IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-41045
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANNY ROYCE BRAZIEL,

Defendant-Appellant.

Appeal from United States District Court
for the Western District of Louisiana
(CV-91-2265)

(June 1, 1995)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:[*]

Danny Royce Braziel appeals the district court's denial of his 28 U.S.C. § 2255 request that his guilty plea be withdrawn. Finding no error in the district court's ruling, we affirm.

FACTS

Danny Royce Braziel was charged by indictment with conspiracy to manufacture phenylacetone and amphetamine, in violation of 21 U.S.C. § 846; the manufacture of and attempt to manufacture phenylacetone and amphetamine, in violation of 21 U.S.C. § 841(a)(1); and possession of a firearm during a drug

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

trafficking crime, in violation of 18 U.S.C. § 924(c). Braziel pleaded guilty to the conspiracy charge pursuant to a plea agreement in which the Government agreed to dismiss the other charges. The district court sentenced Braziel to a 210-month term of imprisonment to begin upon Braziel's release from Texas state custody plus a three-year term of supervised release. On direct appeal, this court affirmed the district court's denial of Braziel's motion to withdraw his guilty plea. United States v. Braziel, No. 89-4645 (5th Cir. Sept. 18, 1990).

Braziel filed a motion for relief under 28 U.S.C. § 2255 alleging, inter alia, that his guilty plea violated F.R.Crim.P. 11[1] because the district court failed to explain the concept of supervised release, the Government breached the plea agreement, and he received ineffective assistance of counsel. The district court denied this motion, and Braziel appeals.

DISCUSSION

In reviewing the denial of a § 2255 motion, this court reviews the district court's factual findings for clear error, and

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[1] Federal Rule of Criminal Procedure 11 provides:

> **(c) Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, ...

questions of law are reviewed de novo. United States v. Gipson, 985 F.2d 212, 214 (5th Cir. 1993). We do not address issues not raised in the district court. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). Moreover, 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. United States v. Shaid, 937 F.2d 228, 232 n.7 (5th Cir. 1991) (en banc), cert. denied, 502 U.S. 1076, 112 S.Ct. 978, 117 L.Ed.2d 141 (1992).

Rule 11 Claims

Explanation of Supervised Release

Braziel argues that he is entitled to § 2255 relief because the district court failed to explain that he would be subject to a term of supervised release and the effect of such a term. Pursuant to F.R.Crim.P. 11, the district court should have advised Braziel about the three year minimum term of supervised probation. Braziel pleaded guilty after the district court informed him that he faced a potential sentence of twenty years; the concept of supervised release was not addressed. The sentence imposed --210-month term of imprisonment and a three-year term of supervised release-- has a total potential sentence of twenty years, six months (246 months). Under similar circumstances, this court reversed the conviction of Braziel's co-defendant Joe Allen

Bounds on direct appeal. See United States v. Bounds, 943 F.2d 541, 546 (5th Cir. 1991). However, Braziel raises this issue under § 2255 rather than on direct appeal.

A failure to comply with the formal requirements of Rule 11 is neither a constitutional nor jurisdictional issue. This issue can and should be raised on direct appeal. Nevertheless, a Rule 11 violation can be cognizable in § 2255 if the movant shows that the Rule 11 error resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." United States v. Timmreck, 441 U.S. 780, 783-84, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979); United States v. Prince, 868 F.2d 1379, 1385 (5th Cir. 1989), cert. denied, 493 U.S. 932, 110 S.Ct. 321, 197 L.Ed.2d 312 (1989).

Braziel's argument concerning supervised release is barred from collateral review because he could have raised the issue on direct appeal (as his co-defendant Bounds did)[2] and because the possibility of serving six months in excess of the twenty years explained to Braziel, under the instant circumstances,[3] does not constitute either a complete miscarriage

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[2] Braziel argues that his counsel was ineffective in failing to raise this issue on direct appeal. We reject this argument because Braziel's counsel had no duty to raise every appealable issue and could not have predicted the outcome of the co-defendant's appeal.

[3] Braziel is not entitled to collateral relief on this issue, even if we were to assume arguendo that his supervised-release argument is cognizable under § 2255. To obtain § 2255 relief, Braziel must show that he would not have pleaded guilty if the district court had "fully explained the nature and consequences" of supervised release. United States v. Saldana, 731 F.2d 1192, 1193 (5th Cir. 1984) (rejecting § 2255 motion by movant

of justice or a violation of fair procedure.

Braziel also argues that the Government breached the plea agreement because the agreement does not mention supervised release and that, when combined with the court's failure to explain supervised release, this fact voids the plea agreement.

"Disputes concerning the . . . terms of a plea agreement generally pose factual questions for resolution in the district court . . . which [this court] review[s] for clear error." United States v. Borders, 992 F.2d 563, 566-67 (5th Cir. 1993). The district court determined that the consideration for Braziel's plea agreement was the Government's agreement to dismiss the other charges pending against him; that the Government kept its bargain; and that the supervised-release issue was irrelevant to the Government's performance of the plea agreement. The record supports the district court's factual determination that the dismissal of remaining charges was the consideration for Braziel's plea and that the Government kept its bargain. Accordingly, we find no clear error in these findings and we reject this argument. See and compare, Borders, 992 F.2d at 566-67.

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imprisoned for violating special-parole terms not explained by the district court). At the time of the plea, Braziel advised the court that he desired to plead guilty because he "conspired to manufacture." In exchange for Braziel's guilty plea, the Government dismissed charges for which Braziel faced an additional twenty-year sentence plus a mandatory five-year consecutive sentence. He does not dispute the magistrate judge's characterization of the evidence against him on the dismissed charges as "overwhelming," and he has not shown that he would not have pleaded guilty if the district court had properly explained the nature and consequences of supervised release. See Saldana, 731 F.2d at 1193.

Nature of Offense and Right Not to Testify

Braziel argues that his guilty plea was involuntary because the district court failed to ascertain that Braziel understood the nature of his offense because it did not inquire whether he understood the meaning of the term "conspiracy." Braziel also suggests that the trial court erred by failing to inform him that he had a right not to testify at trial.

The record shows that the district court explained that to convict Braziel of conspiracy, the Government would have to prove that Braziel "and at least one other person in some way came to a mutual understanding to try to accomplish an unlawful plan as charged in the indictment." Braziel agreed that the Government "wouldn't have trouble" proving that he had done so, and he admitted that he had knowingly and intentionally joined the conspiracy. The record also shows that the district court advised Braziel that he had a right to not testify. Accordingly, we reject these arguments.

Ineffective Counsel

A defendant who raises a constitutional or jurisdictional issue for the first time on collateral review must show (1) "cause" for his procedural default and (2) "actual prejudice" resulting from the error. Shaid, 937 F.2d at 232 (quoting United States v. Frady, 456 U.S. 152, 168, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)). The only exception to the cause and prejudice test is the extraordinary case "in which a constitutional violation has probably resulted in the conviction of one who is actually

innocent." Id. at 232 (quoting Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986)).

To obtain § 2255 relief based on ineffective assistance of counsel, a defendant must show not only that his attorney's performance was deficient, but that the deficiencies prejudiced the defense. United States v. Smith, 915 F.2d 959, 963 (5th Cir. 1990). In evaluating such claims, the 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). To prove deficient representation, a defendant must show that his attorney's conduct "fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In the context of guilty pleas, the "prejudice" requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). Braziel "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id.

Although Braziel makes several complaints about his attorneys,[4] he has failed to show that he would not have pleaded

[4] Braziel suggests that (1) Attorney Robert Gillespie had a conflict of interest because his wife was seeking employment as a U.S. Attorney; (2) his counsel was ineffective for failing to present expert testimony to challenge the computation of the drug quantity on which his sentence was based; (3) Attorney Gillespie allowed him only a cursory review of the PSR and coerced him to sign it; (4) Attorney Kevin Malloy failed to "prepare a memorandum

guilty absent the alleged deficiencies. Braziel's supporting arguments are conclusionary and unpersuasive. Several of his contentions involve alleged acts or omissions which occurred after his guilty plea; these are of no moment on the question of whether Braziel would have pleaded guilty. Other arguments fail to describe any conduct by defense counsel which was supposedly deficient (such as an alleged "conflict" due to an employment application by defense counsel's spouse).

The only argument worthy of discussion is Braziel's contention that one of his attorneys induced his guilty plea by telling him that he would receive a sentence of five to ten years. We reject Braziel's contention because the guilty plea transcript reveals that Braziel's attorney had advised him that his sentence would probably be from seventeen to twenty years.

Given Braziel's exposure if convicted on the other two offenses with which he was charged, and given the voluntary tone of Braziel's statements during the guilty plea colloquy, we find that Braziel has not shown that the errors he alleges resulted in his guilty plea.

Evidentiary Hearing

Braziel argues that the district court should have held an evidentiary hearing on his claim that he did not understand the consequences of his guilty plea. This court reviews for abuse of

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type objection to any issues regarding the PSR before sentencing"; (5) his counsel was ineffective for failing to move for a reduction in offense level because he had only a minor role in the offense; and (6) the record as a whole shows that both of his attorneys failed to act as advocates on his behalf.

discretion the district court's decision not to hold a hearing. United States v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992).

As noted above, the record supports the district court's determination that Braziel would have pleaded guilty even if the trial court had properly explained the nature and consequences of supervised release. See Saldana, 731 F.2d at 1193. Therefore, Braziel has not shown that the district court abused its discretion by failing to hold an evidentiary hearing on his claims. Bartholomew, 974 F.2d at 41; see Koch v. Puckett, 907 F.2d 524, 530 (5th Cir. 1990) (§ 2254 case holding that conclusional allegations of ineffective counsel do not warrant remand for an evidentiary hearing).

Issues Not Raised in the District Court

Braziel seeks to raise on appeal several issues which he did not present to the district court, including claims that his guilty plea was involuntary because he was under the influence of medication and that the sentencing hearing violated FED. R. CRIM. P. 32. We do not consider those issues. Varnado, 920 F.2d at 321.

CONCLUSION

For the foregoing reasons, this district court's denial of Braziel's request for 28 U.S.C. § 2255 relief is AFFIRMED.