UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50329
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SCOTT WILLIAMS,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(W 94 CV 015 (W 92 CR 41 2))

(March 27, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Petitioner Scott Williams (Williams) appeals the district court's order denying his petition for habeas corpus pursuant to 28 U.S.C. § 2255. Williams claims that his trial counsel and appellate counsel were constitutionally ineffective and that his sentence should not have been increased because the offense of which he was convicted was not the type for which the Sentencing

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Guidelines allows career offender enhancements. We affirm.

Facts and Proceedings Below

The facts relevant to Williams's conviction are recounted fully in our unpublished opinion from his direct appeal. *See United States v. Williams*, No. 93-8099 (5th Cir. Aug. 30, 1993). Briefly, Williams was involved with his wife, Connie, and Raymond Allison in the manufacture and distribution of methamphetamine oil from the Williams's home in Cameron, Texas.[1] On May 4, 1991, Williams's step-brother, Phillip Foust (Foust), bought some methamphetamine oil from Connie at the Williams's home and injected himself with it; Williams was present at the house during this time. Soon thereafter, Foust passed out briefly; even after he was revived, he continued to complain of nausea and a bad headache, but refused to seek medical attention. Later that evening, after Foust again lapsed into unconsciousness, neighbors took Foust to the hospital. He died the next day of a brain hemorrhage; the cause of death was listed as "Speed hemorrhage--Amphetamines."

Williams pleaded guilty to one count of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846.[2] The presentence report (PSR) recommended that Williams be classified as a career offender based on two previous convictions for controlled substance offenses. Under the Guidelines' provision

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[1] Allison manufactured the methamphetamine oil, and Connie sold it to specific customers whom she contacted by phone. Williams used the drug and directed customers to Connie.

[2] Williams was indicted on two counts, the second for distribution of methamphetamine, including aiding and abetting. The government agreed to dismiss this count in return for Williams's guilty plea.

governing career offender enhancements, U.S.S.G. § 4B1.1, Williams's base offense level was therefore calculated at 30.[3] Without the career offender enhancement, Williams's sentencing range would have been 24 to 30 months, based on a base offense level of 10 and a criminal history category of VI (14 criminal history points); with it, his sentencing range was 168 to 210 months. Williams's defense counsel did not object to the PSR on the basis of the § 4B1.1 career offender enhancement.

In addition, the PSR noted that section 5K2.1 would warrant an upward departure if the district court found that Foust's death resulted from Williams's involvement in the offense. At the sentencing hearing, in February 1993, Williams's counsel argued against such a departure, pointing out that no autopsy had been performed on Foust to determine the exact cause of death. Defense counsel called his own witnesses to testify that Foust had been complaining of severe headaches for a long time and that the cause of death could have been some preexisting factor not accounted for by the medical personnel who attended Foust at the hospital.[4] Nevertheless, the district court found that Foust's death resulted from his ingestion of the methamphetamine oil distributed as part of the conspiracy. It therefore departed upward from the

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[3] Section 4B1.1 provides for a base offense level of 32, but the PSR recommended a 2-point downward adjustment for acceptance of responsibility. *See* U.S.S.G. § 3E1.1(a).

[4] Williams also argued that Foust's death should not be attributable to him because of his "minor" role in the actual event; he claimed he did not even know that Foust had injected himself until after it had already happened. The district court rejected this argument at sentencing.

applicable Guidelines range to the statutory maximum of 240 months.

On direct appeal, Williams challenged only the district court's finding that the use of the methamphetamine oil was the cause of Foust's death, claiming the evidence was insufficient to support that conclusion. We held that, as there was sufficient evidence to support the conclusion that Foust's death resulted from the ingestion of methamphetamine oil, the district court did not abuse its discretion in deciding to depart upwards.

Williams then filed the section 2255 petition that is the subject of the current appeal. He argued that his trial counsel was ineffective in failing to object to the PSR's counting as two separate convictions the two prior drug offenses on which the recommended career offender enhancement was based. Williams claimed that these two offenses were part of a common scheme or plan and therefore constituted only one offense. He also contended that his appellate counsel was ineffective in not objecting to the district court's failure to make a specific finding, pursuant to Guidelines' section 5K2.1, that Williams intended Foust's death; he claimed that, absent such an explicit finding, the district court was not justified in upwardly departing to the top of the permissible sentencing range. Lastly, Williams claimed that the conspiracy offense of which he was convicted is not the type of offense for which a career offender enhancement is available under the Guidelines. The district court rejected all these arguments and, by May 10, 1994, order, dismissed the petition. Williams timely appealed to this Court.

Discussion

I. Ineffective Assistance of Counsel Claims

The standards under which we review a section 2255 petition are familiar. "Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Segler*, 37 F.3d 1131, 1133 (5th Cir. 1994) (internal quotation marks and citation omitted). Moreover, because habeas review is no substitute for an appeal, the petitioner may not raise constitutional or jurisdictional issues for the first time on collateral review unless he can establish "both `cause' for his procedural default, and `actual prejudice' resulting from the error." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991) (en banc) (footnote omitted), *cert. denied*, 112 S.Ct. 978 (1992).

A substantiated claim of ineffective assistance of counsel generally satisfies the cause and prejudice requirements.[5] *United States v. Pierce*, 959 F.2d 1297, 1301 (5th Cir.), *cert. denied*, 113 S.Ct. 621 (1992). "To succeed on any claim of ineffective assistance of counsel, a defendant must show that: (1) the attorney's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that except for the attorney's unprofessional errors, the result of the proceeding would have been different." *Id.* at 1302 (internal

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[5] There may be a limited exception to this principle when "an adequate record exists to evaluate such a claim on direct appeal," *Pierce*, 959 F.2d at 1301, but that exception is not relevant here.

quotation marks and citations omitted). Although the conclusion that a petitioner has failed to satisfy one or both prongs of this test is a mixed question of law and fact subject to our *de novo* review, *Beets v. Collins*, 986 F.2d 1478, 1489 (5th Cir. 1993), the findings of historic fact underlying the district court's conclusions will be upheld unless clearly erroneous, *United States v. Green*, 882 F.2d 999, 1002 (5th Cir. 1989).

The district court did not err in concluding that Williams failed to prove either of his ineffective assistance of counsel claims. Williams's trial counsel was not deficient in failing to argue that the two prior drug offenses that formed the basis of the career offender enhancement were part of a common scheme or plan, thereby constituting only a single offense. *See* U.S.S.G. § 4A1.2 cmty. (prior offenses are related only if they "(1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing"). The two offenses in question both involved a sale by Williams to an undercover agent of a small amount of methamphetamine; although the offenses occurred five days apart, Williams was arrested for both on the same day. The cases were tried together, but were prosecuted under separate cause numbers and were not consolidated for sentencing, although the sentences were to run concurrently.

This Court has held that none of these factors is sufficient to prove that the prior crimes were related for Guidelines' purposes. In *United States v. Garcia*, 962 F.2d 479 (5th Cir.), *cert. denied*, 113 S.Ct. 293 (1992), the defendant argued that the two heroin deliveries to which he pleaded guilty should have been

considered part of a common scheme or plan because they involved substantially identical conduct and occurred nine days apart. We rejected this contention and held that "[a]lthough the facts surrounding the cases may be similar, [s]imilar crimes are not necessarily related crimes." *Id.* at 482 (internal quotation marks and citations omitted; second alteration in original). Williams has not shown that he agreed with the undercover agent[6] to split a single transaction or that the offenses were other than two separate, distinct sales.[7] Trial counsel could not have been deficient for failing to make an argument that would have been baseless in light of *Garcia*. *See Smith v. Puckett*, 907 F.2d 581, 585 n.6 (5th Cir. 1990) ("Counsel is not deficient for, and prejudice does not issue from, failure to raise a legally meritless claim."), *cert. denied*, 111 S.Ct. 694 (1991).

Williams's contention that his appellate counsel was also ineffective is similarly unavailing. Williams claims that appellate counsel was deficient for not arguing on appeal that the district court made insufficient findings to support its decision

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[6] Williams claims that the sales were to the same undercover agent. Even if the record conclusively supported this assertion, it would make no difference. In *United States v. Ford*, 996 F.2d 83 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 704 (1994), we held that this was a "distinction[] without a difference. . . . The fact that the buyer was the same did not make the sales `related' . . . ." *Id.* at 86.

[7] Although Williams does not argue alternatively that the two offenses were consolidated for trial or sentencing, *see* U.S.S.G § 4A1.2 cmty., we note that *Garcia* also held that offenses are not considered to be consolidated for trial merely because the pleas are accepted at about the same time and that they are not consolidated for sentencing merely because the sentences are imposed at about the same time and run concurrently. *Garcia*, 962 F.2d at 482.

to upwardly depart because of the death that occurred in this case. He notes that section 5K2.1 "does not automatically suggest a sentence at or near the statutory maximum" and contemplates that the district court will "give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's state of mind." U.S.S.G § 5K2.1 (policy statement). He argues that, pursuant to section 5K2.1, the district court was required to make a specific finding that he intended Foust's death and that his appellate counsel was deficient in failing to raise this error on appeal.

On direct appeal, Williams's counsel made only a general argument that there was insufficient evidence to support the departure, not the more detailed argument Williams now claims should have been made. How counsel chooses to argue a case, however, is a tactical decision that presumptively falls within the broad range of reasonably effective assistance, *Anderson v. Collins*, 18 F.3d 1208, 1215 (5th Cir. 1994); counsel is not deficient for failing to pursue every conceivable nonfrivolous argument that could have been made on a defendant's behalf. *Smith v. Collins*, 977 F.2d 951, 960 (5th Cir. 1992), *cert. denied*, 114 S.Ct. 97 (1993).

Even assuming that counsel was deficient in this regard, Williams has not shown that the result in his case would have been different if more detailed findings had been made, and therefore cannot demonstrate prejudice. *See United States v. Faubion*, 19 F.3d 226, 228 (5th Cir. 1994). The district court is not required to make a specific finding that the defendant actually intended

death; it is sufficient that the evidence demonstrates that the defendant's "conduct was such that he should have anticipated that a serious injury or death could result from his conduct." *United States v. Davis*, 30 F.3d 613, 616 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 769 (1995). On direct appeal, this Court's opinion does not assume that Williams intended Foust's death, but does note that the conspirators manufactured methamphetamine in an injectable form to increase its potency. *United States v. Williams*, No. 93-8099 (5th Cir. Aug. 30, 1993) at 2 n.1; *see also United States v. Ihegworo*, 959 F.2d 26, 29 (5th Cir. 1992) (holding a section 5K2.1 departure reasonable when evidence demonstrated that defendant appreciated the danger of distributing extraordinarily pure heroin). Because the evidence in this case sufficiently supported the departure, no prejudice for failing to raise the section 5K2.1 argument resulted.

II. Career Offender Enhancement

Williams also argues that the conspiracy offense for which he was convicted was not the type of offense that will support a career offender enhancement under the Guidelines. In *United States v. Bellazerius*, 24 F.3d 698 (5th Cir.), *cert. denied*, 115 S.Ct. 375 (1994), we held that section 4B1.1 did not permit career offender enhancements for defendants convicted only of conspiracy offenses. *Id.* at 702.[8]

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[8] Our holding in *Bellazerius* was based on the Guidelines' specific reliance on 28 U.S.C. § 994(h), which directs the Sentencing Commission to promulgate guidelines specifying sentences at or near the statutory maximum term only for defendants convicted of crimes of violence and substantive drug offenses. *Bellazerius*, 24 F.3d at 700-01. Although the

Nevertheless, *Bellazerius* is of no help to Williams. Technical misapplications of the Guidelines are not cognizable under section 2255. *United States v. Faubion*, 19 F.3d 226, 233 (5th Cir. 1994); *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992) (per curiam).

Williams's belated suggestion in his reply brief that the failure to raise this issue at trial should be considered ineffective assistance of counsel is not properly before us. Williams did not raise this argument as an ineffective assistance of counsel claim before the district court (or in his appellant's brief in this Court); this is a necessary prerequisite to our review, even when the petitioner is proceeding *pro se*. *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993).[9]

Conclusion

The district court's denial of section 2255 relief is

AFFIRMED.

Commission has broader promulgation authority under 28 U.S.C. §§ 994(a)-(g), and therefore could have made conspiracy offenses subject to the career offender provisions, we found that the Commission's specific reliance in section 4B1.1 on section 994(h) implicitly disclaimed other sources of authority. *Id.* at 701-02. We therefore held that the Commission had exceeded its authority in interpreting section 4B1.1 to include conspiracy offenses, even though it might have had the authority to do so under other subsections of the statute. *Id.* at 702.

[9] Moreover, it is highly doubtful that Williams could show that counsel was deficient in his case. *Bellazerius* was decided June 17, 1994, after the district court entered its order denying Williams's section 2255 motion, and long after his initial sentencing and appeal. Our *Bellazerius* opinion recognizes that there is a circuit split on this issue. The first published appellate opinion reaching the same result, *United States v. Price*, 990 F.2d 1367 (D.C. Cir. 1993), was decided more than two months after Williams was sentenced. Counsel is not necessarily deficient for failing to anticipate changes in the law. *See Morse v. State of Texas*, 691 F.2d 770, 772 n.2 (5th Cir. 1982). We think that principle likely to be especially applicable when the change is as technically sophisticated and nonobvious as was that occasioned by the *Bellazerius* opinion.