kemper's direct appeal. The former contention has nothing to do with his pretrial detention as such but only with the merits of his conviction. Consequently, these objections raised no doubt about the propriety of the magistrate judge's recommendation. The magistrate judge properly concluded, as the district court realized, that any defect in Kemper's pretrial detention was rendered moot by his conviction on July 1, 1992. See Fassler v. United States, 858 F.2d 1016, 1018 (5th Cir. 1988), cert. denied, 490 U.S. 1099 (1989).

We do not rule on any contentions raised in Kemper's appellate brief that have to do with his earlier-filed habeas petition. For the foregoing reasons, the judgment of the district court on the second habeas petition is AFFIRMED.