

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10292

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY AUSTIN THOMAS,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:92-CV-1908-G (3:89-CR-72-G)
- - - - -
(November 17, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

IT IS ORDERED that Larry Thomas's motion for leave to proceed in forma pauperis is DENIED and his appeal is DISMISSED AS FRIVOLOUS. Fifth Cir. R. 42.2. Thomas's appeal is not taken in good faith, i.e., it does not present any nonfrivolous issues. See 28 U.S.C. § 1915(a); Holmes v. Hardy, 852 F.2d 151, 153 (5th Cir.), cert. denied, 488 U.S. 931 (1988).

Larry Austin Thomas (Thomas) was convicted of conspiracy and the substantive offense of damaging and destroying by fire a building and personal property used in interstate commerce, in

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

violation of 18 U.S.C. §§ 371 and 844(i). His conviction was affirmed by this Court on direct appeal. See United States v. Anderson, 933 F.2d 1261 (5th Cir. 1991).

Thomas filed this motion under 28 U.S.C. § 2255, raising the following grounds of error: 1) denial of Sixth Amendment right to counsel and Fifth Amendment due process because his attorney did not appear for oral argument; 2) denial of Sixth amendment right to counsel because his attorney did not contest jury instruction or request jury instruction regarding use of extrinsic offense evidence under Fed. R. Evid. 404(b); 3) outrageous government conduct by denying him access to his dying father who wished to recant his grand jury testimony; 4) perjury by the United States Assistant Attorney; 5) denial of Sixth Amendment right to counsel due to conflict of interest because trial counsel failed to cross-examine Government witnesses that he had previously represented with impeachment evidence obtained during that representation; and 6) Brady violation when Government failed to disclose exculpatory letter. The district court denied his motion.

In reviewing the denial of a § 2255 motion, this Court reviews the district court's findings of fact for clear error. Questions of law are reviewed *de novo*. United States v. Gipson, 985 F.2d 212, 214 (5th Cir. 1993).

Thomas contends that his attorney failed to appear for oral argument in this Court on his direct appeal without permission. To prevail on his claim of ineffective assistance of counsel, Thomas must show 1) that his counsel's performance was deficient

in that it fell below an objective standard of reasonableness; and 2) that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687-94, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to show prejudice, Thomas must demonstrate that counsel's errors were so serious as to "render[] the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, ___ U.S. ___, 113 S. Ct. 838, 844, 122 L. Ed. 2d 180 (1993). A failure to establish either deficient performance or prejudice defeats the claim. Strickland, 466 U.S. at 697.

Wayne Ames, Thomas's counsel at trial and on direct appeal, did not appear for oral argument, but he did file an appellate brief, and this Court considered and rejected Thomas's arguments on appeal in a published opinion. See Anderson, 933 F.2d at 1267-77. Thomas has not demonstrated that the appellate proceedings were rendered unreliable or unfair because his counsel failed to appear at oral argument. See United States v. Birtle, 792 F.2d 846, 847-49 (9th Cir. 1986) (no demonstration of prejudice due to counsel's failure to appear at oral argument where counsel filed brief and court of appeals addressed issues raised).

Thomas challenges the district court's conclusion that he suffered no prejudice from his counsel's failure to challenge the admission of certain evidence under Fed. R. Evid. 404(b) because the other evidence against him was overwhelming. Although Thomas is correct that the statement he made to Bernard Milam is not extrinsic evidence of another crime, wrong, or act, even if the

statement was erroneously admitted, the properly admitted evidence against Thomas, such as Archibald Gordon's testimony that Thomas recruited him to help set the fire and that they set the fire together, was overwhelming, as noted by this Court in his direct appeal. See Anderson, 933 F.2d at 1273 n. 10.

Thomas also argues that the Government introduced evidence of "novelty identifications" and the testimony of other witnesses for the purpose of "character assassination." Thomas did not raise this argument in the district court. This Court need not address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this [C]ourt unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991)(internal quotations and citations omitted). Thomas does not state what this evidence was or how it was prejudicial. In light of Archibald Gordon's testimony that Thomas recruited him to help set the fire and that they set the fire together, the district court's legal conclusion that any prejudice from allegedly inadmissible character evidence was harmless in light of the overwhelming evidence against Thomas is correct. No manifest injustice has been shown.

Thomas challenges the district court's finding that his trial counsel, Ames, did not cross-examine certain witnesses because the trial court ruled that the evidence was inadmissible and not because of a conflict of interest. Thomas questions Ames' credibility at the evidentiary hearing.

In order to establish a Sixth Amendment claim of ineffective

assistance based on conflict of interest, the defendant must demonstrate that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsel's performance. If the defendant demonstrates an actual conflict of interest, prejudice is presumed. United States v. McCaskey, 9 F.3d 368, 381 (5th Cir. 1993), cert. denied, 114 S. Ct. 1565 (1994).

The trial judge ruled that the evidence that the defense sought to use to impeach Harry Thomas and Bernard Milam would be better brought out in Thomas's case-in-chief. He found that the evidence was very peripheral, that it was not impeaching or admissible under Fed. R. Evid. 608(b), and that the testimony did not suggest any illegality or impropriety. The trial judge ruled that Harry Thomas could be recalled on this matter if Thomas testified as anticipated to establish the basis for his claim of motive or bias.

Ames testified at the evidentiary hearing that his prior representation of Harry Thomas and Bernard Milam did not affect his decision not to use the evidence in question. Also, Ames' testimony shows that it was ultimately decided that the property was not part of the bankrupt estate and that Harry had not done anything illegal in taking the property from the warehouse, and so the impeachment value of the evidence appears to be slight.

The district court founds Ames' testimony at the evidentiary hearing to be credible and stated that the record showed that the trial court had ruled the evidence inadmissible. The record supports this finding. To the extent that the resolution of this

issue rests upon Ames' credibility, this Court will not substitute its own judgment for that of the district court. See United States v. Nixon, 881 F.2d 1305, 1310 (5th Cir. 1989) (where district court's finding in § 2255 proceeding rests on credibility determinations after an evidentiary hearing, this Court will not substitute its reading of the evidence for that of the district court). It was Thomas's burden of proof to show that Ames had an actual conflict of interest, which he did not do.

Thomas argues that his counsel appointed to represent him at the evidentiary hearing on his § 2255 motion was ineffective for failing to interview and call witnesses to testify at the hearing, and that the district court abused its discretion in not allowing him to call witnesses. Thomas does not state which witnesses counsel should have interviewed and called, and he does not allege what their testimony would have been. In order for Thomas to demonstrate prejudice under Strickland, he must show that the witnesses' testimony would have been favorable and that the witnesses would have testified. See Alexander v. McCotter, 775 F.2d 595, 602 (5th Cir. 1985). Thomas has not demonstrated prejudice. The only witnesses which Thomas mentions by name are Mr. Carnes and Mr. Elliston, whom he alleges would have testified about Ames' conflict of interest and his general ineffectiveness. The district court did not abuse its discretion in refusing to allow Thomas to subpoena these witnesses. As the magistrate judge noted, Ames was capable of providing the necessary testimony on that issue.

Thomas contends that because the district court issued its

judgment only one day after he filed his objections to the magistrate judge's report, the court could not have conducted the required *de novo* review. 28 U.S.C. § 636(b)(1)(B) requires the district judge to make a *de novo* determination of the portions of a magistrate judge's report to which objection is made. The district court stated in its order adopting the findings and conclusions of the magistrate judge that it had made an "independent review of the pleadings, conclusions and recommendation." This Court assumes that the district court did its statutorily commanded duty in the absence of evidence to the contrary. Longmire v. Guste, 921 F.2d 620, 623 (5th Cir. 1991). Thomas does not present any evidence that the court did not make a *de novo* determination of his objections.

Thomas argues that his conviction is a miscarriage of justice because he is actually innocent. The thrust of his argument is that the witnesses against him were not credible. He contends that Archibald Gordon, who testified that he and Thomas set the fire together, was false. He contends that Harry Thomas lied about Thomas offering him \$5,000 to set the fire because Thomas knew that Harry was stealing bankruptcy assets and because Thomas had given this information to the bankruptcy trustee. He contends that his alibi witnesses were more credible than the Government's witnesses. He states that he "submits this information to the court at this time to allow weighing of facts pertaining to guilt or innocence"

Thomas is basically seeking to have this Court review the evidence and make its own determinations on the credibility of

the witnesses. The jury has the sole responsibility for judging the credibility of witnesses. Schrader v. Whitley, 904 F.2d 282, 287 (5th Cir.), cert. denied, 498 U.S. 903 (1990).

Conclusion

Thomas does not raise any nonfrivolous issues, his motion for IFP is DENIED, and his appeal is DISMISSED AS FRIVOLOUS.