UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30009
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

KENNETH RANDALL,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CR 88-261 L)

(September 8, 1994)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

This is Kenneth Randall's third appeal of motions to correct or modify the sentence that he received in 1988. We **AFFIRM**.

I.

Randall's conviction in 1988 was affirmed on appeal. ***United States v. Randall***, 887 F.2d 1262 (5th Cir. 1989). In March 1991, Randall moved under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, arguing insufficiency of the evidence and

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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 Pursuant to that rule, the court has determined that this opinion should not be published.

prosecutorial misconduct. The district court denied that motion, and this court affirmed. ***United States v. Randall***, No. 91-3561 (April 1, 1992 5th Cir.) (unpublished).

Randall filed a section § 2255 motion in 1992, arguing that his sentence should have been adjusted on several grounds, that the Government engaged in "outrageous behavior", that the district court denied him a fair trial with its interruptions, and that he did not receive effective assistance of counsel. The district court dismissed the motion both on its merits and under Rule 9(a) of the Rules Governing § 2255 Proceedings; and this court affirmed in December 1993. ***United States v. Randall***, No. 93-3278 (Dec. 14, 1993 5th Cir.) (unpublished).

In August 1993 (while his second motion was still pending), Randall filed yet another motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure and 18 U.S.C. § 3582(c)(2), for "correction of sentence, or in the alternative, ... for modification of an imposed term of imprisonment". The district court denied this motion on the grounds that it was not cognizable under Rule 35 or 18 U.S.C. § 3582(c)(2), that it was premature because the second § 2255 motion was pending on appeal, that the motion amounted to an abuse, and that the claims lacked merit. Randall filed a timely notice of appeal.[2]

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[2] After he had filed his notice of appeal, Randall filed an "Amendment to Notice of Appeal Filed January 5, 1994 Interlocutory Appeal, seeking an emergency decision, order for release and writ of mandamus on the ground that he had been incarcerated over the length of "what the sentencing structure should have been." Because we affirm the district court's judgment, we also deny this motion.

II.

As noted, Randall styled his motion as seeking relief under Rule 35 of the Federal Rules of Criminal Procedure and 18 U.S.C. §§ 3742 and 3582(c)(2); but, as the district court properly determined, he is clearly not entitled to relief under any of those provisions.[3] Construing his motion liberally, it is yet another under § 2255 to "vacate, set aside or correct the sentence", which is "reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." ***United States v. Vaughn***, 955 F.2d 367, 368 (5th Cir. 1992). A nonconstitutional claim that could have been raised on direct appeal, but was not, may not be raised in a collateral proceeding. ***Id***.

A.

Randall first maintains that his offense level under the Sentencing Guidelines should have been 26, rather than 28, and that his sentence was improperly imposed under 18 U.S.C. § 924(c). A district court's technical application of the Guidelines is not, however, of constitutional dimension. ***United States v. Vaughn***, 955

[3] With regard to offenses committed after November 1, 1987 (such as Randall's), Rule 35 only governs the correction of a sentence remanded under 18 U.S.C. § 3742; the reduction of sentence within one year for "changed circumstances"; and correction of sentence by the sentencing court within seven days of sentencing. None of these circumstances is applicable. 18 U.S.C. § 3582(c)(2) only provides for reduction of sentence if the defendant "has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered," but Randall does not make any claim that would render this provision applicable.

F.2d 367, 368 (5th Cir. 1992). Further, this issue could have been raised on direct appeal, but was not. *See* ***Randall***, 887 F.2d at 1265-70.

B.

Randall next asserts that the district court abused its discretion by not giving him notice that it was considering dismissal pursuant to Rule 9(a). The district court, however, alternatively denied Randall's motion on its merits. Randall challenges the disposition on the merits and, as discussed above, we have rejected that challenge. Therefore, because we affirm the district court's judgment on the merits of Randall's claims, we need not determine whether denial of relief was also proper under Rule 9.[4]

III.

For the foregoing reasons, the judgment is

AFFIRMED.

[4] We do not address issues raised by Randall for the first time in his reply brief (whether the district court should have construed his motion as one for writ of mandamus and release). *See* ***N.L.R.B. v. Cal-Maine Farms***, 998 F.2d 1336, 1342 (5th Cir. 1993). We also do not address issues that Randall raises for the first time on appeal (ineffective assistance of counsel, an issue that is only mentioned in Randall's initial brief). ***United States v. Smith***, 915 F.2d 959, 964 (5th Cir. 1990).