

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20042
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSE EUCLIDES TABARES-GALLEGO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-1834 (CR-H-88-303))

(September 29, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Jose Euclides Tabares-Gallego ("Tabares-Gallego") was indicted and convicted on three counts--conspiracy to import more than 500 grams of cocaine in violation of 21 U.S.C. §§ 952, 960(b)(2), 963 (Count I), aiding and abetting the importation of more than 500 grams cocaine in violation of 21 U.S.C. §§ 952,

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

960(b)(2) and 18 U.S.C. § 2 (Count II); and possession with intent to distribute more than 5,000 grams of cocaine in violation of 21 U.S.C. § 841(a), b(1)(A). Tabares-Gallego appeals the district court's denial of his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. We affirm.

I. FACTS AND PROCEDURAL HISTORY

The charge under Count III of the indictment involved seven "bricks" of cocaine. At trial, there was testimony from several witnesses regarding the total weight of these cocaine bricks. Nigel Brooks ("Brooks"), a Special Agent with the United States Customs Service, testified that he weighed the packages of cocaine in the days before trial, and that their total weight was 5038.4 grams. On cross-examination, Brooks also stated that the reason he weighed the cocaine was to determine whether the amount of cocaine actually exceeded 5000 grams, as charged in the indictment. A second witness, a DEA chemist, Leo Pulte ("Pulte"), also testified about the weight of the drugs. He stated that he determined the quantity of cocaine by weighing a few of the bricks and extrapolating the result to the remaining bricks. From this extrapolation, he testified that he found the weight of the cocaine to be 4893.1 grams. Further, Pulte acknowledged that there is a ten percent margin of error in extrapolating weights and that the weight of 5038.4 grams obtained by Brooks was within that margin of error. After a jury

trial, Tabares-Gallego was convicted on all three counts charged in the indictment.

A presentencing report was prepared, and the district court adopted the factual findings contained in that report which, among its determinations, accepted the quantity of cocaine alleged in Count III of the indictment. Basing its decision, in part, on the presentencing report and the jury verdict, the district court sentenced Tabares-Gallego to 132 months of confinement to be followed by five years' supervised release and levied a special assessment of \$150.

Tabares-Gallego appealed his conviction alleging insufficient evidence and improper exclusion of an Hispanic juror. On direct appeal, his conviction was affirmed by this court. United States v. Tabares-Gallego, 898 F.2d 150 (5th Cir. 1990).

Next, Tabares-Gallego filed a § 2255 motion in the district court alleging that Brooks perjured himself and that in determining the sentence, the district court improperly relied upon the testimony of Brooks, the jury verdict, and the information contained in the presentencing report. Additionally, Tabares-Gallego argued that the district court, by relying on the presentencing report's findings in regard to the quantity of cocaine, violated Fed. R. Crim. P. 32(c)(3)(D), abused its discretion, and deprived Tabares-Gallego of due process. Finally, in his § 2255 motion, Tabares-Gallego claimed ineffective assistance of trial and appellate counsel.

Specifically, he argued that at trial his Sixth Amendment rights were unconstitutionally impinged by his counsel's failure to independently investigate the weight of the bricks of cocaine, and similarly, that on appeal his counsel was constitutionally defective in neglecting to raise the issue of the dispute in testimony surrounding the weight of the cocaine.

The district court denied the motion on all grounds, and this appeal followed. On appeal, Tabares-Gallego waives his allegations of perjury and ineffective assistance of appellate counsel.

II. STANDARDS OF REVIEW

It is well settled that after a defendant has been convicted and exhausted or waived his right to appeal, he is presumed to "stand fairly and finally convicted." United States v. Shaid, 937 F.2d 228, 231-32 (5th Cir. 1991) (en banc) (quoting United States v. Frady, 456 U.S. 152, 164 (1982)), cert. denied, 112 S. Ct. 978 (1992). Further, once a conviction or a sentence is presumed final, a defendant may challenge it only on issues of constitutional or jurisdictional magnitude. Id. at 232 (citing Hill v. United States, 368 U.S. 424, 428 (1962)).

The presumption, however, is not completely irrefutable. Section 2255 provides a very limited opportunity to collaterally challenge a conviction or a sentence, see United States v. Cates, 952 F.2d 149, 151 (5th Cir. 1992) (describing the role and the scope of § 2255), cert. denied, 112 S. Ct. 2319 (1992), but a § 2255 motion or other collateral attack is not a substitute for

appeal, and therefore, provides much narrower avenues for relief. Shaid, 937 F.2d at 231 (quoting Frady, 456 U.S. at 165). Thus, a defendant normally may not raise issues for the first time on collateral review. Id. at 232. Furthermore, nonconstitutional challenges to a conviction, not raised on direct appeal, will only be heard in a § 2255 motion if they (1) could not have been raised on direct appeal and (2) are errors of a nature that "would, if condoned, result in a serious miscarriage of justice." Shaid, 937 F.2d at 232 n.7 (citing United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981); see also Reed v. Farley, 114 S. Ct. 2291, 2300 & n.13 (1994); Stone v. Powell, 428 U.S. 465, 477 n.10 (1976)).

Similarly, when a defendant raises a constitutional error in a conviction or a sentence, if that error was not raised on direct appeal, courts will not hear it in a collateral attack unless the defendant can show both cause for failing to raise the error on direct appeal and actual prejudice resulting from that error. Frady, 456 U.S. at 167-68 (holding the proper standard for a § 2255 motion is "cause and actual prejudice"); Shaid, 937 F.2d at 232; see also Murray v. Carrier, 477 U.S. 478, 493 (1986) (holding, inter alia, that the cause and actual prejudice standard applies to fundamental errors). The Supreme Court, however, has noted one exception, stating, "in an extraordinary case, where a constitutional violation has resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of

cause for the procedural default." Carrier, 477 U.S. at 496; see also Shaid 937 F.2d at 232.¹

Tabares-Gallego's ineffective assistance of counsel claim must be evaluated under a somewhat different standard. An ineffective assistance of counsel claim is of constitutional magnitude and satisfies the cause and prejudice standard for review on collateral appeal. United States v. Pierce, 959 F.2d 1297, 1301 (5th Cir. 1992), cert. denied, 113 S. Ct. 1297 (1992) (quoting Carrier, 477 U.S. at 488). Thus, such a claim may be asserted for the first time in a collateral appeal. Id. ("`[T]he general rule of this circuit is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal" (internal quotations and citations omitted)).

Still, in order to succeed in an ineffective assistance of counsel claim, a defendant must show both that the attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for the attorney's unprofessional errors, a different result would have occurred. United States v. Kinsey, 917 F.2d 181, 183 (5th Cir. 1990) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984)). Further, the reasonableness of an attorney's conduct is

¹ The cause and prejudice procedural bar to issues first raised on a collateral appeal is not automatic; in order to invoke this bar, "the government must raise it in the district court." United States v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992). In this case, while the government addressed Tabares-Gallego's substantive claims, it raised the procedural bar in its answers to Tabares-Gallego's § 2255 motion in the district court and in a concurrently filed motion for summary judgment.

evaluated "under the professional norms prevailing [at] the time counsel rendered assistance." Black v. Collins, 962 F.2d 394, 401 (5th Cir.), cert. denied, 112 S. Ct. 2983 (1992). Finally, in evaluating the reasonableness of an attorney's conduct, an appellate court must be highly deferential to counsel's decisions since "it is extremely difficult for reviewing courts to place themselves in the counsel's position and evaluate the choices he or she should have made." Id.

III. DISCUSSION

A. Nonconstitutional Claims

In this appeal, Tabares-Gallego seeks relief on several nonconstitutional grounds. First, he claims that in determining his sentence, the district court improperly used the testimony of Brooks, the jury verdict, and the information contained in the presentencing report. These claims, however, are not cognizable on collateral review since they were not raised on direct appeal. The defendant shows no reason why these claims were not raised on direct appeal, and, as discussed above, a nonconstitutional error first raised in a § 2255 motion will not be heard if it could have been raised on direct appeal. Shaid, 937 F.2d at 232 n.7; Capua, 656 F.2d at 1037. Moreover, the errors asserted by Tabares-Gallego are not the type resulting in the "serious miscarriage of justice" required for collateral relief of nonconstitutional errors not raised on direct appeal. Id. None of Tabares-Gallego's nonconstitutional claims even purports to allege factual innocence, but merely involve disputes over the

weight of cocaine. Thus, Tabares fails both of the requirements for bringing a nonconstitutional claim of error in a collateral appeal when that claim was not raised on direct appeal.

B. Constitutional Claims

Tabares-Gallego also raises several constitutional claims and several claims which he classifies as constitutional. Specifically, he alleges that his due process rights were violated by the district court's reliance on the jury verdict to resolve questions regarding the weight of the cocaine. Additionally, Tabares-Gallego contends that the district court abused its discretion and violated his due process rights by adopting the presentencing report and failing to follow Fed. R. Crim. P. 32(c)(3)(D). Finally, Tabares-Gallego asserts ineffective assistance of counsel in violation of his Sixth Amendment rights.

Regardless of whether Tabares-Gallego's claims surrounding the district court's reliance on the jury verdict or presentencing report actually rise to the level of a constitutional deprivation of due process, they fail to meet the cause and actual prejudice standard required for collateral review of constitutional claims first raised on appeal. See Shaid, 937 F.2d at 232 (discussing the standard for reviewing constitutional errors first raised on collateral appeal). Tabares-Gallego offers no explanation why he did not assert these errors on direct appeal, and thus fails the cause and prejudice test. See Carrier, 477 U.S. at 488 (noting that "cause" for

failure to bring an issue on direct appeal consists of "objective factor[s] external to the defense").

Therefore, Tabares-Gallego may only raise the issues surrounding his sentencing in a § 2255 motion if he can show that these errors are the type the Supreme Court alluded to in Carrier--those resulting in fundamental miscarriages of justice and in the conviction of one who is actually innocent. Carrier, 477 U.S. at 495-96; Shaid, 937 F.2d at 232. Simply, this is not such a case. As noted above, Tabares-Gallego does not contest his factual guilt but rather protests only his sentence, and, thus, he may not exercise the narrow exception to the cause and prejudice requirement for issues first raised on a § 2255 motion. See United States v. Flores, 981 F.2d 231, 236 (5th Cir. 1993) (noting that challenge of the computation of a sentence "does not fit within the narrow category of section 2255 proceedings which implicate a fundamental miscarriage of justice").

Finally, Tabares-Gallego argues that his counsel was deficient for failing to investigate the weight of the cocaine either independently or through an expert witness. The record, however, reflects that Tabares-Gallego's counsel not only vigorously cross-examined Brooks about the accuracy of the methodology used to weigh the cocaine, but also thoroughly explored Brook's reasons for weighing the drugs. The decision not to further develop the issue through an expert witness or other means is a strategic decision, and this court "is careful

not to second guess a legitimate strategic choice." Yohey v. Collins, 985 F.2d 222, 228 (5th Cir. 1993).

Tabares-Gallego claims that adequate representation would have required his attorney to independently investigate the weight of the cocaine. This is not the case. While obtaining an independent weighing of the cocaine might have been a superior strategy, Tabares-Gallego offers nothing to overcome the presumption that his attorney's actions constituted sound trial strategy, and in order to succeed in a claim for ineffective assistance of counsel that presumption must be surmounted. Anderson v. Collins, 18 F.3d 1208, 1215 (5th Cir. 1994) (the reasonableness requirement of Strickland requires the defendant to "overcome the presumption that the challenged action might be considered sound trial strategy" (citations and internal quotations omitted)), cert. denied, 114 S. Ct. 1637 (1994). Thus, Tabares-Gallego's claims of ineffective assistance of counsel must fail.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's denial of Tabares-Gallego's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.