

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10978
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIMMIE RICHARD WILBOURN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(7:93-CV-150-X(7:92-CR-001-X))

(July 10, 1995)

Before DUHÉ, WIENER and SMITH, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Jimmie Richard Wilbourn, a federal prisoner, appeals from the district court's denial of his post-

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

conviction motion filed pursuant to 28 U.S.C. § 2255. Specifically, Wilbourn complains that his plea of guilty was involuntary, that the sentencing court erred in relying on hearsay evidence at sentencing, that he received ineffective assistance of counsel at arraignment and sentencing, and that he was erroneously denied credit for time served while released on bond prior to sentencing. The government has filed a motion to supplement the record. Finding no reversible error by the district court, we affirm its denial of post-conviction relief; and we deny the government's motion as unnecessary.

I

FACTS AND PROCEEDINGS

Wilbourn pleaded guilty to a superseding information charging him with one count of possessing a flask with intent to manufacture a controlled substance, in violation of 21 U.S.C. § 843(a)(6) and (c). He was sentenced to a term of imprisonment of 48 months, and his sentence was affirmed on direct appeal.

Wilbourn filed a motion in the district court to vacate, set aside, or correct sentence, arguing that the district court violated Fed. R. Crim. P. 11 by failing to advise him of the mandatory minimum and maximum penalties, the consequences of his guilty plea, and the nature of the charge and circumstances of the offense. Wilbourn insisted that the district court never explained that it would consider conduct charged in the dismissed indictment when sentencing him for the crime charged in the superseding indictment. Wilbourn also contended that the factual basis for his

plea was never established and that he was entitled to a credit for time served while released on bond under 18 U.S.C. § 3585(b)(1).

Wilbourn filed an amended, supplemental, and restated motion in the district court in which he raised additional issues in connection with that court's compliance with Fed. R. Crim. P. 32(a). He contended that the district court had failed to ascertain whether he had personally read the presentence report, denied him the right of allocution, and failed to make findings resolving disputed issues of fact. Wilbourn also asserted that the district court violated Rule 11 by failing to advise him that he would be sentenced under the guidelines. Further, Wilbourn requested specific performance of the plea agreement which he alleged had been breached by the government when it sought to have him sentenced for conduct that had been charged in the dismissed indictment. Finally, Wilbourn contended that he had received ineffective assistance of trial counsel because his attorney had failed to (1) object to the Rule 11 and Rule 32 violations, (2) object in the district court to that court's failure to award a downward adjustment in offense level for acceptance of responsibility, (3) explain the effect of the sentencing guidelines, and (4) advise him that he was subject to a mandatory minimum sentence.

The district court denied the post-conviction motion, and Wilbourn timely appealed. The district court permitted Wilbourn to proceed in forma pauperis (IFP) on appeal.

II

ANALYSIS

A. Voluntariness of Plea

Wilbourn contends for the first time on appeal that the government destroyed "all evidence" prior to the rearraignment. Given the lack of evidence of his guilt, Wilbourn argues, the district court violated his Fifth Amendment right to due process by accepting his guilty plea. We will not consider issues raised for the first time on appeal "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 citation omitted).

Wilbourn stipulated that officers found three round-bottom, triple-neck flasks and other equipment and chemicals used in the manufacture of amphetamine and phenylacetone, along with quantities of amphetamine and phenylacetone, when they executed a warrant to search a storage locker. Wilbourn's fingerprint was found on one of the flasks. Wilbourn admitted that he had rented the storage locker and that he had possessed the flasks with the intent to manufacture amphetamine and phenylacetone.

Before accepting Wilbourn's guilty plea at the rearraignment, the district court asked Wilbourn whether he understood that the government would bear the burden of proving at trial that he knowingly and intentionally possessed the flasks and that he did so with the intent to manufacture a controlled substance. Wilbourn answered, "Yes, sir, but I have not seen a triple-neck, three-

bottom flask or a picture of one. I'd like to be shown one as part of the evidence." The government disclosed at that time that the flask had been destroyed by the chemical destruction team, and that no photographs were taken of the flask. The district court asked Wilbourn, "Well, what do you want to do? Do you want to accept the government's version?" to which Wilbourn responded, "Yeah." The district court then found that there was a factual basis for Wilbourn's guilty plea.

Wilbourn stipulated to the facts underlying his guilty plea, and clearly understood that the flask had been destroyed prior to his entry of his guilty plea. The government could have proved the existence of the flask through the testimony of the investigating officers. Our refusal to consider for the first time on appeal whether Wilbourn's due process rights were violated by destruction of the flask prior to the arraignment will not result in a manifest injustice. See Varnado, 920 F.2d at 321.

Wilbourn also argues that failure to produce the flask or a picture of the flask deprived him of his Sixth Amendment right of confrontation; however, a valid guilty plea waives a defendant's confrontation rights. See Boykin v. Alabama, 395 U.S. 238, 243 (1969) (noting that a guilty plea involves the waiver of three important constitutional rights: the privilege against compulsory incrimination, the right to a jury trial, and the right to confrontation). Under Boykin, the waiver of these rights must be reflected on the record. "This Circuit has repeatedly held that a specific express articulation and waiver of the three rights

mentioned in Boykin is not mandated, but that it is necessary for the record to show that the plea was voluntarily and intelligently given." Neyland v. Blackburn, 785 F.2d 1283, 1287 (5th Cir.), cert. denied, 479 U.S. 930 (1986). Although the district court did not expressly advise Wilbourn that he would be waiving his confrontation right by entering a guilty plea, the plea colloquy reflects that Wilbourn was asked whether he was willing to proceed with his guilty plea, notwithstanding the inability of the government to produce the flask--did he want to "accept the government's version?" Our reading of the record reflects that Wilbourn's guilty plea was voluntarily and intelligently given.

B. Hearsay at Sentencing

Wilbourn contends that the probation officer relied on "ex parte documents" and hearsay evidence to increase his guideline level from 12 to 28, in violation of his confrontation rights under the Sixth Amendment. In the district court, Wilbourn argued that he should not have been punished for conduct that had not been charged in the superseding information.¹ The quantity of drugs at issue, Wilbourn argued, was not established by the factual resume. The district court held that this issue was decided on direct

¹ Wilbourn's base offense level was determined by applying the drug quantity table in U.S.S.G §§ 2D1.1 and 2D1.12 to the amount of controlled substances that could have been produced by the chemicals and equipment that were found in the storage unit. As the resulting imprisonment range exceeded the statutory maximum, Wilbourn was sentenced to the statutory maximum sentence of four years. As the guidelines allow for consideration of relevant conduct of which the defendant has not been convicted, we rejected on direct appeal Wilbourn's argument that the district court erred in using relevant conduct that was related to the charges contained in the dismissed counts of the superseding indictment.

appeal.

[A] defendant's confrontation rights at a sentencing hearing are severely restricted. A court may rely upon uncorroborated hearsay testimony, and even on an out-of-court statement by an unidentified informant (at least where there is good cause for not allowing confrontation and there is some additional corroboration of the statement).

United States v. Rodriguez, 897 F.2d 1324, 1328 (5th Cir.) (internal citations omitted), cert. denied, 498 U.S. 857 (1990). We do not reach the question whether the district court could properly adopt findings in a PSR that were based on hearsay evidence because the objection is raised for the first time on appeal and because the "good cause" component of Rodriguez shows that the issue raises questions that are not "purely legal." Varnado, 920 F.2d at 321.

C. Ineffective Assistance of Counsel

Wilbourn also claims that he received ineffective assistance of trial counsel. To prove that his counsel was ineffective, Wilbourn must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). To show deficient performance, Wilbourn must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. In the context of a guilty plea, the "prejudice" requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59 (1985). Wilbourn "must show that there is a reasonable probability

that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. In the context of sentencing matters, prejudice on an ineffective-assistance claim is met if "there [wa]s a reasonable probability that but for trial counsel's errors the [petitioner]'s non-capital sentence would have been significantly less harsh." Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993) (footnote omitted). A court need not address both components if the petitioner makes an insufficient showing on one. Strickland, 466 U.S. at 697.

Wilbourn argues for the first time on appeal that his attorney erred in allowing him to plead guilty despite the destruction of the evidence against him, and in failing to allow him to cross-examine his accusers. Wilbourn argues that the government never presented witnesses to testify about the contents of the storage locker and did not disclose to the district court that a government informant shared the storage locker with Wilbourn.

His argument fails the first prong of the Strickland test. The destruction of the flasks would not have prevented the government from carrying its burden of proof. There is no reason to believe that cross-examination of the informant and of the investigating officers would have resulted in an acquittal. Also, conviction for the crimes charged in the superseding indictment could have resulted in much more severe sentence. Under these circumstances, the attorney's conduct in allowing Wilbourn to plead guilty and to waive his confrontation rights was not professionally unreasonable.

Wilbourn also asserts that his attorney rendered ineffective assistance in failing to ensure that the district court made findings resolving his objections to the PSR. In the district court, Wilbourn complained that his attorney did not object to the district court's failure to make Rule 32 findings. In his objections to the PSR, Wilbourn complained that the probation officer's guideline calculation was based on conduct outside his factual stipulation. One could not conclude from the stipulations, Wilbourn argued, that he manufactured or attempted to manufacture amphetamine. Wilbourn also argued that consideration of the relevant conduct contravened the plea agreement.

The probation officer responded that law enforcement officers connected with the North Texas Regional Drug Task Force and Drug Enforcement Administration were prepared to testify that Wilbourn was known to be a methamphetamine laboratory operator and distributor. Wilbourn had stipulated that he was renting the storage unit, that he was aware of the items stored there, and that he intended to use those items to manufacture amphetamine. The storage locker contained a complete disassembled methamphetamine/amphetamine laboratory, together with necessary precursor chemicals. According to the probation officer, "[a] forensic chemist for the DEA laboratory in Dallas, Texas, [was] willing to testify at sentencing that the large amount of chemicals recovered in this case represent a multi-million dollar methamphetamine/amphetamine drug operation." The probation officer concluded that there was sufficient evidence to support a conclusion that Wilbourn

was attempting to manufacture, and successfully manufactured, amphetamine and phenylacetone.

Although the district court did not expressly resolve disputed factual issues that may have been raised by Wilbourn's objection, its comments at sentencing imply that the court had accepted the probation officer's reasoning. Under the circumstances, it was not unreasonable for the defense attorney to fail to raise an objection to the district court's failure to make express findings under Rule 32. Wilbourn has not shown that he was prejudiced by his attorney's failure to raise this objection.

Wilbourn also contends that his attorney rendered ineffective assistance by failing to object to the destruction of the physical evidence prior to the rearraignment. As was previously discussed, this issue is raised for the first time on appeal. As the existence of the contraband could have been established through circumstantial evidence, Wilbourn was not prejudiced by the failure of the attorney to object to the destruction of the evidence.

Wilbourn next argues, also for the first time on appeal, that his attorney failed to ensure that Wilbourn would be credited for time served while released on bond pending sentencing. But, as we explain below, Wilbourn was not entitled to this credit. Moreover, his attorney did raise the issue at sentencing, only to have it overruled by the district court in light of the Supreme Court's ruling in United States v. Wilson, 503 U.S. 329, _____, 112 S. Ct. 1351, 1354-55 (1992) (holding 18 U.S.C. § 3585(b) does not authorize a district court to compute credit for time spent in

official detention at sentencing, but that credit awards are to be made by the Attorney General, through the Bureau of Prisons, after sentencing). The defense attorney's representation in this regard was not professionally unreasonable.

Wilbourn finally urges that his attorney was ineffective in failing to "assert law to hold court to plea agreement." Wilbourn's attorney did object to the PSR on the ground that consideration of the relevant conduct contravened the plea agreement, and he reiterated this argument at sentencing. The attorney's representation in this regard was not professionally unreasonable.

D. Credit for Time Served While Released on Bond

Wilbourn contends that he was entitled to a credit of 11 months against his sentence for time he served while he was released on bond prior to sentencing. As this claim challenges the execution of Wilbourn's sentence, it must be brought under 28 U.S.C. § 2241. United States v. Cleto, 956 F.2d 83, 84 (5th Cir. 1992). Section 2241 petitions must be filed in the district where the petitioner is incarcerated. United States v. Gabor, 905 F.2d 76, 78 (5th Cir. 1990). As Wilbourn is incarcerated at El Reno, Oklahoma, the district court sitting in Texas did not have jurisdiction and properly denied this claim. Even though Wilbourn's claim appears to have no chance of success on the merits, see Cleto, 956 F.2d at 84-85 (pre-trial release was not "official detention" for purposes of § 3585(b)), we hereby modify the district court's ruling to reflect that it is without prejudice

as to this issue.

E. Government Motion to Supplement the Record

The government has moved this court to supplement the record with Wilbourn's conditions of release. The motion is denied as unnecessary.

AFFIRMED.