

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20238
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JIMMY ROSSI SAMUEL-BEY,

Defendant-Appellant,

Appeal from the United States District Court
for the
Southern District of Texas
(CA-H-93-3690(CR-H-91-139))

(February 17, 1995)

Before JOHNSON, DUHE, and BENAVIDES, Circuit Judges.

JOHNSON, Circuit Judge:¹

Jimmy Rossi Samuel-Bey ("Samuel") appeals the district court's denial of his 28 U.S.C. § 2255 motion alleging various grounds of ineffective assistance of counsel. Because the district court did not err in denying Samuel's section 2255 motion, we affirm.

I. Facts and Procedural History

On January 16, 1990, Houston police officers and agents of the

¹Local 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 Pursuant to this Rule, the Court has determined that this opinion should not be published.

Bureau of Alcohol, Tobacco and Firearms ("ATF") executed a search warrant at a house in Houston. The officers found Samuel in a bedroom inside of the house in possession of approximately 14.8 grams of cocaine.² In the same bedroom, the officers also found two handguns, a rifle, a triple beam scale, and money hidden throughout the room. The officers conducting the search found nothing consistent with Samuel's use of cocaine, but concluded, based on their experience, that Samuel was a dealer.³

The police arrested Samuel and charged him with possession of cocaine—a felony in the State of Texas. Samuel entered a guilty plea to the charge on May 15, 1990, and received a five year prison term. Samuel served six months of his sentence and was released on parole. Samuel claims that when he appeared in state court to answer his charges on May 15, he encountered ATF Agent Jimmy Brigance ("Agent Brigance") in the courthouse hallway. Samuel claims that a conversation ensued between himself and Agent Brigance in which Agent Brigance informed Samuel that if he plead guilty to the state cocaine charge, the federal government would not bring any federal firearm offense charges against him. Samuel claims that he was relying on this promise by Agent Brigance when

²When the officers first entered the bedroom and discovered Samuel, Samuel attempted to conceal the cocaine. When the officers discovered the cocaine, Samuel tore the plastic bag in which the cocaine was located and began spreading the cocaine all over the room.

³The officers' conclusion that Samuel was probably a dealer was based on the facts that Samuel: had no drug use paraphernalia with him at the time of the search warrant's execution, was found in close proximity to several guns as well as large cash amounts, and was in possession of a substantial amount of cocaine.

he plead guilty to state cocaine possession charges.

On September 1, 1991—after Samuel was out on parole for his state cocaine possession charge—the Houston police arrested Samuel and informed him that he had been indicted by a Federal Grand Jury on August 16, 1991, for being a felony in possession of a firearm. One month later, in a superseding indictment, the Federal Grand Jury in Houston charged Samuel with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and with use of a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c). This matter proceeded to a jury trial on November 19, 1991, in which the jury found Samuel guilty on both counts. During the trial, the United States Government ("Government") offered the May 15, 1990, guilty plea in order to establish the predicate offense for use of a firearm during and in relation to a drug trafficking offense.⁴ After entering judgment in accord with the jury verdict, the trial judge sentenced Samuel to twenty-seven months in prison for the first count and sixty months for the second. The sentences were to be served consecutively and then followed by a period of supervised release.⁵

Samuel directly appealed the trial court's decision and sentence. In an unpublished opinion, this Court affirmed the judgment of the district court. The United States Supreme Court

⁴Notably, during the federal trial, Samuel's trial counsel stipulated that Samuel had plead guilty to the state court possession offense.

⁵The trial court also assessed several thousand dollars worth of fines against Samuel.

denied certiorari. At this point, Samuel returned to the federal district court and submitted this section 2255 motion. In the motion, Samuel alleged ineffective assistance of trial counsel for: 1) failure to file a motion to dismiss for prejudicial preindictment delay, 2) failure to challenge the admission of the guilty plea entered in state court, 3) failure to file a motion for relief from prejudicial joinder of the two federal criminal counts, and 4) failure to object to the jury instructions or request curative instructions.

II. Discussion

This Court reviews ineffective assistance of counsel claims to determine whether counsel's performance was both objectively deficient and actually prejudicial to the defendant. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *United States v. Gipson*, 985 F.2d 212, 215 (5th Cir. 1993). To establish "prejudice," the criminal defendant is required to show that but for counsel's unprofessional errors, there is a reasonable probability that the result of the criminal proceeding would have been different. *Strickland*, 466 U.S. at 694. To establish deficient performance, the defendant must overcome the strong presumption that the attorney's conduct fell within a wide range of objectively reasonable professional assistance. *Strickland*, 466 U.S. at 689. If the defendant makes an insufficient showing on one of the components of the inquiry, the Court need not even address the other. *Id.* at 697. The district court's findings in connection with a denial of a section 2255 petition are reviewed

for clear error. *United States v. Woods*, 870 F.2d 285, 287 (5th Cir. 1989).

A. Preindictment Delay

The Fifth Amendment due process clause provides safety from preindictment delay. *United States v. Beszborn*, 21 F.3d 62, 65 (5th Cir.), *cert. denied sub. nom.*, *Westmoreland v. United States*, 115 S. Ct. 330 (1994). However, a defendant bears the burden of proving unconstitutional preindictment delay. *Id.* To meet this burden the defendant must prove: (1) that the prosecutor intentionally delayed the indictment to gain a tactical advantage and (2) that the defendant incurred actual prejudice as a result of the delay. *Id.* at 65-66. The prejudice must be "actual prejudice, not possible or presumed prejudice." *Id.* at 66.

Neither Samuel nor the record itself provide any indication whatsoever that the Government *intentionally* delayed seeking an indictment of Samuel to achieve some tactical advantage. The passage of time alone in this case⁶ does not provide the necessary evidence of intentional delay. Therefore, Samuel fails to establish ineffectiveness of counsel on this ground since there was no evidence by which Samuel's trial counsel could have proven preindictment delay.

B. Guilty Plea Admissibility

Samuel argues that his trial attorney's failure to object to the admission of Samuel's state court guilty plea constitutes

⁶There was an eighteen-month period between the date of Samuel's initial arrest on January 16, 1990, and the federal court indictment on August 16, 1991.

ineffective assistance of counsel. He claims that his guilty plea was invalid because an ATF agent misrepresented to Samuel that he would not be charged with federal gun offenses if he entered a plea of guilty in state court to the cocaine charge.

The facts indicate that, far from deficiently performing by not objecting to the admission of the guilty plea, Samuel's trial counsel made a tactical decision to emphasize Samuel's admission of guilt as to possession in an attempt to paint Samuel as a cocaine user rather than a dealer. Additionally, even if the guilty plea had been coerced by the ATF officer, Samuel was not prejudiced by its admission because there was sufficient direct evidence of Samuel's cocaine possession for a conviction.⁷ Samuel has failed to overcome the strong presumption that his trial counsel's performance fell within the wide range of reasonable professional assistance established by *Strickland*.

C. Failure to Sever Federal Offense Counts

The Federal Rules of Criminal Procedure *permit* joinder of offenses if the offenses are: 1) of the same or similar character or 2) based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. FED. R. CRIM. P. 8(a); *see also United States v. Fortenberry*, 919 F.2d 923, 926 (5th Cir. 1990), *cert. denied*, 499 U.S. 930 (1991) (citing *United States v. Park*, 531 F.2d 754, 760-61 (5th Cir. 1976) (holding transactions requirement of

⁷The cocaine was actually found clutched in Samuel's hand. Possession, therefore, cannot really be disputed.

Rule 8(a) to be flexible enough to join drug and firearms charges where both were found during a search of the defendant's home)).

The drugs and firearms involved in the present case were found in one house during the course of a single search. Thus, the drugs and firearms were based on the same transaction so as to permit the district court to join the offenses. Given that the district court acted fully within its discretion in joining the offenses, Samuel's defense counsel was not deficient in challenging the joinder as wrongful.

IV. Jury Instructions

Samuel argues that the trial judge should have informed the jury that Samuel's prior guilty plea should not be considered as an admission that Samuel was involved in a drug-trafficking offense since Samuel had only plead guilty to *possession* of cocaine. The district court instructed the jury that, in order to find Samuel guilty of use of a firearm in connection with a drug trafficking crime, the Government had to prove beyond a reasonable doubt that "[t]he defendant possessed the cocaine with the intent to distribute it." III Record 207. The court also instructed the jury that mere possession of the drug for personal use was not enough. *Id.* The court provided the jury with the proper instructions so as to make clear that more than mere possession was required for the underlying distribution offense. Therefore, Samuel did not receive ineffective assistance when his defense counsel did not object to the jury instructions or request curative

instructions.⁸ The district court's denial of section 2255 relief with respect to this allegation was not erroneous.

III. Conclusion

Because Samuel has failed to establish ineffective assistance of his trial counsel, the district court did not err in denying Samuel's section 2255 motion, and its decision should be affirmed. AFFIRMED.

⁸In fact, quite to the contrary, it would appear that Samuel's defense counsel pursued the reasonable strategy throughout the trial of distinguishing between "possession" and "distribution" in an effort to paint Samuel as a user instead of a distributor.