

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-50235
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

NORMAN J. BURFIELD,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CA-630 (SA-92-CR-157))

(December 8, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges

PER CURIAM:¹

Burfield challenges the district court's dismissal of his § 2255 petition. We affirm.

I.

Norman J. Burfield pleaded guilty to conspiracy to manufacture in excess of 100 marihuana plants in violation of 21 U.S.C. § 846. The district court sentenced him to a 60-month term of imprisonment followed by a four-year term of supervised release. The court also assessed a \$300 fine. Burfield timely appealed the district

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

court's sentence. We granted counsel's motion to withdraw as court-appointed counsel and dismissed Burfield's appeal as frivolous pursuant to **Anders v. California**, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

Burfield subsequently filed this motion to vacate, set aside, or correct his sentence pursuant to 28 **U.S.C.** § 2255. Burfield alleges that he received ineffective assistance of counsel, the district court erred in its calculation of his sentence, and the Presentence Report (PSR) omitted exculpatory information. A magistrate judge concluded that Burfield's motion was without merit and recommended that his motion be denied. The district court adopted the magistrate judge's recommendation and denied Burfield's § 2255 motion. Burfield filed a timely notice of appeal.

II.

Burfield first asserts that his trial counsel was ineffective because counsel failed to argue to the district court that Burfield was not responsible for all 100 marijuana plants charged in his indictment. Burfield maintains that his trial counsel knew that there was no conspiracy to manufacture the 100 plants because neither he nor his co-defendants held a shared interest in all of the plants. Rather, each defendant tended only the plants that they individually planted.

Burfield's claim must fail. Both Burfield's trial counsel and the counsel for the co-defendants objected to how the marijuana plants were counted and the PSR's recommendation that Burfield and his co-defendant each be held responsible for all 100 marijuana

plants. In fact, Burfield's trial counsel specifically argued to the court that the evidence supports Burfield's claim that the defendants grew marihuana for their own benefit and that each defendant separately owned and tended their portions of the growing site. Thus, Burfield fails to demonstrate that his trial counsel's assistance was deficient and that this deficiency prejudiced him. **Strickland v. Washington**, 466 U.S. 668, 687 (1984).

Burfield argues for the first time on appeal that his counsel did not effectively pursue his appeal. Burfield contends that his counsel failed to argue that the district court erroneously calculated his sentence based on all 100 marijuana plants. We need not decide whether Burfield's appellate counsel was ineffective because "issues raised for the first time on appeal are not reviewable by this [C]ourt unless they involve purely legal questions and failure to consider them would result in manifest injustice." **Varnado v. Lynaugh**, 920 F.2d 320, 321 (5th Cir. 1991). Burfield's claim does not satisfy either condition.²

Burfield's remaining two claims concern the district court's application of the sentencing guidelines and errors in his PSR. Burfield contends that the district court incorrectly calculated his sentence by considering all of the marihuana plants harvested

² In fact, the record supports the PSR's findings that all 100 plants constitute Burfield's relevant conduct. The Government introduced photographs of Burfield and his co-defendants tending and watering all of the plants on several separate occasions. Drug Enforcement Administration (DEA) Agent Ronald Robinson testified that when Burfield and his co-defendants were at the growing site, they came together, acted together, and watered all of the plant beds together. Robinson testified that the actions of the defendants appeared to be a team effort.

at the growing site as his relevant conduct. Burfield also argues that his PSR is erroneous because it omits his admission that he and his co-defendants were responsible only for the marihuana plants that they individually planted. These claims must also fail. Nonconstitutional claims that could have been raised on direct appeal may not be asserted in a 28 U.S.C. § 2255 proceeding. **United States v. Vaughn**, 955 F.2d 367, 368 (5th Cir. 1992). Such errors will be considered only if they "could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." **Id.** Burfield's remaining claims involve the technical application of the Sentencing Guidelines to the facts of Burfield's case. Because Burfield could have raised these nonconstitutional claims on direct appeal, they are not cognizable under § 2255. **Id.**

AFFIRMED.