

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-50617  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SUSAN OLSEN,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. SA-94-CA-498  
SA-90-CR-104 (1)  
- - - - -  
(February 23, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:\*

Susan Olsen's motion to proceed in forma pauperis (IFP) on appeal is DENIED. IT IS FURTHER ORDERED that the appeal is DISMISSED as frivolous. See 5th Cir. R. 42.2.

Olsen argues that her guilty plea was involuntarily entered because she was under the influence of medication at the time of the plea. This court will review the merits of Olsen's collateral challenge to her guilty plea because the Government failed to raise the procedural bar in the district court. See

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

United States v. Shaid, 937 F.2d 228, 231-32 (5th Cir. 1991) (en banc) cert. denied, 112 S. Ct. 978 (1992); United States v. Drobny, 955 F.2d 990, 994-95 (5th Cir. 1992).

The conviction of a legally incompetent defendant violates constitutional due process. See Pate v. Robinson, 383 U.S. 375, 378 (1966). The competency standard for pleading guilty is the same as the competency standard for standing trial: "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has a 'rational as well as factual understanding of the proceedings against him.'" Godinez v. Moran, \_\_\_ U.S. \_\_\_, 113 S. Ct. 2680, 2685-86 (1993) (quoting Dusky v. United States, 362 U.S. 402 (1960)).

"Where the defendant's testimony evidenced his lucidity and competence, and there is a clear inference from the records that the defendant was fully competent," the district may deny § 2255 relief without conducting a hearing. United States v. Drummond, 910 F.2d 284, 285 (5th Cir. 1990), cert. denied, 498 U.S. 1104 (1991). Olsen's sworn testimony and demeanor during the plea colloquy refute her allegations of incompetence. Olsen has not provided a supporting affidavit from a reliable third party indicating that she was mentally incompetent at the time that she entered the plea or that she was under the influence of a medication that rendered her incompetent. This claim is without arguable merit.

Olsen argues that her counsel was ineffective because he coerced her into pleading guilty while she was under the

influence of medication. Olsen also argues that her counsel should have realized that the type of medications that she was taking resulted in her functioning under a diminished capacity.

To obtain § 2255 relief on ineffective assistance grounds, a defendant must demonstrate that his counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (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 (1985). Olsen "must show that there is a reasonable probability that, but for counsel's errors, [s]he would not have pleaded guilty and would have insisted on going to trial." Id. "[W]hen the alleged error of counsel is failure to advise of an affirmative defense, the outcome of the prejudice element of the test will depend largely on whether the affirmative defense likely would have succeeded at trial." Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993) (internal quotations and citations omitted).

Olsen has not presented any evidence, other than her own self-serving declarations, that she was under the influence of medication that rendered her incompetent at the time of her arraignment. Therefore, Olsen has not demonstrated that her counsel was ineffective because he did not argue to the court that his client was mentally incapable of entering a guilty plea. For that same reason, Olsen's argument that counsel coerced her

into pleading guilty because she was under the influence of medication fails.

Olsen argues for first time on appeal that her counsel was ineffective because he failed to raise the issue of her mental health history during sentencing and on appeal. This court need not address issues not considered by the district court.

"[I]ssues raised for the first time on appeal are not reviewable by this court 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). This issue is not subject to review.

Olsen also argues for the first time on appeal that the probation officer failed to comply with Fed. R. Crim. P. 32 in preparing the presentence report and that the district court erred in departing upward at sentencing. Because Olsen failed to present these issues to the district court, they are not subject to review on appeal. Varnado, 920 F.2d at 321.

Olsen's motion for appointment of counsel is also DENIED. See Schwander v. Blackburn, 750 F.2d 494, 502 (5th Cir. 1985).

APPEAL DISMISSED.