

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10596
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HUBBARD BELL, JR.,
a/k/a "Hub",

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(4:93 CV 704 E (4:88 CR 099 E))

March 20, 1995

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Hubbard Bell appeals from the district court's denial of his second motion to vacate, to set aside, or to correct his sentence under 28 U.S.C. § 2255. Finding no reversible error in the district court's determination, we affirm.

I. BACKGROUND

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

On May 17, 1989, Bell was convicted in a jury trial on one count of conspiracy to possess and distribute cocaine in violation of 21 U.S.C. § 846, and on one count of possession of cocaine base with intent to distribute in violation of 21 U.S.C. 841(a)(1). He sentenced, inter alia, to 360 months for each count, with the terms to be served concurrently. Bell subsequently initiated a direct appeal to this court which was unsuccessful. While his direct appeal was pending, Bell sought to vacate, to correct, or to set aside his sentence under 28 U.S.C. § 2255. In his claim, Bell argued that there was insufficient evidence to support his conviction, that his sentence was excessive and improperly enhanced under the career offender provisions of § 4B1.2 of the Sentencing Guidelines, and that his counsel was ineffective for failing to call certain witnesses and for failing to appeal the length of his sentence and the use of the enhancement provisions in computing the sentence. The district court denied Bell's claims, and we affirmed. Bell, for the second time, challenged his sentence under 28 U.S.C. § 2255 in the district court, and that court again rejected Bell's contentions. Bell once again appeals.

II. STANDARD OF REVIEW

It is well settled that, "[t]he decision whether to dismiss a motion for abuse of the section 2255 proceedings is committed to the sound discretion of the district court." United States v.

Flores, 981 F.2d 231, 234 (5th Cir. 1993). Accordingly, "[w]e review such a decision only for abuse of discretion." Id.

III. DISCUSSION

Two considerations guide the analysis of a second collateral challenge to conviction under § 2255. The first is embodied in the Rules Governing Section 2255 Proceedings, and it provides, in part, that:

A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged the judge finds the failure to of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

Rule 9(b), Rules Governing Section 2255 Proceedings in the United States District Court; see also Flores, 981 F.2d at 234 & n.3 (discussing and quoting the rule).

The second consideration stems from the Supreme Court's decision in McCleskey v. Zant, 499 U.S. 467 (1991), and it more explicitly addresses claims not raised in the first § 2255 attack. We applied McCleskey's rule to § 2255 cases in Flores, noting that we generally will not hear claims raised for the first time in a second or later § 2255 motion. We also described an exception, however, stating that if a petitioner "can show cause for failing to raise the claims earlier, and prejudice from the errors of which he complains, the motion is not subject to dismissal." Flores, 981 F.2d at 235.

In the instant case, Bell did not raise all of his current contentions in his first § 2255 motion. Accordingly, we address them only if he shows that there was cause for his failure to raise those claims, and if he demonstrates that he suffered actual prejudice from the alleged errors included in those claims. Flores, 981 F.2d at 235; see also McCleskey, 499 U.S. at 494-96 (describing the cause and prejudice standard for a dismissal for abuse of the writ). The cause prong of this test requires the petitioner to show that "some objective factor external to his defense prevented him from raising the claim in his initial motion." Flores, 981 F.2d at 235; accord McCleskey, 499 U.S. at 493; Murray v. Carrier, 477 U.S. 478, 488 (1986); Cuevas v. Collins, 932 F.2d 1078, 1083 (5th Cir. 1991). In McCleskey, the Supreme Court described external objective causes, listing "interference by officials that makes compliance with . . . procedural rules impracticable"; "a showing that the factual or legal basis for a claim was not reasonably available to counsel"; and "constitutionally ineffective assistance of counsel." McCleskey 499 U.S. at 493-94; accord Cuevas, 932 F.2d at 1082.

In his first § 2255 petition, Bell did not assert his current claims regarding a faulty superseding indictment, a failure to receive notice of the government's intention to seek sentencing enhancement based on prior convictions, and a wrongful denial of the application of good time and parole laws. In his reply brief, Bell attempts to explain why he did not raise these claims, stating that:

cause for failing to raise the issue previously stems from ineffective assistance of counsel. In relation to the ground contesting the validity of a conviction on an indictment not presented to the full Grand Jury, counsel informed [Bell] that the issue would be raised in [Bell's] direct appeal. Counsel failed to raise the issue on direct appeal. Because both the initial Sec. 2255 and the direct appeal were submitted at approximately the same time counsel's failure caused the issue to be omitted.

Simply, this is not an acceptable explanation of Bell's failure to raise these claims in his original § 2255 action.

Although ineffective assistance of counsel is cause for failure to raise a claim, in the instant case, counsel's alleged ineffectiveness was on the direct appeal and may have led to the omission of the issue in that appeal. Such supposed ineffectiveness, however, does not explain why Bell failed to raise all of his claims in his first collateral § 2255 attack. In his original habeas petition, Bell raised issues that were not included in the appeal filed by his counsel, and Bell also claimed that his counsel was ineffective at trial and on appeal.¹ Bell filed the first § 2255 petition himself and any omissions in that petition were his responsibility; the district court's dismissal of the claims that Bell simply failed to assert was not an abuse of discretion.²

¹ Bell clearly knew how to discern his counsel's effectiveness-- he filed a pro se supplemental brief to his direct appeal in which he raised additional issues not addressed by his attorney.

² The fact that Bell was proceeding pro se in his original § 2255 motion does not excuse his failure to include all of his claims. As we have noted, "McCleskey draws no distinction between pro se petitioners and those represented by counsel." Saahir v. Collins, 956 F.2d 115, 118 (5th Cir. 1992); accord

Under the rule of McCleskey, "[i]f petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he . . . can show that a fundamental miscarriage of justice would result from a failure to entertain the claim." McCleskey, 499 U.S. at 494; accord Flores, 981 F.2d at 236; Cuevas, 932 F.2d at 1082. To show a fundamental miscarriage of justice, a petitioner must allege that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Cuevas, 932 F.2d at 1083 (quoting Murray v. Carrier, 477 U.S. 478, 495 (1986)).

In the instant case, Bell does not assert that he was convicted of a crime of which he is innocent. Instead, he merely challenges his sentence. Simply put, such a challenge to a sentence "does not fit within the narrow category of section 2255 proceedings which implicate a fundamental miscarriage of justice" Flores, 981 F.2d at 236. Accordingly, the district court did not err in dismissing Bell's claims.

Two of Bell's claims must be addressed separately. First, Bell contends that after his sentence was imposed, the law surrounding § 4B1.1 of the sentencing guidelines was clarified by our decision in United States v. Bellazerius, 24 F.3d 698 (5th Cir.), cert. denied, 115 S. Ct. 375 (1994). In Bellazerius, we held that the conspiracy to commit controlled substance offenses

Flores, 981 F.2d at 236 n.8. Accordingly, pro se status is not an objective external factor constituting cause for failure to raise an issue in a § 2255 motion. Saahir, 956 F.2d at 118.

was not within the ambit of § 4B1.1 and could not be used "as a trigger for career offender enhancement." Id. at 700-01.

In the instant case, however, we need not determine whether our decision in Bellazerius constitutes an intervening change and therefore is cause entitling Bell to raise this challenge in a second habeas proceeding because Bell can show no prejudice from the change in the law. Bell was convicted and sentenced for conspiracy as well as for possession with intent to distribute. Each sentence was for 360 months, and the sentences are to be served concurrently. As discussed below, there is no question that Bell was subject to 360 months imprisonment for the possession with intent to distribute conviction. Thus, even if his sentence for the conspiracy were reduced, Bell would still be required to serve 360 months for the possession conviction. Because he would serve the same amount of jail time even if he were to prevail in his challenge to enhancement on his conspiracy conviction, Bell shows no prejudice from his alleged error. Accordingly the district court did not err in dismissing this claim.

Second, Bell alleges that an intervening "clarification of the law" excuses his failure to bring another of his current claims in his first habeas petition. Specifically Bell points to amendments to the sentencing guidelines effective on November 1, 1989, and to our holding in United States v. Gaitan, 954 F.2d 1005 (5th Cir. 1992), to support his claim that the law has been clarified since his first habeas claim. Consequently, according

to Bell, his sentence should not have been enhanced under the career offender provisions of § 4B1.2(2) for his prior conviction for simple possession.

As the district court noted, the amendment to the sentencing guidelines on which Bell premises his argument went into effect on November 1, 1989 -- over one month before Bell filed his first habeas petition. Thus, Bell could have raised the issue in that first petition. Bell also contends, however, that our decision in Gaitan, which was handed down after his first petition for habeas relief, constitutes an intervening change in the law entitling him to raise his claim for the first time in this proceeding.

Irrespective of the cause element of his claim, Bell again fails to show prejudice. Bell was convicted under 21 U.S.C. § 841(b)(1)(A), which provided a punishment of "a term of imprisonment which may not be less than 10 years or more than life." 21 U.S.C. § 841(b)(1)(A). Bell was sentenced to 360 months imprisonment, a term well within the range of the statute under which he was convicted, as well as within the applicable sentencing guidelines range for his conviction, notwithstanding the career offender enhancements. Bell simply has failed to demonstrate that the application of the sentencing guidelines caused him prejudice in his sentencing. Because Bell fails to demonstrate prejudice through a misapplication of the sentencing guidelines, the district court did not err in dismissing the claim in Bell's second collateral challenge.

IV. CONCLUSION

For the foregoing reasons, the decision of the district court is AFFIRMED.