

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-11084
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ANTHONY RAY JOHNSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:94-CV-0037-R) 3:92-CR-279-R))

(May 29, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Anthony Ray Johnson appeals the denial of his motion to reduce his sentence. We affirm.

Appellant plead guilty to a drug offense. In accordance with the plea agreement, the Government moved for downward departure of six levels due to Appellant's cooperation. The sentencing court granted the motion, departed downward three additional levels, and sentenced Appellant to the minimum within the guideline range thus produced, which was below the statutory minimum. Johnson did not

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeal. He filed this § 2255 motion attacking the competence of his counsel on numerous grounds and claiming that his plea was involuntary. The district court denied his motion without a hearing.

Johnson's appellate arguments are somewhat confusing but, as near as we can determine, he asserts on appeal that his counsel was ineffective because: (1) he failed to object to sentencing errors; (2) he had a conflict of interest; and (3) he failed to inform Appellant of his right to appeal. Johnson also contends that the district court erred in rejecting his claims without an evidentiary hearing.

We test the ineffective assistance of counsel claims under the well known standards of Strickland v. Washington, 466 U.S. 668 (1984).

Johnson first argues that self incriminating information was used to compute the total amount of drugs attributable to him and that his counsel failed to object to the calculation. He did not raise this issue in the district court. It raises issues of law and fact and, therefore, we do not consider it for the first time on appeal. Varnado v. Collins, 920 F.2d 320, 321 (5th Cir. 1991); Black v. Collins, 962 F.2d 394, 401 (5th Cir.), cert. denied, 112 S.Ct. 2983 (1992).

Appellant also argues that counsel failed to object to the amount of cocaine which the district court attributed to him as reasonably foreseeable in furtherance of the drug conspiracy. He apparently believes that his base offense level was based on the

delivery of three or four times 150 kilograms of cocaine. This is a misconception. No § 1B1.8 information was used to compute his base offense level and his level of 36 reflected the distribution of between 50 and 150 kilograms of cocaine.

He states that counsel was ineffective because he failed to object to a two level increase Appellant received for being the supervisor of a drug conspiracy. He does not argue this issue, however, and the issue is thereby waived. Yohey v. Collins, 985 F.2d 222, 224-25 (5th Cir. 1993).

Appellants argument that counsel had a conflict of interest differs in this Court from that which he made to the district court. In the district court his argument was purely conclusional. Here it is specific. In the district court he did not identify the nature of the alleged conflict nor did he specify what adverse consequences he suffered because of it. Thus, the district court did not err by concluding that this claim raised no constitutional issue. See United States v. Pineda, 988 F.2d 22, 23 (5th Cir. 1993). In addition, he has not shown in this Court how it constituted an abuse of discretion for the district court not to conduct a hearing on this claim.

Finally, Appellant contends that counsel was ineffective for failing to inform him of his right to appeal. However, he offers no factual support for this contention. While failure to inform a defendant of rights to appeal may constitute ineffective assistance, the Appellant must present more than Johnson has presented. His conclusional statement is directly rebutted by the

plea agreement which strongly indicates that he was completely informed about his rights of appeal. An evidentiary hearing is not likely to produce any other information other than Johnson's contention because it appears that defense counsel is deceased.

We find no error in any of the district court's conclusions and findings and, therefore, the denial of Appellant's motion is

AFFIRMED.