

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40032
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID LEE FORD,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Texas
(93-CV-296 (1:90-CR-99-1))

(December 22, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

David Lee Ford alleges four grounds for § 2255 relief. We will address each separately, beginning first with Ford's claim that he received ineffective assistance of counsel.

There are two components to an ineffective-assistance-of-counsel claim. Lockhart v. Fretwell, ___ U.S. ___, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993). An appellant must first establish that counsel's performance fell below an objective standard of

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

reasonable competence and then show that he was prejudiced by counsel's deficient performance. Id.

We need not reach the issue whether counsel's performance was deficient. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Id. at 697. Prejudice is shown in the context of a guilty plea only if, but for counsel's ineffectiveness, the petitioner would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d. 203 (1985). Ford must demonstrate prejudice by showing that his attorney's errors were so serious that they rendered the proceedings unfair or the result unreliable. Fretwell, 113 S.Ct. at 844; see Armstead v. Scott, ___ F.3d ___ (5th Cir. Nov. 3, 1994, No. 92-1648), 1994 WL 570642 (applying Fretwell to ineffectiveness at guilty plea). This prejudice must be pleaded. Hill, 474 U.S. at 59. Ford has alleged only that he received ineffective assistance of counsel because his court-appointed attorney did not have significant experience in federal court. Ford does not plead any resulting prejudice. Ford's ineffectiveness claim is only conclusional and is not supported by any factual allegations.

Next, Ford argues that his sentence should be vacated because the government allegedly failed to disclose exculpatory evidence. He argues that the PSR was initially withheld from him and from his lawyer, and that he was allowed to see it only for about ten

minutes, five or six days prior to his sentencing. Ford fails, however, to say how the PSR was exculpatory or what kind of exculpatory material it contained.

Ford further argues that the government failed to bring to the court's attention information that would have affected his sentence concerning tides in the area where the child's body was found. The record refutes Ford's contention in this respect. The judge had in fact postponed the sentencing for a day because he wanted the government to furnish him with estimates of how much the tides rose and fell at the location where the child's body was found. Ford had told the judge that he had left the girl's body on the bank of the ditch, not in the water where authorities discovered the body. The judge wanted to know if the waters rose with the tides enough in that location to perhaps corroborate Ford's story. The government furnished the court with estimates that the water level in that location increased anywhere from 2.58 inches to 5.16 inches due to tidal influences. Ford's attorney told the court that the government had furnished him with the same information. Ford does not say how this information could be considered exculpatory. Moreover, the information was certainly not withheld from the court or from his attorney. Ford's claim concerning exculpatory evidence being withheld is without merit.

We need not address the merits of Ford's third ground for requested relief. He states that he was not permitted to review a copy of the PSR until five or six days prior to sentencing, in

violation of Fed. R. Crim. P. 32(c)(3). Ford, however, did not object to the alleged violation at sentencing, and did not raise the issue in a direct appeal. "[V]iolations of Rule 32 that can be raised on direct appeal . . . are not cognizable for the first time in a 28 U.S.C. § 2255 proceeding." U.S. v. Weintraub, 871 F.2d 1257, 1266 (5th Cir. 1989). This court has "the power to correct a Rule 32 violation on collateral attack if the § 2255 Movant can demonstrate that the error could not have been brought to the court's attention earlier." U.S. v. Bartholomew, 974 F.2d 39, 43 (5th Cir. 1992). Ford's only excuse for not bringing the issue on direct appeal is that the time to appeal had elapsed. A § 2255 motion "may not do service for an appeal." U.S. v. Frady, 456 U.S. 152, 165, 102 S.Ct. 1584, 71 L.Ed.2d. 816 (1982).

Finally, Ford's conclusional allegation that the Government and/or the district court somehow violated his rights under the Sixth and Fourteenth Amendments is also without merit. He essentially stated that the court should have been aware of the stress that Ford was under during the sentencing, and should have conducted a mental evaluation to determine "what type of mental attitude [he] had" In the words of the appellant, it was the district court's failure to "stop the proceedings until the errors were corrected" that presumably constitutes the claimed Fourteenth Amendment violation. He also states that his attorney did not "try to work out any deal with the prosecution," presumably amounting to his claimed Sixth Amendment violation. Again, the

record negates these claims. Ford stated that he had entered his guilty plea freely and voluntarily, that he was very satisfied with his attorney and his attorney's representation, and that he fully understood the plea agreement.

Because none of Ford's claims have merit, the district court's order denying Ford's § 2255 motion is

A F F I R M E D.¹

¹Ford's motion for appointment of counsel is denied.

Furthermore, Ford's motion to stay the court's review of his appeal is denied as moot because his "interlocutory appeal" of the district court's order denying his motion to quash has never been properly before this court.