

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-50011
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOHN EDWARD SOTO,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-93-CA-306-JN (A-89-CR-81-2))

(August 10, 1994)

Before DUHÉ, WIENER and STEWART, Circuit Judges.

PER CURIAM:¹

Appellant was convicted on his guilty plea of drug offenses and sentenced pursuant to the Guidelines. His sentence was ultimately affirmed on appeal. He now appeals the district court's denial of his motion for relief under § 2255. We affirm.

Appellant complains, as he did in the district court, that the Ex Post Facto Clause was violated by his sentence because the district court applied the sentencing guideline in effect when the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

sentencing occurred rather than the guideline in effect when the crime was committed. He contends that because of this the district court failed to consider matters which the earlier version of the guideline required be considered. The government argued procedural bar in the district court and the court sustained that argument. The government relies on the same argument here and Appellant does not address it.

We note first that Appellant's argument is based upon the assumption, which is not supported or contradicted by the record, that the later guideline provision was applied. We therefore reject his argument on the basis that it is not supported by the record.

We also agree with the district court that the contention is procedurally barred. A defendant who has been convicted and has exhausted or waived his right to appeal is presumed to have been fairly and finally convicted. United States v. Shaid, 937 F.2d 228, 231-32 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 978 (1992). A collateral challenge under § 2255 cannot be substituted for an appeal. Id. at 231 (quoting United States v. Frady, 456 U.S. 152, 165 (1982)). Therefore, a defendant who raises a constitutional or jurisdictional issue for the first time on collateral review must show both cause for his procedural default and actual prejudice resulting from the error. Id. at 232 (quoting Frady, 456 U.S. at 168). This Appellant does not do.

Appellant also argues that he is entitled to relief because his counsel was ineffective for not arguing that the early

guideline was the applicable one.² To prevail, Appellant must meet the familiar standard of Strickland v. Washington, 466 U.S. 668, 687 (1984). As noted, the record is inadequate to show which version of the guidelines the sentencing court in fact applied. Additionally, Appellant's counsel brought to the sentencing court's attention Appellant's objection to the presentence report that he never intended that the weapons which he supplied be used to kill. Appellant has failed to demonstrate that his counsel's purported deficiency rendered his sentencing hearing unfair.

AFFIRMED.

² Soto does not reurge on appeal his district court argument that his trial counsel was ineffective because "he should have pushed for a resolution of the cocaine objection." Issues not briefed on appeal are waived. Fed. R. App. P. 28(a)(4); see Atwood v. Union Carbide Co., 847 F.2d 278, 280 (5th Cir. 1989).