

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20304
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PHANOR GOMEZ-RODRIGUEZ,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC No. 91-CR-00126-01

- - - - -
(November 16, 1994)

Before JONES, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

Phanor Gomez-Rodriguez (Gomez), convicted by guilty plea of money laundering offenses and sentenced to a total of 235 months imprisonment, appeals from the district court's denial of his motion to vacate, set aside, or correct sentence. 28 U.S.C. § 2255.

"A district court's technical application of the Guidelines does not give rise to a constitutional issue." United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Thus, Gomez's contention that his sentence should be reduced for acceptance of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

responsibility pursuant to U.S.S.G. § 3E1.1 is not cognizable in a § 2255 motion.

Gomez contends that his counsel was deficient for failing to raise, on direct appeal, the argument that Gomez was erroneously denied the two-point reduction for acceptance of responsibility. We review claims of ineffective assistance of counsel to determine whether counsel's performance was both deficient and prejudicial to the defendant. United States v. Gipson, 985 F.2d 212, 215 (5th Cir. 1993). To establish "prejudice," the defendant is required to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To show deficient performance, the defendant must overcome the strong presumption that the attorney's conduct falls within a wide range of reasonable professional assistance. Id. at 689. If the defendant makes an insufficient showing on one of the components of the inquiry, the court need not address the other. Id. at 697.

We apply a very deferential standard of review to a district court's refusal to credit a defendant's acceptance of responsibility. See United States v. Thomas, 12 F.3d 1350, 1372 & n.39 (5th Cir.) (applying "clearly erroneous" standard and noting that there "appear[ed] to be no practical difference" between that standard and the "without foundation" or "great deference" standards used in other cases) (internal quotations and citations omitted), cert. denied, 114 S. Ct. 1861, 2119

(1994). Gomez has failed to show that there was a reasonable probability that but for his counsel's failure to assert the acceptance of responsibility issue on direct appeal, his sentence would have been significantly less harsh. Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993).

Gomez argues that the district court failed to make an adequate statement of its reasons for choosing the 235-month sentence as is mandated by 18 U.S.C. § 3553(c). "[A] collateral challenge may not do service for an appeal.'" United States v. Shaid, 937 F.2d 228, 231 (5th Cir. 1991) (en banc) (quoting United States v. Frady, 456 U.S. 152, 165, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)), cert. denied, 112 S. Ct. 978 (1992). Relief under § 2255 is reserved for violations of a defendant's constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice. United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981). If a defendant alleges a fundamental constitutional error, he may not raise the issue for the first time in a § 2255 motion without showing both "cause" for his procedural default and "actual prejudice" resulting from the error. Shaid, 937 F.2d at 232.

The district court was required to state its reasons for imposing the 235-month sentence pursuant to § 3553(c)(1) because the guidelines range exceeded 24 months. The district court's reasons for imposing sentence were not clearly erroneous. Cf. United States v. Pennington, 9 F.3d 1116, 1118 (5th Cir. 1993) (holding that the district court's reasons for an upward

departure amount to fact findings reviewable for clear error). The reasons reflect an assessment by the district court comporting with the factors to be considered in imposing sentence set forth in 18 U.S.C. § 3553(a). Cf. United States v. Jones, 905 F.2d 867, 869 (5th Cir. 1990) (reasons for upward departure can include an assessment of aggravating circumstances not adequately considered by the guidelines). It is unnecessary for us to determine whether ineffective assistance of counsel constituted cause for Gomez's procedural default, because he has failed to show prejudice.

The only exception to the cause-and-prejudice test is when the failure to grant relief would result in a "manifest miscarriage of injustice," i.e., in the "extraordinary case . . . in which a constitutional violation has probably resulted in the conviction of one who is actually innocent." See Shaid, 937 F.2d at 232 (internal quotation marks omitted). Assuming such an analysis extends to non-capital sentencing issues, see Smith v. Collins, 977 F.2d 951, 959-60 (5th Cir.), cert. denied, 114 S. Ct. 97 (1993), Gomez has not shown that he was not "legally eligible for the sentence he received." Id. Therefore, he does not meet the exception to the cause-and-prejudice test.

AFFIRMED.