IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8900
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GLORIA SHERMAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(MO-93-CA-157(MO-91-CR-63-(6)))

(August 10, 1994)

Before JOLLY, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Gloria Sherman appeals the district court's denial of her motion to vacate, set aside, or correct her sentence, pursuant to 28 U.S.C. § 2255. Specifically, Sherman

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

urges that the district court erred in finding that her objections to the magistrate judge's report were untimely; and she insists that the government's response to her § 2255 motion was untimely and that her counsel was ineffective. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Sherman was convicted by jury of conspiracy to possess with intent to distribute and possession with intent to distribute cocaine base ("crack cocaine"), was sentenced, and her conviction and sentence were affirmed on appeal. United States v. Branch, 989 F.2d 752, 757 (5th Cir.), cert. denied, 113 S.Ct. 3060 (1993).

Proceeding pro se, Sherman filed a § 2255 motion to vacate, set aside, or correct sentence. She argued that (1) the district court misapplied U.S.S.G. § 1B1.3; (2) the punishment scheme for crimes involving cocaine versus cocaine base is racially discriminatory; (3) her involvement was significantly over-represented by her sentencing range and offense level; and (4) the district court erred in failing to consider certain mitigating factors in imposing sentence.

The district court referred the case to a magistrate judge who ordered the government to file a response. The government filed a motion for an extension of time in which to respond, which extension was granted through November 5, 1993. The government filed a response on November 5, 1993, raising, albeit somewhat generally, the defense of procedural bar.

The magistrate judge filed his report on November 17, 1993, and relying on United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 978 (1992), recommended denying Sherman's motion. The magistrate judge advised the parties that "[p]ursuant to 28 U.S.C. § 636(b)(1), any party who desires to object to this report must serve and file written objections within ten (10) days after being served with a copy unless the time period is modified by the District Court."

Sherman received the report on November 22, 1993, but did not file written objections to it until December 6, 1993. Determining that Sherman had failed to file her objections timely, the district court did not consider them in ruling on her § 2255 motion. The court adopted the magistrate judge's report and denied Sherman's motion, after which Sherman timely appealed.

II

ANALYSIS

A.

Sherman argues that the district court erred in holding that her objections to the magistrate judge's report were untimely. She contends that, pursuant to 28 U.S.C. § 636(b)(1), she had ten days after being served with the report to file written objections; that the district court should not have counted intermediate weekends and holidays in determining whether her objections were filed timely; and that she should have been granted an additional three days to respond because service was by mail (citing Fed. R. Civ. P. 6(a) and (e)).

A party has ten days after being served with a magistrate judge's report in which to file objections. 28 U.S.C. § 636(b)(1). The Federal Rules of Civil Procedure provide that

> [i]n computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. . . . When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Fed. R. Civ. P. 6(a). Thus, even assuming that Sherman did not have three additional days in which to file objections pursuant to Fed. R. Civ. P. 6(e), she had ten days to file objectionsSQ exclusive of weekends and holidayssQfrom November 17, 1993, the date of service of the report. Sherman argues that the ten days did not begin to accrue until she <u>received</u> the report on November 22, 1993. Her argument is not persuasive, as service was made by mail on November 17, 1993, and, pursuant to Fed. R. Civ. P. 5(b), service by mail is complete upon mailing. Nonetheless, excluding holidays and weekends, Sherman had until December 2, 1993, to file her objections.

The government argues nevertheless that Sherman's objections were not timely filed, reasoning that

> [28 U.S.C. § 636(b)(1)] states that when objections are filed it is in accordance with the rules of the court. The Local Court Rules of the United States District Court for the Western District of Texas provide that the time to file a response is ten (10) calendar days. Appendix B [CV-7(f)]. Ten days from November 17, 1993 was November 27, 1993.

Local Rule CV-7(f) provides that

> (f) Time to File Response. A party filing a response has ten (10) calendar days from the date of service in which to file and serve the response and supporting documents.

Independent research discloses, however, that the local rule cited by the government was amended as early as 1991 to provide that

> [a] party filing a response or reply has 10 days, excluding Saturdays, Sundays, and legal holidays, in which to serve and file supporting documents and brief. If a party fling a response or reply has been served by mail, then 3 calendar days shall be added to the 10-day period for response or reply.

U.S.D.C. Local Rules, W.D. Tex., Rule CV-7(f). Thus, the government's reliance on Rule CV-7(f) is misplaced, as Sherman's objections were timely even under that rule.

Sherman's certificate of service provided that service of the objections was made on December 2, 1993. In fact, though, the objections were not filed until December 6, 1993. A pro se prisoner's objections to a magistrate judge's report are considered timely filed if they are handed to prison officials prior to the expiration of the district court's deadline. Thompson v. Rasberry, 993 F.2d 513, 515 (5th Cir. 1993) (applying Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988), to the filing of objections by a pro se prisoner to a magistrate judge's report). Assuming Sherman placed the objections in the prison mail system on December 2, 1993, the date on the certificate of service, the objections were timely. See id. Therefore, absent a finding by the district court that the objections were not handed to prison officials on or before December 2, 1993, the objections were timely

filed.

It is error for a district court not to consider timely-filed objections to a magistrate judge's report and recommendation. See § 636(b)(1)(C); Smith v. Collins, 964 F.2d 483, 485 (5th Cir. 1992). Still, such error by the district court may be harmless. See Smith, 964 F.2d at 485. As we find, for the reasons discussed below, that Sherman's objections lack merit, the district court's error in this case was in fact harmless.

B.

In her objections Sherman also contended that, as the government's response to her § 2255 motion was untimely, the district court should have granted her motion. But her objection lacks a factual basis. The magistrate judge granted the government's motion for an extension of time in which to file a response, giving the government through November 5, 1993, to respond. Thus the government response, filed November 5, 1993, was timely.

C.

The magistrate judge's report, adopted by the district court, provides that Sherman could have raised each of her § 2255 claims on direct appeal and that she failed to show cause and prejudice for her procedural default. "[A] `collateral challenge may not do service for an appeal.'" Shaid, 937 F.2d at 231. A defendant may not raise an issue for the first time in a § 2255 proceeding without showing cause for procedural default and actual prejudice resulting from the error. Id. at 232.

Sherman objected to the magistrate judge's finding that she could not satisfy the cause and prejudice standard, stating that "[i]t would be prejudicial within itself to require [her] to explain the reason her prior attorney failed to make the allegations in her direct appeal that she now raises." Sherman argues that her constitutional right to effective assistance of counsel was violated. As pro se pleadings must be liberally construed, Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), Sherman has arguably raised ineffective assistance of counsel as the cause for her procedural default.

Constitutionally ineffective assistance of counsel, in the form of failure to raise issues on appeal, may operate as cause for procedural default. Murray v. Carrier, 477 U.S. 478, 488-92, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). To prevail on her claim of ineffective assistance, Sherman must show that her counsel's performance fell below an objective standard of reasonable competence and that she was prejudiced by her counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A failure to establish either deficient performance or prejudice defeats the claim. Strickland, 466 U.S. at 697.

Misapplication of U.S.S.G. § 1B1.3

In her § 2255 motion, Sherman contended that the district court misapplied § 1B1.3, basing her sentence on the total amount of drugs involved in the conspiracy rather than on the amount of drugs that was foreseeable to her pursuant to a clarifying

amendment to U.S.S.G. § 1B1.3 regarding relevant conduct.

Section 1B1.3, its commentaries and application notes, have been amended to clarify the meaning of relevant conduct. See United State v. Maseratti, 1 F.3d 330, 340 (5th Cir. 1993), cert. denied, 114 S.Ct. 1096 and 114 S.Ct. 1552 (1994). Sherman was sentenced on January 16, 1992, and the amended guideline did not go into effect until November 1, 1992. Nonetheless, "if an amendment was intended only to clarify Section 1B1.3's application and, therefore, implicitly was not intended to make any substantive changes to it or its commentary, [this court] may consider the amended language of Application note 2 even though it was not in effect at the time of the commission of the offense." Id. (citations omitted). Guidelines Amendment 439, effective November 1, 1992, states "[t]his amendment clarifies and more fully illustrates the operation of this guideline." See id.

Application note 2 to § 1B1.3 provides that "a defendant is accountable for the conduct . . . of others that was both (1) in furtherance of the jointly undertaken criminal activity; and (ii) reasonably foreseeable in connection with that criminal activity." § 1B1.3, comment. (n.2). At the time of Sherman's sentencing, the application notes to § 1B1.3 provided that "[i]n the case of criminal activity undertaken in concert with others, . . . the conduct for which the defendant `would be otherwise accountable' also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonable [sic] foreseeable to the defendant." § 1B1.3, comment

(n.1) (Nov. 1991).

Sherman failed to object to the PSR which provided that the quantity of drugs appropriate for sentencing purposes was approximately 564 grams of cocaine base. This is the amount of cocaine base on which Sherman was sentenced. Thus she is not truly seeking retroactive application of changes in the guidelines; in reality, she is seeking an opportunity to relitigate the facts underlying her sentence. Consequently, although Sherman's counsel in the district court arguably may have been remiss in failing to develop a record on the issue whether the drug quantity was foreseeable, based on the record as it stands her counsel was not ineffective for failing to raise this issue on direct appeal.

Punishment scheme for crimes involving cocaine versus cocaine base

In Sherman's § 2255 motion, she contended that the disparity in punishments for crimes involving cocaine versus cocaine base is racially discriminatory. In United States v. Galloway, 951 F.2d 64, 65-66 (5th Cir. 1992), we held that there was no evidence of discriminatory intent in the adoption of § 2D1.1, and that there was a rational basis for providing harsher penalties for cocaine base. In United States v. Watson, 953 F.2d 895, 897-98 (5th Cir.), cert. denied, 112 S.Ct. 1989 (1992), we held that the sentencing guidelines provision for higher punishment for cocaine base did not violate due process or equal protection. As Sherman's attack on the sentencing scheme is thus unavailing, her counsel was not ineffective for failing to raise this issue on direct appeal.

Sentencing guidelines over-represent her involvement in offense

At sentencing, the district court adopted the factual findings and guideline application in the PSR. It determined that Sherman's offense category was 34 and her imprisonment range was 151 to 188 months. She did not object to the PSR. In her § 2255 motion, Sherman contended that her involvement was significantly over-represented by her guidelines sentencing range and offense level; however, Sherman cited no case, statute, or guideline in support of her conclusion.

Applications of the sentencing guidelines are reviewed de novo for errors of law. United States v. Otero, 868 F.2d 1412, 1414 (5th Cir. 1989). Factual findings regarding sentencing factors are reviewed under the "clearly erroneous" standard. Id. Sherman has not alleged that the court was clearly erroneous in any of its findings of fact, contending only that her role in the offense was minimal because she "exercised no decision making authority, did not own the drugs, and did not finance any part of the offense. [She] did not sell the drugs and did not play any significant part in negotiating the terms of any of the sales." Although the district court did not find that her role was minimal, it did determine that her role was a minor one and awarded her a two-point decrease in her base offense level on that basis.

Sherman has made no specific contention that the sentencing guidelines were misapplied to the facts found in the presentence report. As such, her sentence must stand unless it is a violation of the law. See 18 U.S.C. § 3742(f)(1). Sherman has not alleged,

nor is there any indication in the record, that a violation of law has occurred by the imposition of a one hundred and fifty-one month sentence under the guidelines. Sherman's assertion that her offense level and sentencing range significantly over-represent her involvement in the offense do not impose an obligation on this court to examine the district court's motives for not downwardly departing from the guidelines or choosing a lesser sentence under the guidelines. Absent a violation of the law, a sentence resulting from the proper application of the sentencing guidelines by the district court must be upheld. United States v. Velasquez, 868 F.2d 714, 715 (5th Cir. 1989). Sherman's counsel was not ineffective for failing to pursue this contention on appeal.

Failure to consider mitigating factors

In her § 2255 motion, Sherman also contended that the district court erred in failing to depart downward at sentencing on the basis of various purportedly extraordinary family responsibilities. The district court concluded that there were no aggravating or mitigating circumstances warranting downward departure. We will not review a district court's refusal to depart unless the refusal was in violation of law. United States v. Adams, 996 F.2d 75, 78-79 (5th Cir. 1993). There is no indication of a violation of law; therefore, this issue provides no basis for appellate review. See Adams, 996 F.2d at 79. Further, family ties and responsibilities generally may not be considered in sentencing; they may be considered only in extraordinary cases. 28 U.S.C. § 994(e); U.S.S.G. § 5H1.6, p.s.; United States v. Carr, 979 F.2d 51, 54 (5th

Cir. 1992). This is not an extraordinary case. Thus, Sherman's counsel was not ineffective for failing to raise this issue on appeal.

As there was no prejudice as a result of Sherman's counsel's alleged errors, Sherman has failed to show that ineffective assistance of counsel was the cause for her procedural default. Consequently, her § 2255 issues were properly held to be procedurally barred, and the district court's error in failing to review her objections to the magistrate judge's report was harmless.

III

CONCLUSION

For the reasons set forth above, the judgment of the district court is, in all respects,

AFFIRMED.