IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20534
Summary Calendar

United States of America,

Plaintiff-Appellee,

versus

Jose Rodriguez,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CA-H-94-1990 (CR-H-89-2293))

(February 16, 1995)

Before KING, JOHNSON, and DeMOSS, Circuit Judges.[*]

JOHNSON, Circuit Judge:

Jose Rodriguez appeals the district's courts summary denial of his motion to vacate sentence filed pursuant to 28 U.S.C. § 2255. We AFFIRM in part and VACATE and REMAND in part.

I. FACTS AND PROCEDURAL HISTORY

A jury convicted Jose Rodriguez of conspiracy to possess, with intent to distribute, marijuana, in violation of 21 U.S.C. §§ 841(a)1) and 846, and of aiding and abetting in the structuring of a money transaction, in violation of 18 U.S.C. § 2

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and 31 U.S.C. § 5324(1)(3). The district court sentenced him to a term of imprisonment of 240 months on the conspiracy conviction and a term of imprisonment of 60 months on the money-structuring conviction, the sentences to be served concurrently. This Court affirmed his conviction and sentence.

In his first motion to vacate his sentence pursuant to 28 U.S.C. § 2255, Rodriguez asserted that his appellate counsel was ineffective for failing to argue that 1) the drug quantity attributable to him was not reasonably foreseeable and that 2) he was not a manager or supervisor under U.S.S.G. § 3B1.1(b) because he did not control the requisite number of people. Rodriguez also contended that his trial counsel was ineffective for failing to challenge his allegedly illegal arrest and that the makeup of the jury venire was improper.

The district court summarily dismissed Rodriguez's motion, citing Rule 4(b) of the Rules Governing Section 2255 Proceedings. Despite the lack of findings of fact and conclusions of law to support the district court's action, a panel of this Court affirmed because it determined that the record was sufficient as to those claims to allow it to conduct a meaningful review even in the absence of findings and conclusions.

Rodriguez then filed a second motion to vacate his sentence pursuant to 28 U.S.C. § 2255. Now represented by counsel, Rodriguez alleged that his trial counsel was ineffective because he 1) failed to contact or interview witnesses who were allegedly willing to testify and would have refuted government witness'

testimony, and 2) failed to disclose the presentence report ("PSR") to Rodriguez until the day of sentencing. Further, Rodriguez contended that the district court relied on an improper prior conviction to enhance his sentence under 21 U.S.C. § 841 and that, because he did not control the requisite number of people, the district court erred when it enhanced his sentence under U.S.S.G. §3B1.1(b).

In a one-page Order of Dismissal, the district court summarily dismissed this motion pursuant to Rule 4(b), stating only that the "[d]efendant has simply used an attorney to restate some of the claims previously presented in his original motion." R. Vol. 2 at 860. Rodriguez now proceeds with this appeal *pro se*.

II. DISCUSSION

A. Failure to Investigate

Rodriguez contends that his trial counsel was ineffective because he made no attempt to contact potentially exculpatory witnesses. To succeed with an ineffective assistance of counsel claim, Rodriguez would have to show that 1) his trial counsel's performance was deficient, and 2) that the deficient performance prejudiced his rights. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). The district court made no findings of fact or conclusions of law, however, as to whether Rodriguez had successfully established these elements. Instead, the district court merely dismissed Rodriguez's petition summarily pursuant to Rule 4(b), 28 U.S.C. foll. § 2255.

This Court consistently requires district courts to state

findings and conclusions for their rulings dismissing actions filed pursuant to 28 U.S.C. § 2255. *United States v. Daly*, 823 F.2d 871, 872 (5th Cir. 1987). Findings and conclusions "are plainly indispensable to appellate review." *Hart v. United States*, 565 F.2d 360, 362 (5th Cir. 1978). Such findings are necessary "unless the record conclusively shows that the petitioner is entitled to no relief." *United States v. Edwards*, 711 F.2d 633, 633 (5th Cir. 1983).

In this case, we cannot say that Rodriguez's claim that his trial counsel was constitutionally ineffective for failing to investigate potentially exculpatory claims is either facially frivolous or conclusively negated by the record. Rodriguez has provided affidavits from four individuals who contend that they could have provided exculpatory testimony. While the first two affiants stated that they were afraid to testify, this fear apparently stemmed from warnings from Rodriguez's trial counsel that if they testified on behalf of his client, it would prejudice their own cases. The third and fourth witnesses recited that their testimony would contradict that of the government's witnesses. In particular, they both specifically refuted the testimony of government witness Timothy Tolbert as to Rodriguez's presence at a particular drug transaction. Finally, the fourth witness declared that he was willing to testify, but that Rodriguez's lawyer said that it was unnecessary.

This Court has rejected claims premised on counsel's failure to call witnesses unless the habeas petitioner demonstrates

prejudice therefrom. *United States v. Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 3534 (1984). In order to demonstrate the requisite *Strickland* prejudice, the appellant must show not only that this testimony would have been favorable, but also that the witnesses would have testified at trial. *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985). Although the provided affidavits of the uncalled witnesses are somewhat vague, they are sufficient to prevent us from concluding that the record conclusively establishes that the petitioner is entitled to no relief. *Edwards*, 711 F.2d at 633. Accordingly, we must remand this case for appropriate findings and conclusions.[1]

B. Enhancement for Prior Conviction Under 21 U.S.C. § 841

In 1983, Rodriguez was convicted in an Illinois state court for felony theft and delivery of marijuana. Based on this prior conviction, the district court enhanced Rodriguez's sentence under 21 U.S.C. § 841. Rodriguez contends, though, that it was error to enhance based on this prior conviction because it arose out of the same course of action as the instant drug conspiracy offense. Rodriguez's claim is without merit.

---

[1] On remand, if the government seeks to have this action dismissed as an abuse of the writ, the district court should provide Rodriguez with at least 10 days notice and opportunity to respond. Rule 9(b), 28 U.S.C. foll. § 2255. Then, this Court would be in a procedural position to review such action. *See Williams v. Whitley*, 994 F.2d 226, 230 n.2 (5th Cir.), *cert. denied*, 114 S.Ct. 608 (1993) (stating that this Court strictly construes the notice requirement and that it has never dismissed a petition where there is no evidence that the district court's judgment rested on this basis and the Government raised the issue for the first time on appeal).

This same argument was made in *United States v. Hughes*, 924 F.2d 1354 (6th Cir. 1991). In that case, as in the instant case, the defendant argued that the incident that led to the defendant's prior state conviction was part of the conduct underlying the later federal drug conspiracy conviction. Accordingly, the defendant argued that both convictions were part of the same criminal "episode" and thus an enhancement under 21 U.S.C. § 841 was improper. The Sixth Circuit disagreed, though. It found that an "episode" is an incident that is part of a series, but forms a separate unit within the whole. *Id.* at 1361. Accordingly, the court found that the events that led to the state conviction were a separate criminal episode, occurring at a different time, than the conspiracy. *Id.* at 1361-62.

We agree with the reasoning of the Sixth Circuit. Rodriguez' state conviction, which arose out of conduct in 1983, was a distinct criminal episode forming a separate unit within the whole. *See Id.* at 1361. Thus, all that the government had to show was that Rodriguez committed a drug conspiracy offense after the prior state conviction became final. *United States v. Puig*, 19 F.3d 929, 947 (5th Cir.), *cert. denied*, 115 S.Ct. 180 (1994). This it clearly did.[2]

C. Review of the Presentence Investigative Report

Rodriguez argues that he received ineffective assistance of

[2] We also reject Rodriguez's argument to the extent it implicates double jeopardy principles. As Rodriguez's prior conviction was entered by a separate sovereign, those principles do not apply. *United States v. Moore*, 958 F.2d 646, 650 (5th Cir. 1992), *cert. denied*, 114 S.Ct. 647 (1993).

counsel because counsel failed to review the PSR with him until the day sentencing. However, we believe that the record is sufficient as to this issue for us to conclusively show that the petitioner is entitled to no relief. *Edwards*, 711 F.2d at 633. This is because Rodriguez has failed to make any showing, or even allegation, of prejudice sufficient to satisfy the *Strickland* standard. *See Bridge v. Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988) (habeas petitioner must affirmatively plead the resulting prejudice from ineffective assistance of counsel in his petition).

All Rodriguez claims is that his attorney's failure to discuss the PSR with him at an earlier time deprived him of an opportunity to present mitigating evidence. However, Rodriguez provides no specifics as to what that mitigating evidence might say or how it would aid him.[3] These conclusory statements are insufficient to satisfy *Strickland's* prejudice prong. *See Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 2419 (1993) (mere conclusory statements do not raise a constitutional issue in a habeas case). Hence, Rodriguez's contention fails.

D. Enhancement Under Section 3B1.1

In his original habeas petition, Rodriguez contended that his attorney was ineffective for failing to challenge on direct

[3] The only specific example Rodriguez cites is that he might have been able to show that his prior state conviction was part of the same offense as the conspiracy. As we have determined that this is not legally correct in Part IIB above, there was no prejudice to Rodriguez on that issue.

appeal the district court's application of U.S.S.G. § 3B1.1. According to Rodriguez, he did not control the requisite number of people. The district court decided this issue against Rodriguez, though, and this Court affirmed. Now, Rodriguez has merely restyled this argument as violation of due process. However, the factual argument is the same. Rodriguez claims that he did not control the requisite number of people.

The district court was correct in summarily disposing of this claim. Rodriguez is not entitled to relitigate a factual claim previously resolved against him. *Cf*. *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir.), *cert. denied*, 106 S.Ct. 1977 (1986) (no right to relitigate on collateral attack a claim previously resolved against the petitioner on direct appeal). Thus, we find no error here.

III. CONCLUSION

As we cannot conclude that the record conclusively establishes that Rodriguez is entitled to no relief as to his failure to investigate claim, we VACATE the district court's judgment as to that claim and REMAND for findings and conclusions. In all other respects, the judgment of the district court is AFFIRMED.