UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-20825
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

TROY WAYNE JONES,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas
(CR H 89 245 1; CA H 94 2719)

(August 31, 1995)

Before WISDOM, JOLLY, and JONES, Circuit Judges.

WISDOM, Circuit Judge[*].

The appellant/petitioner, Troy Wayne Jones, seeks review of the district court's dismissal of his motion to vacate his sentence under 28 U.S.C. § 2255. We AFFIRM the judgment of the district court.

I.

In August of 1989, Troy Wayne Jones pleaded guilty to

---

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

conspiracy to manufacture more than 100 grams of methamphetamine. The Presentence Investigation Report (PSI) determined the petitioner's offense level at 24 with a sentencing range of 51 to 63 months. The petitioner, however, was sentenced to 10 years in prison and five years supervised release based on a statutory minimum set forth in 21 U.S.C. § 841(b)(1)(A)(viii). The petitioner did not pursue a direct appeal.

In November of 1991, Jones filed a § 2255 petition challenging the sufficiency of the evidence supporting his conspiracy plea. That motion was denied by the district court. This Court affirmed that decision. In August of 1994, the petitioner filed his current § 2255 petition seeking to vacate his sentence on three grounds. First, he argued that the amount of drugs attributable to his activities was never properly determined before sentencing. Second, he alleged that his sentence was disproportionately long as compared to sentences imposed on similarly situated defendants. Finally, he argued that the sentencing court incorrectly applied the statutory minimum of ten years set forth in 21 U.S.C. § 841(b)(1)(A)(viii) as opposed to the five year minimum set forth in 21 U.S.C. § 841(b)(1)(B)(viii). The district court dismissed the Jones's petition without formal findings. On appeal, Jones continues to argue that his sentence should be vacated based on the three grounds he alleged in his § 2255 petition.

II.

Challenging a sentence with a § 2255 motion is "fundamentally different from a direct appeal".[1] "After conviction and exhaustion or waiver of any right to appeal, `we are entitled to presume that [the defendant] stands fairly and finally

[1] *United States v. Drobny*, 955 F.2d 990, 994 (5th Cir. 1992).

convicted.'"[2] The only claims cognizable in a § 2255 petition are those of a "constitutional or jurisdictional magnitude".[3] A § 2255 petitioner must also show cause for not raising the issue on appeal and show that he suffered actual prejudice from the alleged error.[4] Non-constitutional errors will not be considered unless the petitioner can establish that "the error could not have been raised on direct appeal, and if condoned, would result in a complete miscarriage of justice".[5]

In this case, the petitioner faces an additional burden because this is his second petition under § 2255. Under Rule 9(b) of the Rules Governing § 2255 Proceedings, a successive § 2255 motion which asserts new grounds for relief can be dismissed when failure to raise the issues earlier constitutes abuse of the § 2255 motion. The term "abuse" is not defined in the rules but this Court has found that, "a second or subsequent habeas corpus petition which raises a claim for the first time is generally regarded as an abuse of the writ".[6] To avoid dismissal based on a finding of abuse of the writ, a petitioner must make showings similar to those required to excuse the failure to raise issues on direct appeal: cause for his failure to raise the claim earlier and the prejudice he suffered as a result, or, "that the court's refusal to hear the claim would result in a fundamental miscarriage

---

[2] *United States v. Shaid*, 937 F.2d 228, 231-32 (5th Cir. 1991), cert denied, 502 U.S. 1076 (1992) (en banc decision) (quoting *United States v. Frady*, 456 U.S. 152 (1982)).

[3] Id. at 232.

[4] *United States v. Pierce*, 959 F.2d 1297, 1301 (5th Cir.), cert. denied, 113 S.Ct. 621 (1992).

[5] Id.

[6] *United States v. Flores*, 981 F.2d 231, 234 (5th Cir. 1993).

of justice".[7] We review a district court's decision to dismiss under Rule 9(b) for an abuse of discretion.

In this case, the petitioner continues to assert the three grounds raised below that he argues compel vacating his sentence. None of these issues, however, are constitutional or jurisdictional in nature. Thus, they are generally not cognizable in a § 2255 motion. Further, the petitioner did not raise these issues on direct appeal nor did he raise them in his first § 2255 motion. The petitioner, therefore, must establish the cause of his failure to raise these issues. Of the three issues, Jones suggests a reason for his failure to raise only one of the issues earlier. Thus, that is the only issue we will consider.

The petitioner argues that the ten year statutory minimum should not have been applied to him. He is correct. At the time of sentencing, both § 841(b)(1)(A)(viii) and § 841(b)(1)(B)(viii) appeared to address the statutory minimum in cases involving at least 100 grams of a mixture containing methamphetamine. The inconsistency was a clerical error and was amended in 1990.[8] The ten year statutory minimum under § 841(b)(1)(A)(viii) applies when the case involves at least 1 kilogram or *1000* grams of methamphetamine. The five year statutory minimum applies to cases involving at least 100 grams of methamphetamine. Thus, the petitioner was subject to the five-year statutory minimum.

The petitioner argues that, under the rule of lenity, the sentencing court should have applied the shorter statutory minimum in the face of the ambiguous provisions. Jones alleges that he was unaware of the error in the statute or the application of the rule of lenity until both were recognized by this Court in *United States*

---

[7] Id.

[8] See, *United States v. Kinder*, 946 F.2d 362, 367-68, 367 n. 2 (5th Cir. 1991).

v. Kinder.[9] The argument that the statute was ambiguous and the rule of lenity should apply, however, could have been raised at sentencing, on appeal, or in Jones's original § 2255 motion. Also, the statute was amended in 1990, a full year before the petitioner filed his first § 2255 motion. Thus, he has had ample opportunity to raise this issue but has failed to do so. In these circumstances, the district court did not abuse its discretion when it dismissed the Jones's § 2255 petition.

III.

The petitioner is entitled to no relief under 28 U.S.C. § 2255 and we, therefore, AFFIRM the district court's dismissal of his petition.

---

[9] 946 F.2d 362, 367-68 (5th Cir. 1991).