

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40743
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH BALLARD,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(1:93 CV 655 (1:92 CR 105 L))

April 14, 1995

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Joseph Ballard appeals the denial of his motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. We affirm.

Ballard was convicted by guilty plea of possession of a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. § 924(c)(1) and sentenced to a five-year

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

term of imprisonment, a three-year period of supervised release, and a \$50 special assessment. In exchange for the plea, the Government agreed not to prosecute Ballard for any other offense committed in Livingston, Texas, on June 26, 1992. Ballard waived his right to appeal his sentence as part of his plea agreement.

Ballard filed a § 2255 motion to vacate sentence, which, as amended, alleged, inter alia, that 1) his conviction was invalid because he was not represented by counsel at the sentencing hearing; 2) his counsel was ineffective because he failed to review the PSR with Ballard; 3) the sentencing court erred in failing to require strict compliance with Fed. R. Crim. P. 32 at the sentencing hearing; and 4) he was denied effective assistance of counsel because his counsel had a conflict of interest.

The magistrate judge recommended that § 2255 relief be denied. Ballard filed a motion for an evidentiary hearing and filed objections to the magistrate judge's report. The district court, over Ballard's objections, adopted the magistrate judge's report and denied Ballard's § 2255 motion on the merits. Ballard appeals.

Ballard argues that the Strickland v. Washington, 466 U.S. 668, 687 (1984), test is inapplicable to his ineffective assistance of counsel claims and that prejudice should be presumed in accordance with United States v. Cronin, 466 U.S. 648, 659 (1984). The usual Strickland analysis of an ineffective-assistance claim is not conducted when there has been

actual or constructive complete denial of counsel at a critical stage of the proceeding. See Cronic, 466 U.S. at 659. Ballard argues that because he was denied effective assistance of counsel at the sentencing hearing, a critical stage of the proceeding, prejudice should be presumed under Cronic. It is undisputed that Ballard's counsel was late for the January 25, 1993, sentencing hearing. However, the court granted a recess until 1:30 P.M., at which time Ballard's counsel had arrived. Ballard's counsel stated that he had reviewed the PSR with Ballard by telephone. Ballard denied having such a conversation with his counsel.

Ballard's counsel did not file written objections to the PSR on Ballard's behalf, but the court provided Ballard and his counsel an opportunity to object to the PSR at the sentencing hearing. Neither Ballard nor his counsel objected to the PSR, and the court sentenced Ballard to a sixty-month term of imprisonment in accordance with the PSR's recommendations. Ballard's argument that he was actually or constructively completely denied counsel at the sentencing hearing is meritless as it is not supported by the record. The Strickland standard is therefore applicable to his ineffective-assistance claims.

Ballard contends that his counsel was ineffective for failing to review the PSR prior to sentencing and failing to confer with him concerning the PSR as required by Fed. R. Crim. P. 32. To establish an ineffective-assistance-of-counsel claim Ballard must demonstrate that his attorney's performance was deficient and that the deficient performance prejudiced his

defense. Strickland, 466 U.S. at 687. To establish prejudice he must show that counsel's errors were so serious as to render the proceedings fundamentally unreliable and fundamentally unfair. Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993). To establish deficient performance, Ballard must show that his counsel's performance was deficient in that it fell below an objective standard of reasonableness and that the deficient performance prejudiced his defense. Strickland, 466 U.S. at 687-94. This court indulges in "a strong presumption" that counsel's representation fell "within the wide range of reasonable professional competence." Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988).

For ineffective-assistance claims in the context of a non-capital sentencing proceeding, the burden Ballard must meet on the prejudice prong is "whether there is a reasonable probability that but for trial counsel's errors [Ballard]'s non-capital sentence would have been significantly less harsh." Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993) (footnote omitted). A number of factors are considered:

the actual amount of the sentence imposed on the [petitioner] by the sentencing . . . jury; the minimum and maximum sentences possible under the relevant statute . . . the relative placement of the sentence actually imposed within that range, and the various relevant mitigating and aggravating factors that were properly considered by the sentencer.

Id. at 88-89. As Ballard was sentenced to the statutory minimum term of imprisonment, he cannot show that there is a reasonable

probability that but for his counsel's errors his sentence would have been significantly less harsh. Spriggs, 993 F.2d at 88; see § 924(c)(1). Thus, his claims of ineffective assistance of counsel in connection with his sentencing lack merit.

Ballard argues that at sentencing, the court failed ensure that Ballard and his counsel discussed the PSR prior to sentencing and, thus, that the court failed to comply with Fed. R. Crim. P. 32(a)(1)(A) and (a)(1)(C). He acknowledges that he was provided a copy of the PSR before the sentencing hearing but argues that his counsel failed to discuss the PSR with him.

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, if condoned, would result in a complete miscarriage of justice. United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992). Ballard is not entitled to § 2255 relief for alleged violations of Rule 32. See United States v. Weintraub, 871 F.2d 1257, 1265-66 (5th Cir. 1989) (violations of Rule 32 are not cognizable for the first time in a § 2255 proceeding).

Ballard argues that his Sixth Amendment right to effective assistance of counsel was violated because his counsel "labored under dual conflict of interest." He argues that he did not waive his right to "conflict-free" counsel. He suggests that the sentencing court, aware that Ballard's counsel would not answer his calls, had an obligation to determine if an actual conflict of interest existed.

In order to prevail on this issue, Ballard must show that his defense counsel had an actual conflict of interest that adversely affected his lawyer's performance. Although Ballard states that he "has pointed to specific instances in the record to suggest an actual conflict or impairment of his [counsel's] interest," he has, in fact, presented no such facts; at most, he has pointed to his (Ballard's) statements at the sentencing hearing which suggest that he was displeased with his counsel's performance. Thus, his arguments are meritless.

Finally, Ballard suggests that the district court erred in failing to conduct an evidentiary hearing. A district court may deny a § 2255 motion without conducting a hearing "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). If the allegations in the § 2255 motion are negated by the record, the district court need not hold an evidentiary hearing. See United States v. Briggs, 939 F.2d 222, 228 (5th Cir. 1991), cert. denied, 113 S. Ct. 1016 (1993). This court reviews a district court's denial of an evidentiary hearing for abuse of discretion. Bartholomew, 974 F.2d at 41. As the above discussion demonstrates, the record in this case conclusively negates Ballard's allegations of error. Accordingly, the district court did not abuse its discretion in refusing to hold an evidentiary hearing.

Ballard has filed a motion for appointment of counsel on appeal with this court. Ballard's pleadings demonstrate his

ability to provide himself with adequate representation. He has not demonstrated that the interests of justice would be served by the appointment of counsel. See Schwander v. Blackburn, 750 F.2d 494, 502 (5th Cir. 1985). The motion for appointment of counsel is, therefore, denied.

The judgment of the district court denying Ballard's motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255 is AFFIRMED. Ballard's motion for appointment of counsel is DENIED.