UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20757
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

MOHAMMAD KHALED SAEID,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-94-2905 (CR-H-87-0131))

(May 25, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Mohammad Saeid appeals from the denial of his 28 U.S.C. § 2255 petition. We **AFFIRM**.

I.

Saeid was convicted by jury in 1988 of distribution, and conspiracy to possess with intent to distribute in excess of 500 grams of cocaine. He was sentenced to seven years imprisonment for the distribution charge, and five years imprisonment, suspended for five years probation with supervision, for the conspiracy charge.

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[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

The conviction and sentence were affirmed on direct appeal. ***United States v. Saeid***, No. 88-6153 (5th Cir. Dec. 1, 1989), *cert. denied*, 494 U.S. 1037 (1990).

In 1994 Saeid, proceeding *pro se*, petitioned for § 2255 relief, alleging insufficiency of the evidence, attorney conflicts, ineffective assistance of counsel, prosecutorial misconduct, and constitutional speedy trial right violations. He also filed an *unsworn* document entitled "Movant's Affidavit of Bias and Vindictiveness", requesting that his § 2255 motion not be presented to his trial judge, Judge Hoyt. Without specifically addressing Saeid's "affidavit" (which we construe as a recusal motion), Judge Hoyt summarily dismissed the § 2255 motion.

II.

A.

Saeid challenges Judge Hoyt's refusal to recuse himself pursuant to Saeid's "affidavit" alleging bias and vindictiveness. We review for abuse of discretion. ***Unites States v. MRR Corp.***, 954 F.2d 1040, 1044 (5th Cir. 1992). In the course of these proceedings, Saeid has referred to recusals under 28 U.S.C. §§ 144 and 455. We consider both.

1.

Under § 144, a party must timely file a motion to recuse, accompanied by an affidavit stating the facts and reasons supporting the motion. 28 U.S.C. § 144. Saeid's "affidavit" is insufficient. It is unsworn and does not otherwise comply with the statutory requirements for a substitute affidavit, because it does

not state that it was made under penalty of perjury. *See* 28 U.S.C. § 1746. Likewise, his attempt to cure this deficiency in his reply brief is untimely. Consequently, § 144 recusal was not raised properly in the district court; we need not review it. *E.g.,* ***United States v. De La Fuente***, 548 F.2d 528, 541 (5th Cir.), *cert. denied*, 431 U.S. 932 (1977).

2.

Section 455 requires a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned". 28 U.S.C. § 455. Saeid offers three bases on which Judge Hoyt's impartiality might reasonably be questioned:

First, Saeid points to various adverse rulings at trial. Obviously, this, without more, is insufficient to support recusal. ***MMR Corp.***, 954 F.2d at 1045. Second, Saeid complains that his sentence was disproportionate to his codefendants' (Saeid received a seven year sentence; his codefendants, one year). This ground for recusal has no merit; the codefendants pleaded guilty and accepted a plea bargain -- one that Saeid rejected. Finally, Saeid contends that the judge demonstrated his bias through two comments directed to Saeid.[2] "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a

[2] First, during a detention hearing the judge stated that Saeid was "unworthy" for release on bond. The judge quickly corrected his comment to reflect only that it was unlikely that Saeid would show up for trial -- a determination he was required to make. Second, the judge described Saeid as "indifferent, difficult, and belligerent" -- attributing these characteristics as contributing to the lengthy delay in Saeid's trial.

bias or partiality challenge." ***Liteky v. United States***, 114 S. Ct. 1147, 1157 (1994).

We find nothing to suggest that Judge Hoyt's "impartiality might reasonably be questioned". There was no error.[3]

B.

Saeid contends also that the district court erred in summarily denying his § 2255 motion without a hearing and without providing findings of facts and conclusions of law. We review for abuse of discretion. ***United States v. Bartholomew***, 974 F.2d 39, 41 (5th Cir. 1992).

Saeid's claim consists of little more than his bare assertion that a hearing was required. Nonetheless, and as Saeid recognizes, the court may deny a § 2255 motion without a hearing "if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief". ***Id***. In denying the motion, the district court noted that it had "carefully considered the present motion along with the records of the prior criminal proceeding".

Although we review *pro se* briefs liberally, Saeid must present some basis in the record for why an evidentiary hearing was required. *See* ***United States v. Wilkes***, 20 F.3d 651, 653 (5th Cir. 1994). He has failed to do so. His claim consists only of a

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[3] We note that Saeid's initial complaint was that the district court failed to even consider his recusal motion. Because Saeid's affidavit prefaced his § 2255 motion, we construe the court's order denying the § 2255 motion as denying also the motion to recuse. In any event, because we find no basis for recusal, any error in refusing to consider the motion was harmless.

string of case quotations standing for the above stated general proposition -- that a hearing is required unless the record clearly negates relief. Saeid makes no argument on appeal concerning the validity of his asserted grounds for § 2255 relief, and concedes that "the issue ... is not whether the District Court should grant [his] motion, but whether the Court should have granted him an evidentiary hearing". On that issue, the district court determined that the record clearly negated § 2255 relief. Saeid has offered no basis for disagreement.

Finally, even assuming *arguendo* that the district court erred in dismissing Saeid's motion without findings and conclusions, such error is harmless here. As noted, Saeid has not presented the merits of his § 2255 claim.[4] Therefore, there is no justification for remanding for findings and conclusions, when Saeid has not put these matters in issue. ***United States v. William***, No. 94-20604, slip op. at 2 (5th Cir. Jan. 26, 1995).

III.

For the foregoing reasons, the judgment is

AFFIRMED.

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[4] In his reply brief, Saeid may have attempted to raise the merits of his motion by "rest[ing] his case on" the issues raised in that motion. Such incorporation is not permitted; and, alternatively, issues raised for the first time in a reply brief are waived. *E.g.,* ***United Paperworkers Int'l Union v. Champion Int'l Corp.***, 908 F.2d 1252, 1255 (5th Cir. 1990).