UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-40881
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FRANK A. KECK,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
(CV 94 0593 M; CR 91 30043 03)

March 29, 1995

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judge.

PER CURIAM:[1]

Following a plea agreement, Frank Keck pled guilty to conspiracy to distribute in excess of 100 pounds of marijuana. He was sentenced to a 69 months' imprisonment. On direct appeal, this court affirmed Keck's conviction and sentence. **United States v. Keck**, No. 92-4957 (5th Cir. Aug. 12, 1993). Keck then filed a motion to vacate his sentence under 28 U.S.C. § 2255. The district court denied relief and Keck lodged this appeal.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Keck first contends that his equal protection rights were violated because he received a harsher sentence than his female co-defendant, Shirley Carter. Keck relies on **United States v. Redondo-Lemos**, 955 F.2d 1296 (9th Cir. 1992). In **Redondo-Lemos**, the defendant complained of gender discrimination by the government in plea bargaining. Here, it is not clear which entity Keck is accusing of discriminating against him: the government or the district court. However, Keck has not presented evidence that would permit an inference that either the government or the district court acted with discriminatory intent. In fact, Keck received precisely the same plea agreement as Carter. In addition, the differences between Keck and Carter's sentences result from objective, neutral factors. Carter's criminal history category was lower than Keck's and she received a downward departure for substantially assisting the government. Keck's sentence of 69 months was within his guideline range and was well below the statutory maximum sentence of twenty years under 21 U.S.C. § 841(b)(1)(C). Keck's equal protection claim is without merit.

Keck contends next that the district court erred by imposing a sentence that exceeded 24 months without articulating reasons as required by 18 U.S.C. § 3553(c)(1). However, this claim involves a nonconstitutional sentencing issue that should have been raised on direct appeal and is not cognizable under § 2255. **See United**

States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992).[2]

Keck also argues that the government violated his plea agreement by using his post-arrest statement to establish aggravating relevant conduct. However, this issue was already decided adversely to Keck in his direct appeal and we will not revisit it here.[3] **United States v. Kalish**, 780 F.2d 506 (5th Cir.), **cert. denied**, 476 U.S. 1118 (1986).

II.

Keck makes several ineffective assistance of counsel claims. Some time before entering his guilty plea, Keck filed a Motion to Dispense with Counsel and to Appoint New Counsel. Nine days before his plea hearing, the district court obliged and appointed Keck a new attorney. This attorney represented Keck through sentencing.

Keck argues that his first counsel was ineffective because he failed to (1) file a motion for a bond hearing; (2) communicate with Keck; (3) conduct discovery; (4) inform Keck of the opportunity to cooperate with the Government; (5) provide Keck with copies of the bill of particulars and discovery motions. These alleged mistakes occurred before Keck consulted with his new counsel and entered his guilty plea. Keck has not explained, much less established, how these alleged mistakes prejudiced him either by causing him to plead guilty when he would otherwise have

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[2] This claim is also meritless. Section 3553(c)(1) applies when the spread of the applicable guideline range exceeds 24 months, not when the sentence itself exceeds 24 months.

[3] We note that Keck also failed to raise this issue in his § 2255 motion before the district court.

insisted on going to trial, **Hill v. Lockhart**, 474 U.S. 52, 59 (1985), or otherwise.

The remainder of Keck's complaints are about his second attorney. Keck complains that his counsel failed to make the equal protection and § 3553 claims he makes above. Because these arguments would not have been successful even if counsel had made them, Keck has not shown either that his counsel's representation fell below an objective standard of reasonableness or that he was prejudiced. Keck has not met his burden under **Strickland v. Washington**, 466 U.S. 668 (1984). The district court correctly rejected these claims.

Keck next maintains that his counsel was ineffective for failing to seek a reduction for his allegedly minor role in the offense. However, the district court correctly found that Keck had failed to provide any facts to support this claim. In addition, we doubt that Keck's counsel would have succeeded in obtaining this reduction, given that the evidence portrayed Keck as a long-time, integral member of the conspiracy. In light of the record, Keck has not established prejudice.

Lastly, Keck argues his attorney ineffectively assisted him by failing to object to the imposition of a "repeat offender enhancement." Keck was not sentenced under the repeat offender provisions found in 21 U.S.C. § 841(b) and was not given a career offender enhancement. We assume instead that Keck simply intends to dispute his criminal history score, which included points for prior convictions.

Keck has not presented any facts contradicting his criminal history as summarized in his presentence investigative report (PSR). We have reviewed the PSR's criminal history calculations and find no room for argument. Keck has not established that, for want of an objection to his criminal history score, his sentence was significantly harsher than it would have been. **Spriggs v. Collins**, 993 F.2d 85, 88 (5th Cir. 1993).

For these reasons, the judgment of the district court is **AFFIRMED**.