

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-40286
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

REGINALD BRADFORD,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1:93-CV-557 (1:92CR85-2))

(November 17, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Appellant Bradford pleaded guilty to using a firearm during and in relation to a drug trafficking offense and was sentenced. He did not appeal, but brought a motion under § 2255 attacking his conviction. He contended that 18 U.S.C. § 924(c)(1) is a sentence enhancement provision not a crime; that he was required to be charged with and proven guilty of the predicate offense of drug trafficking under 21 U.S.C. § 841(a)(1); and that the indictment was defective because it did not charge him with this predicate

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

offense. He claimed ineffective assistance of counsel for counsel's failure to move to dismiss the indictment and for advising Appellant to plead guilty to a defective indictment. The district court denied Bradford's motion and he appeals. We affirm.

On appeal, Appellant changes his argument and contends that the indictment was insufficient not from a jurisdictional basis, but simply for failure to allege the proper offense. He renews his ineffective assistance of counsel issue but does not brief it and therefore abandons it. See, Brinkman v. Dallas County Dep. Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987). He raises for the first time on appeal the contention that the record does not establish that he committed a drug trafficking crime, or that the gun was carried in relation to such crime, and that the indictment was duplicitous because it charged a violation under both 924c(1) and 841a(1) in a single count.

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. United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981). We consider such errors only if they could not have been raised on direct appeal and, if condoned, would result in a complete miscarriage of justice. United States v. Shaid, 937 F.2d 228, 232, n.7 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 978 (1992).

Appellant's argument here that the indictment was defective is based upon United States v. Fountain, 993 F.2d 1136, 1139 (4th Cir. 1993). This argument is neither constitutional nor jurisdictional,

could have been raised on direct appeal, and, therefore, is not appropriate in this action. Additionally, we have rejected the argument that § 924(c)(1) is merely an enhancement provision holding that it provides independent criminal liability. United States v. Munoz-Fabela, 896 F.2d 908, 910 (5th Cir.), cert. denied, 498 U.S. 824 (1990). The statute does not require indictment or conviction of the underlying drug trafficking offense. Id. Therefore, the indictment was not defective.

Appellant's argument that the record does not establish that he in fact committed a drug trafficking crime or that the gun was carried in relation thereto is raised for the first time on appeal. This presents a factual issue and, therefore, need not and will not be considered. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). Likewise, Appellant's argument that the indictment is duplicitous is nonjurisdictional, does not raise a constitutional issue and could have been raised on direct appeal. Accordingly, it may not be considered. See Capua, 656 F.2d at 1037.

Appellant's final argument that the district court lacked authority to sentence him to a five-year mandatory sentence is frivolous.

AFFIRMED.