

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-20867  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

THOMAS CLINTON MARTIN,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
(94 CV 333 (CR H 92 0090))

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August 21, 1995

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:\*

Thomas Clinton Marshall appeals from the district court's denial of his petition for habeas corpus relief. Specifically, Martin contends that he was denied effective assistance of counsel and was entitled to an evidentiary hearing on that issue. Because we find that no error was committed by the district court, we affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

## **BACKGROUND**

Martin pleaded guilty pursuant to a written, signed plea agreement to being a felon in possession of a firearm and the possession of a firearm during and in relation to a drug-trafficking offense. Martin received a 97-month term of incarceration, a consecutive five-year term of incarceration, two concurrent three-year terms of supervised release, and a \$100 special assessment. This court affirmed Martin's conviction and sentence on direct appeal. United States v. Martin, No. 92-2761 (5th Cir. Jan. 5, 1994) (unpublished).

Martin subsequently filed the instant § 2255 motion, alleging various constitutional violations. The district court denied Martin's § 2255 motion without an evidentiary hearing and granted summary judgment for the Government.

## **DISCUSSION**

Martin has only briefed on appeal issues relating to his ineffective assistance claim. Arguments must be briefed to be preserved. See Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987). Therefore, the issues not briefed are deemed abandoned.

Martin also attempts to recast some of the abandoned issues in the ineffective-assistance context. However, Martin did not present those specific allegations to the district court as instances of ineffective counsel, and thus they have been

raised for the first time on appeal in that posture.<sup>1</sup> 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 omitted). Martin's allegations which have been raised for the first time in this court are not purely legal issues, nor has he shown that manifest injustice will result.

The only allegations properly before this court are Martin's allegations that his trial counsel was ineffective because 1) he falsely assured Martin that he would receive a light sentence if he pleaded guilty; 2) he advised Martin that he was in a "no-win" situation and would receive a 35-year sentence if he went to trial; and 3) he threatened to abandon Martin unless he paid an additional \$5,000 in attorneys fees should the case go to trial.

In order to prevail on his ineffective assistance claim, Martin must show that counsel's performance fell below an objective standard of reasonable performance and that he was prejudiced by that deficient performance. Lockhart v. Fretwell, \_\_ U.S. \_\_, \_\_, 113 S. Ct. 838, 842 (1993). In the context of a guilty plea, Martin must show that counsel's deficient

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<sup>1</sup> To conclude, as urged by Martin on appeal, that the substance of the abandoned issues were presented to the district court in the ineffective assistance context would require this court to stretch the principle of liberal construction of *pro se* pleadings beyond recognition. We decline to do so.

performance prejudiced his defense to the extent that there is a reasonable probability that, but for the attorney's errors, he would not have pleaded guilty, but would have gone to trial. Hill v. Lockhart, 474 U.S. 52, 60, 106 S.Ct. 366, 371 (1985).

Martin first alleges that his counsel promised that he would receive a light sentence if he pled guilty. To prevail, Martin must prove: 1) the terms of the alleged promise; 2) where, when, and by whom the promise was made; and 3) the identity of an eyewitness to the promise. Davis v. Butler, 825 F.2d 892, 894 (5th Cir. 1987). Martin has not pleaded facts that would, if proved, satisfy this test. Further, Martin testified at sentencing that no one had made any promises "other or different" than those contained in the plea agreement.<sup>2</sup> A defendant's solemn declarations, made in open court, carry a strong presumption of verity. Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 1629 (1977); United States v. Young, 981 F.2d 180, 184 n.5 (5th Cir. 1992), cert. denied, 111 S.Ct. 2454 (1993).

Next, Martin's contention that he received erroneous advice from counsel is factually incorrect. The Government had filed a notice of intent to seek sentencing enhancement pursuant to § 924(e)(1), which mandates a minimum term of incarceration of "not less than 15 years." Martin was also facing a possible 10-year term of incarceration regarding his violation of

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<sup>2</sup> If no promise exists, there is no improper inducement for a plea. See Harmason v. Smith, 888 F.2d 1527, 1529-32 (5th Cir. 1989).

§ 922(g)(1), see § 924(a)(2), and a possible 10-year term of incarceration on the charge of possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d). See 26 U.S.C. § 5871. Martin's counsel properly informed him that he was facing a possible 35-year term of incarceration should the judge choose to run the sentences consecutively.

Finally, although Martin contends that counsel required an additional \$5,000 should the case go to trial, such an allegation does not show deficient performance. It is axiomatic that retained counsel can charge a higher fee for matters which are more involved and require trial preparation and presentation. Martin never requested court-appointed counsel in the district court. He admits he did not have additional funds to pay the cost of going to trial. Therefore, his contention that counsel was deficient for requiring more compensation for the additional complexities and involvement of trial is without merit.

Furthermore, at his guilty-plea hearing, Martin specifically stated that he had sufficient time to consult with his attorney and that he was satisfied with his attorney. The plea agreement states "that no threats had been made against [Martin] and that [he was] pleading guilty freely and voluntarily because [he was] guilty." Martin has shown neither deficient performance nor prejudice as the result of counsel's actions.

Martin also contends that the district court erred by denying his § 2255 motion without an evidentiary hearing. Because the district court could fairly resolve his ineffective

assistance claims with the record before it, no evidentiary hearing was necessary. See United States v. Smith, 915 F.2d 959, 964 (5th Cir. 1990).

Martin's contention that he received ineffective assistance of counsel at sentencing because counsel failed to challenge the district court's upward departure was not raised in his § 2255 motion presented to the district court. The mere allegation that, at sentencing, counsel "did not speak on [his] behalf" is insufficient and thus is not properly before the court. See Varnado, 920 F.2d at 321.

Accordingly, the district court's dismissal of Martin's petition for writ of habeas corpus is **AFFIRMED**.