UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10860
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MERVIN GLEN ANDERSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93-CV-86-H(3:90-CR-165-H)

(April 20, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Appellant Anderson, currently serving a 30-year term of imprisonment for kidnapping Regina Beasley and violating the Mann Act, 18 U.S.C. § 2421, sought a § 2255 relief based on newly discovered evidence and counsel's alleged ineffectiveness. The district court denied an evidentiary hearing and dismissed the claims. Finding no error, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Anderson first contends that the district court or magistrate judge was required to hold an evidentiary hearing in this case. Because Anderson's contentions are conclusively negated by the district court record, however, the magistrate judge did not abuse his discretion in ruling on the § 2255 motion without conducting an evidentiary hearing. United States v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992).

Anderson next contends that because he did not discover new evidence until after the jury had found him guilty, he is entitled to a new trial. He raised this precise claim on direct appeal and may not do so again in a § 2255 motion. United States v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1986).

Third, Anderson contends that the government withheld exculpatory evidence in violation of Brady v. Maryland, 83 S.Ct. 1194 (1963). Anderson appears to assert that the government came into possession of a pawn shop ticket that established he was in Dallas on June 2, 1990, a day later than the victim testified she was abducted to Memphis. As one element of a Brady claim, Anderson was required to show that the evidence allegedly suppressed by the prosection was "material either to guilt or punishment." Blackmon v. Scott, 22 F.3d 560, 564 (5th Cir.), cert. denied, 1994 W.L. 466509 (1994). In Anderson's direct appeal, this court determined that "Anderson failed to show that if the jury had known about the pawn shop ticket, he would probably been acquitted." Because this

court has already found the pawn shop ticket immaterial, no Brady violation can be established.

Anderson's final contention is that his lawyer ineffectively failed to call certain witnesses during the trial: the owner of the pawn shop where the pawn shop ticket was purchased; Memphis police officers who found Regina Beasley; Regina's uncle; and a friend of Anderson's identified as Jay, who accompanied Anderson and Beasley from Dallas to Memphis. The attorney was not constitutionally deficient for failing to call any of these witnesses.

Anderson contends that the pawn shop owner would have testified that Anderson visited the shop on June 2, 1990, impeaching Beasley's account of the date she was kidnapped. Anderson did not even remember the pawn shop visit until after the trial had ended, however, so his attorney's failure to call a witness unknown at the time of trial cannot have been deficient.

Anderson asserts that the Memphis police officers would have testified that Beasley gave them a false name when they approached her in Memphis. Beasley so testified, however, making the officers' testimony to the same fact unnecessary.

Anderson cannot contend that Regina's uncle would have testified that Beasley voluntarily travelled with Anderson to Memphis, because the uncle recanted this version of events.

Finally, Anderson's friend Jay informed Anderson's attorney before trial that he would not testify on grounds of potential self-incrimination. Anderson's attorney could not force

Jay to testify, so neither deficient performance nor prejudice can be shown. Alexander v. McCotter, 755 F.2d 595, 602 (5th Cir. 1985).

Finally, Anderson's attorney did not err by failing to raise on direct appeal a Brady issue with regard to the pawn shop ticket. Because the ticket was not material to the outcome of trial, his attorney did not have to argue that point on appeal.

For these reasons, the judgment of the district court denying federal habeas relief is AFFIRMED.