UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10747
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAYMOND LEE HARRIS,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Texas
(4:94 CV 186 K (4:90 CR 043 K))

(June 21, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Raymond Lee Harris (Harris) appeals the district court's denial of his motion for relief under 28 U.S.C. § 2255. We affirm in part and vacate and remand in part.

Facts and Proceedings Below

Harris pleaded guilty to one count of interstate travel in aid

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of an unlawful business enterprise in violation of 18 U.S.C. § 1952(a)(3). A magistrate judge appointed counsel to represent Harris at sentencing. The Presentence Report (PSR) calculated Harris's guideline range to be 108 to 135 months. Because 18 U.S.C. § 1952(a)(3) provides a statutory maximum term of imprisonment of five years, the PSR determined that the statutory maximum became the guideline sentence. Thus, on December 21, 1990, the district court sentenced Harris to 5 years of imprisonment, three years of supervised release, and imposed a special assessment of $50. Harris did not file a direct appeal. On April 12, 1993, Harris filed a *pro se* motion under Fed. R. Civ. P. 60(b), seeking to set aside his conviction on the ground that the indictment was insufficient. The district court denied this motion on May 10, 1993.

On March 23, 1994, Harris filed a *pro se* motion under 28 U.S.C. § 2255, alleging that his guilty plea was involuntary and that his counsel was constitutionally ineffective. The district court denied this motion. Harris filed a timely notice of appeal and was granted leave to proceed *in forma pauperis*.

Discussion

Harris argues that the district court failed to adhere to Fed. R. Crim. P. 11 by not informing him at the time of his guilty plea that his sentence could be increased under the guidelines based on his prior felony convictions and possession of a firearm. Harris thus argues that his guilty plea was invalid and that, if he had known of the possibility of such sentencing enhancements, he would

not have pleaded guilty. Fed. R. Crim. P. 11(c)(1) requires only that the defendant be informed of the maximum prison term and the fine for the offense charged. In compliance with Rule 11(c)(1), the district court determined that "[t]he record in this case clearly indicates that the Defendant was fully informed of the maximum sentence he faced three times."

Harris does not challenge this finding; rather, he argues that he was not informed that his prior felony conviction and possession of a firearm could increase his guideline sentencing range. Harris's argument would require the district court to inform him of the likely sentence he would receive under the guidelines. This argument is meritless. The guidelines make no changes in the substantive penalties provided by law. *United States v. Jones*, 905 F.2d 867, 868 (5th Cir. 1990). "The district court is not required to calculate or explain the applicable guideline sentence before accepting a guilty plea." *Id.* (citation omitted). Accordingly, the district court did not violate Rule 11 by failing to inform Harris that his guideline range could be increased based on his prior felony conviction and possession of a firearm during the commission of the offense.

Harris also argues that his guilty plea was invalid because his counsel failed to inform him of this potential for upward adjustments in his guideline range. "[E]rroneous advice of defense counsel as to the guideline sentence does not constitute a violation of Rule 11." *Id.* (citation omitted); *see also United*

States v. Santa Lucia, 991 F.2d 179, 180 (5th Cir. 1993). Accordingly, we reject Harris's argument.

Harris also claims ineffective assistance of counsel. In order to prevail on his ineffective assistance of counsel claim, Harris must show (1) that counsel made errors so serious that his performance fell below an objective standard of reasonableness; and (2) that the deficient performance actually prejudiced Harris's defense. *Strickland v. Washington*, 104 S.Ct. 2052, 2064 (1984). Harris first argues that his attorney was ineffective because he failed to object to the use of Harris's 1957 felony conviction to enhance his criminal history category and the upward departure in his offense level for use of a firearm. This argument is directly contradicted by the record. The addendum to the PSR indicates that Harris's attorney objected to the PSR's use of the 1957 felony conviction and to the possession of a firearm.[1] Thus, we reject this argument.

---

[1] In his objections to the PSR, Harris stated, "Defendant objects to [PSR] finding No. 13 adding 2 offense levels based on possession of a firearm. Defendant was not charged with possessing a firearm and there is no evidence that he knew of the existence of the firearm." The addendum rejected this objection on the ground that the weapon was found in a van belonging to Harris and that Harris travelled in the van for purposes of purchasing marihuana. Harris's attorney also filed an objection concerning the use of the 1957 felony conviction: "Defendant objects to PSR finding No. 21 adding 3 points to criminal history category [for the 1957 felony conviction] as the relevant sentence was not imposed and did not result in incarceration within 15 years of the instant offense, and, therefore, according to the guidelines should not be considered in determining criminal history category." The addendum rejected this objection because Harris did not receive final discharge from his parole for the 1957 conviction until July 9, 1983.

Harris also argues that his counsel was ineffective because he failed to inform him that his sentence could be increased under the guidelines based on his prior felony conviction and possession of a firearm. We reject this argument because Harris cannot establish prejudice. If the sentencing court had not used the 1957 conviction, placing him in criminal history category I, and if he had not received the two points for possession of a firearm, making his offense level 28 instead of 30, his guideline range would have been 78-97 months. In this situation, the sentencing court still would have imposed the statutory maximum of 60 months. Because the guideline adjustments of which Harris complains would not have reduced his guideline range below the statutory maximum, he cannot establish that he suffered any prejudice as a result of his attorney's alleged failure to inform him of the guideline adjustments. Harris's failure to establish prejudice defeats his ineffective assistance claim. *Strickland*, 104 S.Ct. at 2069.

Harris also argues that his appointed counsel was ineffective because he failed to file a timely notice of appeal and failed to inform him of his right to appeal or the time limits in which to appeal. Harris raised this argument in the district court below, but the district court did not address it in its order denying Harris's section 2255 motion. Although Harris raises this argument again on appeal, the government does not respond to it.

We have held that an attorney's failure to file a notice of appeal may rise to the level of ineffective assistance of counsel when the client makes known his desire to appeal and the attorney

either promises to file an appeal and does not or misleads the client by intimating that he has filed an appeal when he has not. *Arrastia v. United States*, 455 F.2d 736, 740 (5th Cir. 1972); *Kent v. United States*, 423 F.2d 1050, 1051 (5th Cir. 1970). At the very least, counsel must inform the indigent defendant of his right to appeal, *Martin v. State of Texas*, 737 F.2d 460, 462 (5th Cir. 1984), and notify him of the time limits in which to appeal. *United States v. Gipson*, 985 F.2d 212, 215 (5th Cir. 1993). A defendant who expressly makes known his desire to appeal a conviction does not waive the right to appeal unless it is clear that the attorney will not appeal on the client's behalf. *Id.* at 216-17 & n.7. On the other hand, when a client has been informed of his right to appeal and has not made known to his attorney his desire to pursue an appeal, he has waived his right to appeal, and a claim of ineffective assistance of counsel will not lie. *Childs v. Collins*, 995 F.2d 67, 69 (5th Cir.), *cert. denied*, 114 S.Ct. 613 (1993).

When a defendant shows that his attorney's lapse resulted in a denial of an appeal, he need not show prejudice. *Childress v. Lynaugh*, 842 F.2d 768, 772 (5th Cir. 1988) ("Prejudice resulting from the denial of a defendant's right to appeal is presumed because a criminal conviction can be attacked on numerous procedural and substantive grounds and thus, given the likelihood of prejudice, a case-by-case inquiry is not worth the cost.").[2]

[2] However, simply because the attorney does not file a notice of appeal does not evidence any denial of a defendant's rights. The key is whether the defendant properly relied on the

Where counsel's failure to file a notice of appeal rises to the level of ineffective assistance, as by misleading the defendant into thinking that a notice of appeal has been filed but failing to do so, the remedy is granting an out-of-time appeal. *Gipson*, 985 F.2d at 216 (citation omitted).[3]

In his section 2255 motion and again in his brief on appeal, Harris asserts that his counsel failed to file a timely notice of appeal, failed to inform him of his right to appeal, and failed to notify him of the time limits involved. Aside from Harris's pleadings, there is no other evidence in the record regarding the circumstances surrounding the failure to file a notice of appeal in this case. We do not know whether Harris's counsel indicated to him that he would file a notice of appeal and neglected to do so, or whether the district court informed Harris of his right to appeal. (The record does not include a transcript of the sentencing hearing.) A district court may deny a section 2255 motion without a hearing "only if the motion, files, and records of

---

attorney to file the notice of appeal. *United States v. Green*, 882 F.2d 999 (5th Cir. 1989). In *Green*, the defendant told his attorney that he wanted to appeal his conviction, but the attorney stated that he would not file a notice of appeal unless he was paid more money. *Id.* at 1003. We held that the defendant could not claim to have been misled by the attorney into thinking that the attorney would file a notice of appeal on his behalf. *Id.* The defendant was not therefore entitled to the presumption of prejudice that attaches when a defendant has reasonably relied on the attorney's representations, and we found that the defendant had failed to demonstrate prejudice. *Id.*

[3] The defendant, however, is "not entitled to have his plea vacated, as his decision to plead guilty was not affected by a later failure to file a notice of appeal." *Green*, 882 F.2d at 1003.

the case conclusively show that the prisoner is entitled to no relief." *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992) (citation omitted). We cannot say that the record in this case demonstrates conclusively that Morris is not entitled to relief in this particular respect. The district court should have conducted further proceedings to determine the merits of Harris's claim that his counsel was constitutionally ineffective for failing to file a notice of appeal. We therefore vacate the judgment as to this one aspect of the case and remand for further proceedings in accordance with this decision.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court in all respects except as to Harris's claim of ineffective assistance of counsel with respect to the filing of the notice of appeal, as to which the judgment is vacated and the cause is remanded for further proceedings not inconsistent herewith.

AFFIRMED IN PART and VACATED AND REMANDED IN PART.