UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20729
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TOMMY ALEXANDER, SR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 92 1979 c/w CR H 89 331 1)

August 24, 1995

Before DAVIS, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Alexander's first attempt at a federal habeas corpus was met with summary denial by the district court and a reversal and remand on appeal for more complete proceedings. The district court, without holding a hearing, then responded to Alexander's claims perfunctorily. We do not condone the district court's complaints about this court, but in the context of the explanation

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

of the case furnished by the parties, and with the additional work of this court, we affirm the denial of relief.

This court affirmed the conviction of Tommy Alexander, Sr., on multiple drug -- cocaine base or crack -- and firearm counts which resulted in a sentence including concurrent terms of life imprisonment. United States v. Alexander, No. 90-2508 (5th Cir. Mar. 16, 1992) (unpublished). Alexander had been tried with codefendant, Nelson Jason. Jason was found not guilty on the only count for which he was indicted, count one, drug conspiracy. The other named defendant, Harvey Dobbins, was not tried with the two defendants. See id.

Proceeding pro se, Alexander filed a 28 U.S.C. § 2255 motion and raised multiple claims of constitutional error. Alexander contended that the Government falsely claimed at trial that Dobbins was a fugitive. Alexander alleged that after his trial, he learned that Dobbins had been living in Houston, Texas, all the time and that no one was looking for him. From this information, Alexander contended that the Government knowingly obtained a sham indictment, indicting Dobbins in order to get before the jury the evidence that Dobbins and the confidential informant, Bradley Wiltz, committed the drug offenses so as to prove Alexander's guilt by implication. Further, Alexander asserted that this sham indictment deprived him of a crucial witness, Dobbins, who would have testified that he, Dobbins, was not part of a drug conspiracy and that he cooked the crack for his and Wiltz's personal consumption.

Alexander asserted that the Government indicted Jason, knowing that the case against Jason lacked merit, in order to prevent Alexander from calling Jason as a witness who would have testified that the firearms mentioned in the indictment belonged to Jason, not Alexander.

Alexander alleged that the Government withheld videotapes made by law enforcement on June 21, 1989, and August 9, 1989, coinciding with two controlled drug purchases by Wiltz from Alexander. See R. 6, 142-54 (June 21st buy), 182-202 (Aug. 9th buy). Alexander contended that a videotape would have shown that on June 21, Wiltz hid the crack in a barbecue pit before entering Alexander's club or clubhouse at 6311 Allegheny, Houston, Texas, and, after exiting the club, Wiltz retrieved the crack. At trial, the crack was asserted to have been purchased from Alexander in the club. Alexander also contended that another videotape would have shown that, in contrast to the Government's contention at trial, Alexander did not carry a black tote bag, containing crack, to Wiltz's car parked at 6311 Allegheny on August 9. Because the Government allegedly had the videotape which refuted the trial evidence, the Government knowingly used false evidence at trial.

Alexander contended that the Government tampered with the audio tapes which recorded Wiltz's drug purchases on July 13 and August 9. He also contended that the transcripts of these tapes had deliberate misstatements of what was being said.

Alexander contended that the Government improperly withheld crucial evidence, an offense report created by Officer

Kevin Blair, the agent in charge of Wiltz for the investigation. The report was withheld from defense until cross-examination of Blair. The report indicated that Wiltz had made drug purchases from a nearby motel, the Rainbow Motel, during the relevant period of the investigation targeting Alexander. Alexander contended that the timing of the release of the report prevented defense counsel from investigating whether Wiltz actually bought the drugs, purportedly from Alexander, at the motel. Alexander contended that the improprieties by the Government listed above deprived Alexander of fundamental fairness.

Alexander also asserted several instances of ineffective assistance of counsel. Alexander alleged that he told counsel while his appeal was pending that Dobbins was not a fugitive and that the Government used this ruse to obtain Alexander's conviction. Counsel failed to act upon this information, thus failing to move for a new trial based on newly discovered evidence.

Alexander contended that counsel failed to investigate adequately for trial, thus failing to call an alleged key witness who would have testified that he saw Wiltz hide the bag of crack in the barbecue pit on June 21st. Counsel also failed to acquire the two video tapes, one to support the hiding-the-crack story and the other to support the contention that Wiltz placed the black bag containing crack in his car on August 9th.

Alexander contended that counsel rendered ineffective assistance by failing to challenge the introduction of the audiotapes and for failing to obtain an expert to analyze the tapes

and transcripts who would testify at trial that the tapes had been tampered and the transcripts incorrectly transcribed.

On remand after the first habeas appeal, the district court denied Alexander's motions, previously filed, concerning production of the audio and video tapes, production of reports, and recusal of the district judge. This court denied Alexander's petition for writ of mandamus. United States v. Alexander, No. 93-0114 (5th Cir. Mar. 2, 1994) (unpublished; copy at R. 1, 454-56). The district court then ruled against Alexander on the merits.

Alexander has failed to raise on appeal many issues found in his § 2255 motion. See, e.g., R. 1, 372 (contending that counsel was ineffective for failing to move for a severance of Alexander's trial from codefendant Jason's trial). Such issues are deemed abandoned on appeal. See Eason v. Thaler, 14 F.3d 8, 9 n.1 (5th Cir. 1994).

Alexander argues in several ways that the Government knowingly used false evidence to convict him. First, he alleges that the Government perpetrated a fraud upon the court by indicting Dobbins, knowing he was innocent, and falsely portraying him as a fugitive. His argument includes assertions that he has proof that Dobbins resided in Houston, Texas, throughout the time of Alexander's criminal proceedings and that no one was looking for Dobbins. The district court's order did not specifically address this contention. However, the record disposes of this claim.

As correctly pointed out by the Government, Alexander fails to identify where in the record the Government made the

assertion, or a witness testified, as to Dobbins' fugitive status. A review of the trial transcript reveals that Dobbins' status was not mentioned.[1] Further, the record contains evidence of Dobbins' culpability. See R. 6, 94-95 (Officer Blair testifying that Dobbins left the club at 6311 Allegheny and drove evasively as if checking for law enforcement surveillance), 150-53 (Wiltz testifying that on June 21, Dobbins, on Alexander's instructions, cooked seven ounces of cocaine); see also R. 8, 407 (Gov't exh. 11a audio tape played for the jury); R. 1, 521 (transcript; Alexander instructing Dobbins, a/k/a Cadillac, to cook two more).

Second, in a rambling discourse of alleged facts, Alexander's counsel appears to argue that the Government videotaped the events occurring outside of 6311 Allegheny on August 9, 1989 and therefore had documentation that Alexander did not carry the black bag containing crack to Wiltz's vehicle and place it in the trunk, contravening the Government's evidence offered at trial.[2] Alexander makes no factual showing, however, that any such videotapes existed, so there is no basis for habeas relief or further proceedings.

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[1] The record does not include transcripts of opening statements or closing arguments. See R. 1, 327, 332 (orders for transcripts).

[2] After continuing Wiltz' testimony on the following day, see R. 6, 202; R. 7, 206, the Government questioned Wiltz again on who placed the black bag in the car trunk. Wiltz testified that he did, but that Alexander told him the bag contained crack. R. 7, 207-08; see also R. 6, 197-98 (Wiltz's earlier testimony that Alexander carried and placed the bag in the trunk); R. 7, 324-25 (Officer Reynaldo Ollie testifying that he observed Alexander carry a black bag to the car and apparently place it in the trunk); R. 10, 622-24 (defense witness Adrian Butler testifying that she was speaking with Alexander when Wiltz arrived and left with a black bag and that Alexander never went near Wiltz's car).

Alexander also contends that the audiotapes admitted into evidence were improperly edited or "doctored."[3] The record belies Alexander's contention. See R. 8, 395, 397-99, 401-02; R. 9, 415-16, 419-20, 466, 471-72, 481, 490-92 (DEA Special Agent Mathis testifying that he monitored the reception of Wiltz's hidden microphone, he turned the recording switch off and on to capture pertinent conversation, and the tapes had not been altered). More important, this court concluded on direct appeal that the district court did not err in admitting the tapes into evidence and noted the testimony supporting the tape's authenticity. Alexander, No. 90-2508, slip op. at 6-7 (at R. 1, 353-54). "[I]ssues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 [m]otions." United States v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1986).

Alexander next argues that the Government withheld, until cross-examination of Officer Blair, the police report made by Blair which indicated that Wiltz made other drug purchases in the neighborhood of 6311 Allegheny, specifically the Rainbow Motel, during the time of the investigation of Alexander. Alexander contends that the timing of the report's disclosure denied him due

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[3] In reply, Alexander contends that the main thrust of his § 2255 motion was the governmental manipulation of the evidence. He focuses upon an alleged drug purchase on July 12, 1989, by Wiltz from Alexander and asserts that the transcripts refute Wiltz's testimony that he purchased drugs on that day. Reply brief, 5-7. Wiltz testified that he did not purchase crack on the twelfth, but on the following day. See R. 6, 164-71; see also R. 6, 64-71 (Officer Blair's testimony concerning the same events).

process. The district court concluded that the report was "irrelevant" to Alexander's conviction.

Brady "requires a retrial only if, after conviction of a defendant, it is learned that evidence requested and not produced creates a reasonable doubt that did not otherwise exist as to the guilt of the accused." United States v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979). Alexander admits that Blair's report was disclosed to the defense. As for the timing of the disclosure, the record reveals that defense cross-examined Blair and Wiltz on the other drug purchases. See R. 6, 106-09, 123-24; R. 7, 224-25, 231, 256. In light of Alexander's opportunity to use the report in his cross-examination of Blair and Wiltz, no due process violation occurred. See United States v. Nixon, 634 F.2d 306, 312-13 (5th Cir. 1981), cert. denied, 454 U.S. 828 (1981).

Alexander argues that the Government withheld tapes of the radio transmissions from the arrest of Wiltz and Willis Adams on August 9. He contends the tapes will indicate that law enforcement expected Wiltz's passenger to be Alexander, not Adams. This claim was not raised in the district court. This court need not address issues not considered by the district court. "[I]ssues raised for the first time on appeal are not reviewable by this court unless they involve purely legal questions and failure to consider them would result in manifest injustice." Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991) (internal quotation and

citation omitted). The issue is not purely legal and cannot be addressed.

Alexander raises several claims of ineffective assistance of counsel. Under the two-prong test enunciated in Strickland v. Washington, 466 U.S. 668, 687 (1984), Alexander must show that counsel's assistance was deficient and that the deficiency prejudiced his defense. The second prong requires showing that the error deprived him of a fair trial. Id. at 687; Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993). In disposing of Alexander's ineffective-assistance claims, the district court concluded that the claims, if true, would not have had a material effect on the trial's outcome in light of the overwhelming evidence of guilt.

Alexander contends that counsel had an improper underlying motive to his representation, namely, to enrich himself by selling off Alexander's property. Alexander notes that this was raised in an earlier appellate brief. This claim was not raised in the district court, and, therefore, this court need not address it. See Varnado, 920 F.2d at 321.

Alexander argues that counsel rendered ineffective assistance by failing to obtain an expert to analyze the audio tapes of the drug purchases and by failing to do anything to protect Alexander from the Government's use of these tapes such as filing a motion in limine for their exclusion. As to the second claim, counsel objected during trial to the admission of these tapes and transcripts based on the tapes being garbled and untrustworthy, along with the failure of the Government to identify

all the voices on the tapes, thus denying Alexander his right to confrontation. Further, the admissibility of the tapes was addressed on appeal. See Alexander, No. 90-2508, slip op. at 6-7 (at R. 1, 353-54). Therefore, Alexander has not shown that counsel's failure to make the objections before trial deprived him of a fair trial. See Strickland, 466 U.S. at 687.

As for counsel's failure to use an expert witness, Alexander does not cite to authority that trial counsel was required to utilize expert testimony in rebutting the effect of the tape's contents. See Cantu v. Collins, 967 F.2d 1006, 1016 (5th Cir. 1992), cert. denied, 113 S. Ct. 3045 (1993). Alexander fails to cite any legal authority concerning ineffective assistance of counsel. Alexander's argument presumes that the tapes and transcripts were flawed and that the expert would have detected this and brought this out through testimony. The record indicates that the tapes were authentic. See Alexander, No. 90-2508, slip op. at 7 (at R. 1, 353) ("The agents and the informant testified that the tapes were accurate."). To the extent that Alexander contends that the expert would have shown that the tape made on August 9 contains Alexander making a certain statement, and to the extent that Alexander contends that the tape admitted into evidence was not the original tape, he did not raise these contentions in the district court. See Varnado, 920 F.2d at 321. Therefore, Alexander has not shown that counsel's failure to use an expert deprived him of a fair trial with a reliable result. See Strickland, 466 U.S. at 687.

Alexander argues that counsel failed to investigate fully before trial in order to locate any witnesses with key information. In particular, Alexander contends that 1) counsel, by failing to investigate, failed to find witnesses who knew about Wiltz's drug purchases from the Rainbow Motel during the relevant time frame and 2) if counsel had checked the neighborhood, counsel would have found a witness who saw Wiltz hide a bag of crack in the outside barbecue pit. Neither before this court nor before the district court has Alexander identified a witness whom counsel failed to contact or find, and he has not asserted that the identified witnesses would have been available to testify. Without these essential allegations to his failure-to-call-witnesses claim, Alexander has failed to meet the requisite showing of prejudice on his claims. See United States v. Cockrell, 720 F.2d 1423, 1427 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984). Therefore, Alexander fails to meet his burden in showing that the pretrial investigation done by counsel was deficient. See Strickland, 466 U.S. at 689.

Alexander has not met his burden on his claims of ineffective assistance raised on appeal.

Alexander argues that the district court erred by failing to conduct an evidentiary hearing because the lack of one contravenes this court's mandate and because his issues raised on appeal cannot be determined without one. As noted by this court, "[w]hen the allegations in the § 2255 motion are not negated by the record, the district court must hold an evidentiary hearing."

Alexander, No. 92-2811, slip op. at 4 (at R. 1, 437). In light of the above analysis, Alexander fails to raise an issue which cannot be negated by the record. Further, this court did not require the district court to hold a hearing, it advised the court to "give serious consideration to holding" one. Id. Therefore, the district court did not err by denying Alexander's § 2255 motion without a hearing.[4]

For these reasons, the judgment of the district court is AFFIRMED.

[4] We do not read Alexander to appeal the district court's refusal to recuse. If Alexander does appeal that point, his contention is meritless.