UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30734
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JESUS GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA 94 3292 (CR 89 69 A))

(August 24, 1995)

Before SMITH, EMILIO GARZA, and PARKER Circuit Judges.

PER CURIAM:[*]

FACTS

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

Jesus Garcia (Garcia) pleaded guilty to conspiracy to possess with intent to distribute twenty-five kilograms of cocaine. The Government objected to the pre-sentence report (PSR) because the probation officer did not assess a two-level increase for obstruction of justice. Garcia told the probation officer that he had been arrested in the Bahamas for a fishing violation; however, evidence indicated that he was arrested for a marijuana-related offense. After hearing testimony, the district court concluded that Garcia's omission was a conscious effort to misrepresent the nature of a "highly material" prior drug offense and imposed the increase. *See* U.S.S.G. § 3C1.1.

Garcia objected because the PSR based his offense level on a larger quantity of cocaine than the twenty-five kilograms charged in the indictment and stipulated in the plea agreement. At sentencing, the court overruled Garcia's objection and adopted the PSR. Garcia was sentenced to serve 188 months in prison and five years supervised release.

On direct appeal, Garcia contested the two-level increase for obstruction of justice and the district court's failure to base his sentence on the drug quantity stipulated in the plea agreement. *United States v. Garcia*, 902 F.2d 324, 325-26 (5th Cir. 1990). This court affirmed after concluding (1) that the sentencing court determined that Garcia intentionally lied about the prior arrest; and (2) that the sentencing court was not bound by the stipulation regarding drug quantity. *Id.* at 326-27.

In 1994, Garcia filed a motion under 28 U.S.C. § 2255 again challenging the two-level enhancement for obstruction of justice and the drug quantity used to determine his base offense level. Garcia argued that developments in the law subsequent to his direct appeal required the court to reconsider his sentence. Regarding the obstruction-of-justice claim, he argued that the sentencing court considered only willfulness, that the new guideline required a material falsehood, and that the marijuana arrest was not a material factor for sentencing. He also argued that his failure to disclose the nature of the arrest did not impede the probation officer's investigation of his case. Regarding his base offense level, Garcia maintained that the 275-kilogram quantity of cocaine was not reasonably foreseeable and was not part of the conspiratorial activity to which he agreed. Finally, Garcia raised a new argument based on sentencing entrapment.

The district court held that because Garcia had raised the obstruction of justice and the relevant conduct issues on direct appeal, he was precluded from raising them in his § 2255 action. The court explained that sentencing courts are not bound by drug quantities mentioned in indictments or in stipulations if other information indicates a greater quantity was involved. Garcia timely appealed.

DISCUSSION

A defendant who has been convicted and has exhausted his right to appeal is presumed to have been "`fairly and finally convicted.'" *United States v. Shaid*, 937 F.2d 228, 231-32 (5th Cir.

1991) (en banc) (citation omitted), *cert. denied*, 502 U.S. 1076, 112 S. Ct. 978, 117 L. Ed. 2d 141 (1992). "[A] `collateral challenge may not do service for an appeal.'" *Id.* at 231 (quoting *United States v. Frady*, 456 U.S. 152, 165 (1982)). In reviewing the denial of a § 2255 motion, this court reviews the district court's factual findings for clear error, and questions of law are reviewed *de novo*. *United States v. Gipson*, 985 F.2d 212, 214 (5th Cir. 1993).

OBSTRUCTION OF JUSTICE

Garcia contends that post-1989 amendments to U.S.S.G. § 3C1.1 and its commentary require the court to reconsider the two-level increase he received for his initial failure to reveal the marijuana charges. Garcia asserts that the amendments require that the false statement be material and impede an investigation or influence an issue under determination. Garcia argues that the sentencing court did not consider materiality and that because he disclosed the truth about his arrest to others prior to sentencing, his omission did not obstruct or impede any investigation.

Normally, Garcia's request for this court to reexamine his obstruction-of-justice enhancement would not be considered. "[I]ssues raised and disposed of in a previous appeal from an original judgment of conviction are not considered in § 2255 Motions." *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir.), *cert. denied*, 476 U.S. 1118, 106 S. Ct. 1977, 90 L. Ed. 2d 141 (1986). However, although Garcia's argument in the present case

concerns the same sentence adjustment, the argument presented is different than Garcia presented on direct appeal.

Allegations of error which are not of constitutional or jurisdictional magnitude which could have been raised on direct appeal may not be asserted on collateral review in a § 2255 motion. *United States v. Capua*, 656 F.2d 1033, 1037 (5th Cir. 1981). Such errors will be considered only if they could not have been raised on direct appeal, and if condoned, would result in a complete miscarriage of justice. *Shaid*, 937 F.2d at 232 n.7. Although Garcia's argument does not raise a constitutional or a jurisdictional issue, he could not have raised it previously because his direct appeal was decided in May 1990, and the amendments he cites became effective in September 1990. *See Garcia*, 902 F.2d at 324; U.S.S.G. § 3C1.1 (Nov. 1990).

In 1989, § 3C1.1 allowed a two-level increase for "willfully imped[ing] or obstruct[ing], or attempt[ing] to impede or obstruct the administration of justice during the investigation or prosecution of the instant offense." U.S.S.G. § 3C1.1 (Nov. 1989). The Sentencing Commission amended § 3C1.1 in 1990 to allow the enhancement for willful obstruction of the administration of justice during sentencing as well. *See* U.S.S.G. § 3C1.1 (Nov. 1990). The commentary was also amended to clarify § 3C1.1's intended application. U.S.S.G. App. C., Amend. 347 (Nov. 1990); *see United States v. Rodriguez*, 942 F.2d 899, 901-02 (5th Cir. 1991), *cert. denied*, 502 U.S. 1080, 112 S. Ct. 990, 117 L. Ed. 2d 151 (1992). The amendment did not affect a substantive change and

was not afforded retroactive application. *See* U.S.S.G. § 3C1.1 and comment (historical notes) (Nov. 1990); U.S.S.G. § 1B1.10 (Nov. 1990). However, because the amendment was intended to clarify § 3C1.1, the commentary is relevant to Garcia's case. *Rodriguez*, 942 F.2d at 902; *see* U.S.S.G. App. C. Amend. 347 (Nov. 1990).

The commentary provides that the increase is appropriate when a defendant "provid[es] materially false information to a probation officer in respect to a presentence or other investigation for the court." U.S.S.G § 3C1.1, comment (n.3(h)) (Nov. 1990). However, the increase does not apply when the defendant "provid[es] incomplete or misleading information, not amounting to a material falsehood, in respect to a presentence investigation." U.S.S.G. § 3C1.1, comment. (n.4(c)).

At Garcia's sentencing hearing, the Government presented testimony from the probation and the pre-trial services officers indicating that Garcia lied about his prior arrest record. The probation officer explained that although previous arrests are not assessed points, they are relevant to the presentence report to show a pattern of criminal behavior and to justify a sentence at the upper end of the guidelines. *See* U.S.S.G § 3C1.1, comment (n.4) (defendant can be sanctioned for providing incomplete or misleading information, not amounting to a material falsehood, by adjusting the particular sentence within the otherwise applicable guideline range). The probation officer did not testify that Garcia's lie impeded or obstructed his investigation.

Garcia testified that he was arrested for a fishing violation and that he was never convicted of marijuana charges. Garcia also testified that he revealed the arrest on marijuana-related charges to the probation officer and to the Grand Jury. He further testified that the pre-trial service officer did not ask him about world-wide arrests and that his nervousness caused him to omit the Bahamian marijuana arrest.

The sentencing court concluded that Garcia's omission was willful and was done to avoid disclosure of potentially prejudicial information. The court described Garcia's omission as "a conscious effort on his part to misrepresent the nature of an offense in which he participated, one which was highly material since it involved a prior drug arrest." The court also explained that furnishing false evidence will prejudice and eventually dissolve the entire presentence investigation report process.

In *United States v. Surasky*, 976 F.2d 242, 244 (5th Cir. 1992), the defendant lied to jail officials about his participation in an escape attempt. The court held that a defendant's false statement to law enforcement officers "cannot constitute obstruction of justice unless the statement obstructs or impedes the investigation at issue significantly." *Id*. at 246.

Garcia, relying on *Surasky*, contends that he did not deserve the increase for obstruction of justice because his omission was not material and did not impede any investigation. *Surasky* involved a defendant's lie to jail officials, not to a probation officer. *Surasky*, 976 F.2d at 244. The application notes

specifically exclude unsworn false statements made to law enforcement officers unless the statement was material and impeded an investigation. *See* § U.S.S.G § 3C1.1, comment (nn.4(b), 3(g)) (Nov. 1990).

The sentencing court found that Garcia intentionally misrepresented the nature of his Bahamian arrest to avoid prejudice. The court also found that the information Garcia concealed was "highly material." Unlike the situation in *Surasky*, Garcia lied to a probation officer during the preparation of a presentence report. The amended application notes specifically provide for the increase in this situation and do not require that the information impede an investigation. *See* § 3C1.1, comment. (nn.3(h), 4(c)) (Nov. 1990). The sentencing court did not err by imposing the increase for obstruction of justice, and thus Garcia was properly denied § 2255 relief on this issue.

QUANTITY OF DRUGS

Garcia contends that the district court erred in basing his offense level on a quantity of cocaine that was not foreseeable by him and that was not part of his conspiratorial agreement. Garcia contends that his § 2255 argument differs from that advanced on direct appeal and that developments in the law subsequent to the time he appealed his sentence require this court to consider the drug quantity used by the district court in sentencing him.

The district court did not consider Garcia's § 2255 drug quantity argument because it determined that he raised the same argument on direct appeal. On direct appeal, Garcia did challenge

the quantity of drugs used to calculate his sentence; however, he argued that the sentencing court was bound by the drug quantity stipulated in the plea agreement as his relevant conduct. *See Garcia*, 902 F.2d at 326-27. In his § 2255 motion, he argued that post-1989 changes in the law warrant reconsideration of his sentence because the drug quantity upon which his sentence was based was neither foreseeable by him nor part of the conspiratorial activity to which he agreed. Garcia argues, as he did in the district court, that the indictment, the plea agreement, and the factual resume prove that his conduct was limited to twenty-five kilograms of cocaine.

"Relief under . . . § 2255 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 district court's technical application of the Guidelines does not give rise to a constitutional issue." *Id*.

In *United States v. Warters*, 885 F.2d 1266, 1271-72 (5th Cir. 1989), the defendant challenged the quantity of drugs used by the district court in its calculation of his sentence. This court, citing applicable guideline commentary, explained that the defendant's sentence "should be imposed only on the basis of [his] conduct or the conduct of co-conspirators in furtherance of the conspiracy that was known to the defendant or was reasonably foreseeable [by him]." *Id*. at 1272; *see* U.S.S.G. § 1B1.3, comment

(n.1) (Nov. 1989) (defendant is accountable for reasonably foreseeable conduct of others done in furtherance of jointly-undertaken criminal activity).

Garcia's claim that his sentence was calculated incorrectly could have been raised on direct appeal. Garcia was sentenced in November 1989. The *Warters* opinion, cited in Garcia's brief, was issued in September 1989. *Warters*, 885 F.2d at 1266. Garcia's challenge to his sentence involves the technical application of the Guidelines, a nonconstitutional issue, and could have been raised on direct appeal. Thus, it is not cognizable in a § 2255 motion. *See Vaughn*, 955 F.2d at 368.

Garcia also challenges the sufficiency of the evidence supporting the drug quantity that the sentencing court used to establish his base offense level. Garcia asserts that the court was required to, but did not determine the quantity of drugs for which he was accountable. These arguments raise nonconstitutional issues that could have been raised on direct appeal, and thus, are not cognizable in a § 2255 motion. *Capua*, 656 F.2d at 1037.

SENTENCING ENTRAPMENT

Garcia argues that the Government orchestrated the drug offense that involved 275 kilograms of cocaine and his sentence was unfairly based on that amount of drugs. This court has previously rejected a similar challenge to a money-laundering conviction. *See United States v. Richardson*, 925 F.2d 112, 117-18 (5th Cir.), *cert. denied*, 501 U.S. 1237, 111 S. Ct. 2868, 115 L. Ed. 1034 (1991) (district court's discretion to determine amount of money

attributable as relevant conduct is sufficient check on Government's ability to arbitrarily influence sentence). As noted above, a nonconstitutional claim that could have been raised on direct appeal, but was not, may not be raised in a collateral proceeding. *Shaid*, 937 F.2d at 232 n.7. Garcia's argument does not raise a constitutional issue and, by his own admission, could have been raised on direct appeal. Thus, Garcia is not entitled to § 2255 relief.

Garcia also seeks remand and permission to re-urge his sentencing claims pursuant to a motion under 18 U.S.C. § 3582(c)(2). Section 3582(c)(2) provides that the court may reduce a defendant's term of imprisonment if that term was based on a sentencing range that has subsequently been lowered by the Sentencing Commission. However, such a reduction is allowed when the applicable guideline range has been lowered as a result of a retroactive amendment. *United States v. Towe*, 26 F.3d 614, 616 (5th Cir. 1994). Garcia has not cited amendments designated for retroactive application.

EVIDENTIARY HEARING

Garcia argues that the district court erred by failing to hold an evidentiary hearing on his § 2255 motion. "A motion brought under 28 U.S.C. § 2255 can be denied without a hearing only if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992) (citation omitted). Because the

record is sufficient to show conclusively that Garcia is entitled to no relief, an evidentiary hearing was unnecessary.

CONCLUSION

Based on the foregoing reasons, the judgment of the district court is AFFIRMED.