

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-10723
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JERRI BYARS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:94-CV-947-R(3:91-CR-149-R))

(January 10, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Appellant Jerri Byars, proceeding pro se and in forma pauperis, attacks her prison sentence under 28 U.S.C. § 2255. The district court sentenced her to 109 months in prison after a jury found her guilty of conspiracy to possess methamphetamine with intent to distribute. Byars did not appeal her conviction. The district court denied Byars's § 2255 motion. We affirm.

DISCUSSION

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Byars raised four claims in her § 2255 motion: (1) disparity of punishment between her sentence and the sentence of a co-defendant; (2) incorrect calculation of her criminal history points; (3) failure to identify the type of methamphetamine when determining the length of the sentence; and (4) insufficiency of the evidence.

Byars cannot obtain relief for these claims under § 2255. "Relief under § 2255 is reserved for (1) errors of constitutional dimension and (2) other injuries that could not have been raised on direct appeal and, if left unaddressed, would result in a miscarriage of justice." United States v. Faubion, 19 F.3d 226, 233 (5th Cir. 1994). The district court's technical application of the Sentencing Guidelines does not give rise to a constitutional issue. United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Byars could have raised these claims on direct appeal but did not. The district court was correct in not considering these claims.

In the "Conclusion" section of her § 2255 motion, Byars suggests that she has an ineffective assistance of counsel claim as well.² The district court did not address this claim. Byars suggests that her court-appointed attorney failed to render her

² The Conclusion section of the motion reads as follows:

[Byars's] attorney of record failed to bring any of the foregoing issues to light in direct appeal. He told [Byars] that he knew little or nothing about filing a notice of appeal and did nothing in this regard. He is a malpractice attorney, not criminal, and was court-appointed. For the foregoing reasons and in light of the fact that [Byars's] defense and appeal rights suffered lack of effective counsel, the conviction of record should be vacated.

1 Record at 7.

effective assistance of counsel by failing to appeal her conviction. Such a claim, if validly presented, is cognizable under § 2255 because of its constitutional basis in the Sixth Amendment. Ineffective assistance of counsel requires proof of deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687 (1984).

Byars's motion fails to allege facts that are sufficient to support an ineffective assistance of counsel claim. Although we construe pro se petitions liberally, they must set forth facts that give rise to the cause of action. See Koch v. Puckett, 907 F.2d 524, 529 (5th Cir. 1990); Guidroz v. Lynaugh, 852 F.2d 832, 834 (5th Cir. 1988). Bare allegations will not suffice. Koch, 907 F.2d at 529. Byars states that her attorney did not file an appeal, but she does not state whether she asked her attorney to appeal. An attorney has no right or duty to take an appeal until the client expresses a desire to do so. Faubion, 19 F.3d at 231. The performance of Byars's attorney cannot have been deficient if she did not ask him to file an appeal. Her motion fails to set forth facts that would give rise to a claim for ineffective assistance of counsel. We conclude that the district court properly did not consider this claim.

CONCLUSION

For the foregoing reasons, the district court's judgment is AFFIRMED.