IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41156
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIE GREGORY ATKINSON,

Defendant-Appellant.

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Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 93-CV-430 (1:87-CR-57-1)

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(April 12, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

This case is here on a motion to proceed in forma pauperis on appeal. This court may authorize Atkinson to proceed in forma pauperis on appeal if he is unable to pay the costs of the appeal and the appeal is taken in good faith, i.e., the appeal presents nonfrivolous issues. 28 U.S.C. § 1915(a); Holmes v. Hardy, 852 F.2d 151, 153 (5th Cir.), cert. denied, 488 U.S. 931 (1988).

Atkinson filed this motion under 28 U.S.C. § 2255 alleging three grounds for relief: 1) that the evidence was insufficient

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

because the Government did not prove that the banks were insured by the FDIC; 2) that convicting and sentencing him under both 18 U.S.C. §§ 2113 and § 924(c) constituted double jeopardy; and 3) that his appellate counsel was ineffective for relying on inapposite case law in his appellate brief. The district court addressed the merits of his claims, interpreting his claim of ineffective assistance of appellate counsel as an argument by Atkinson that his appellate attorney's failure to raise these issues operated as cause for the procedural default, and denied relief on the merits.

On appeal, Atkinson argues that the Government's evidence of the banks' FDIC insured status[**] was insufficient because the Government did not introduce the certificates of insurance or the testimony of the individual mentioned in the Government's opening statement who was supposed to identify the certificates. Atkinson also argues that the trial court did not instruct the jury that FDIC insured status was a required element of the offense. Atkinson does not raise the double jeopardy claim on appeal, and so it is considered abandoned. See Yohey v. Collins, 985 F.2d 222, 225 (5th Cir. 1993).

Constitutionally ineffective assistance of counsel, in the form of failure to raise issues on appeal, can operate as cause

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[**] Proof that the deposits of the institution are insured by the Federal Deposit Insurance Corporation (FDIC), or in this case, the Federal Savings and Loan Insurance Corporation (FSLIC), is an essential element of the crime of bank robbery under 18 U.S.C. § 2113 and is essential for the establishment of federal jurisdiction. United States v. Slovacek, 867 F.2d 842, 845 (5th Cir.), cert. denied, 490 U.S. 1094 (1989).

for procedural default. Murray v. Carrier, 477 U.S. 478, 488-92 (1986). While attorney error rising to the level of ineffective assistance can constitute cause, "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." Id. at 486. "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." Id. at 488. The Sixth Amendment does not require counsel to raise all nonfrivolous issues on appeal, even if the defendant specifically requests that a particular issue be raised. Jones v. Barnes, 463 U.S. 745, 750-54 (1983); Sharp v. Puckett, 930 F.2d 450, 452 (5th Cir. 1991).

Counsel's failure to raise these issues was not deficient because Atkinson's allegations are not supported by the record. Two employees of each bank testified that the banks were FSLIC insured. The testimony of these employees is sufficient to prove the required fact. Slovacek, 867 F.2d at 845-46. The trial court did instruct the jury that the deposits of the institutions must be insured by the Federal Savings and Loan Insurance Corporation, and the instruction was sufficient. Id. at 847. Appellate counsel was not ineffective, Atkinson has failed to demonstrate cause for failing to raise these issues on direct appeal, and so they are procedurally defaulted.

Atkinson argues that his trial counsel was ineffective because he failed to request a judgment of acquittal based on the lack of proof of FDIC insured status and because he did not cross-examine the bank employees regarding their testimony on this fact. The only allegation in his appellate brief regarding his appellate counsel is that counsel did not meet the requirements of an Anders[***] brief.

Atkinson did not raise the claim of ineffective assistance of trial counsel in the district court in his § 2255 motion. Issues raised for the first time on appeal and not presented to the district court in the § 2255 proceeding may not be considered by this court. United States v. Madkins, 14 F.3d 277, 279 (5th Cir. 1994).

Appellate counsel was not required to file an Anders brief because he filed an appellate brief raising nonfrivolous issues.

Atkinson's appeal does not raise any nonfrivolous issues, his motion for IFP is DENIED, and his appeal is DISMISSED AS FRIVOLOUS. See Clark v. Williams, 693 F.2d 381, 382 (5th Cir. 1982) (the court may dispose of the appeal on the merits on a motion for IFP).

[***] Anders v. California, 386 U.S. 738, 744 (1967).