

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-50654
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JERRY WAYNE DEAS,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

(M0-80-CR-004)

(May 19, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Jerry Wayne Deas pleaded guilty in 1980 to an indictment charging him with possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and was sentenced to a term of imprisonment of five years under 18 U.S.C.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

4205(b)(2), followed by a special parole term of ten years plus a fine of \$10,000. Deas's direct appeal was dismissed.

In 1981, Deas filed motions to correct his sentence to reflect credit for time served while on appeal bond and for reconsideration of the order imposing the \$10,000 fine. The record does not reflect whether the motion to correct sentence was ruled upon. The motion for reconsideration of the fine was denied as untimely. Deas then filed a motion for modification of sentence, arguing that 21 U.S.C. § 841(a)(1) did not provide in its penalty provision for imposition of a special parole term. Although the government agreed with Deas's motion, the district court denied the motion on the merits because the authority relied upon by Deas pertained to another statute. This court denied Deas's motion for leave to proceed in forma pauperis on appeal.

In 1994, Deas filed a motion to reduce or correct sentence under Fed. R. Crim. P. 35. Deas also invoked 28 U.S.C. § 2255. Deas stated that he was confined at the Wyoming State Penitentiary in connection with an unrelated state conviction. Deas suggested that the government had lodged a federal detainer against him for violating the terms of his special parole.¹ The district court denied the motion on the merits. Deas appealed. The magistrate

¹Although Deas stated that the special parole term began to run on June 7, 1985, he also alleged that he had served only two years and seven months of the special parole term. A document filed by Deas as an exhibit indicates that Deas's special parole term terminates on June 6, 1995, and that this appeal will become moot if it is still pending on that date.

judge granted Deas's motion for leave to proceed in forma pauperis on appeal.

OPINION

Deas's motion was not timely filed under the applicable version of Fed. R. Crim. P. 35(b). See 18 U.S.C.A. Rule 35, historical notes (West Supp. 1995). Therefore, the motion should be construed as a motion under 28 U.S.C. § 2255. See United States v. Santora, 711 F.2d 41, 42 (5th Cir. 1983) (construing pro se litigant's post-conviction motion as arising under § 2255 for purposes of determining timeliness of notice of appeal).

As the government notes, it cannot be determined from the record whether the federal detainer is related to the 1980 sentence. Assuming Deas does meet the "in custody" requirement of § 2255, the government contends that Deas's issues are not cognizable under § 2255. The Government also suggests that Deas's claims should be barred because Deas failed to raise them on direct appeal. (Citing United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, 502 U.S. 1076 (1992)). The government did not invoke the procedural bar in the district court because it had not been required to file an answer. See United States v. Drobny, 955 F.2d 990, 994 (5th Cir. 1992). Arguably, the motion should have been dismissed as an abusive serial filing under Rule 9(b) of the Rules Governing Section 2255 Proceedings. Because the case may be easily resolved on the merits, however, the court affirms the district court's ruling.

Deas contends that he was not sentenced in conformity with 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). Under 21 U.S.C. § 841(b)(1)(B), Deas was subject to a term of imprisonment of not more than five years. See 21 U.S.C.A. § 841(b)(1)(B) (West 1981). The statute also provided, "[a]ny sentence imposing a term of imprisonment under this paragraph shall . . . impose a special parole term of *at least 2 years* in addition to such term of imprisonment" Id. (emphasis supplied). Deas argues that his term of imprisonment and special parole term, combined, should have exposed him to a maximum period of incarceration of five years under the statute.

The government argues that this issue is not cognizable under § 2255. (Citing United States v. Smith, 32 F.3d 194, 196 (5th Cir. 1994)).

Relief under § 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. Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding.

United States v. Towe, 26 F.3d 614, 616 (5th Cir. 1994) (citation omitted).

In Smith, the defendant was erroneously sentenced to a term of special parole, instead of a term of supervised release. 32 F.3d at 196. Smith could not have raised the issue on direct appeal because he was correctly sentenced under the law in effect at the time of his direct appeal. Id. The court held that Smith had failed to present an issue of constitutional magnitude but reached

the issue anyway because failure to reach the issue would result in a miscarriage of justice -- Smith was entitled to be sentenced under the correct law. Id. Deas contends that his sentence was not consistent with the penalty provision of the statute under which he was convicted. Although Deas could have raised his issue on direct appeal, Smith indicates that the issue may be cognizable on collateral review because Deas's sentence may have resulted in a miscarriage of justice.

Deas's substantive issue is without merit, in any event. The statute unambiguously provided that the special parole term was in addition to the term of imprisonment. The two-year period established in connection with the special parole term was clearly a minimum period and the sentencing court correctly stated that it could have sentenced Deas to a special parole term of life under the statute. See United States v. Garcia, 877 F.2d 23 (9th Cir. 1989) (Identical language in § 841(b)(1)(A) "apparently authorized a special parole term for life."); United States v. Rich, 518 F.2d 980, 987 (8th Cir. 1975) ("[W]e read the special parole statute in question as providing a maximum term of parole of life. Due process is not violated by failure of a sentencing statute to specify the maximum sentence of imprisonment or parole.") (citing Earin v. Beto, 453 F.2d 376 (5th Cir.), cert. denied, 406 U.S. 909 (1972)), cert. denied, 427 U.S. 907 (1976); United States v. Simpson, 481 F.2d 582, 583-85 (5th Cir. 1973) (statute not void for vagueness), cert. denied, 414 U.S. 1095 (1973).

The opinion of the Ninth Circuit in United States v. Torres, 865 F.2d 1120 (9th Cir. 1989), cited by Deas, was withdrawn and republished. In its revised opinion, the Ninth Circuit held that the sentencing court erred in imposing a special parole term because the applicable penalty provision, § 841(b)(1)(A), did not provide for imposition of a special parole term. United States v. Torres, 880 F.2d 113, 115 (9th Cir. 1989), cert. denied, 493 U.S. 1060 (1990). Torres is inapposite because Deas was sentenced under § 841(b)(1)(B), which did require imposition of a special parole term. In United States v. Billings, 747 F. Supp. 625, 627 (D. Colo. 1990), cited by Deas, the court imposed a two-year term of special probation and held that the district court improperly imposed a term of supervised release. Billings does not stand for the proposition that the term of special probation under § 841(b)(1)(B) is limited to two years or that the combined sentence of imprisonment and special probation must not exceed five years. In Moore v. United States, 402 F. Supp. 1244, 1250 (D.N.J. 1975), also cited by Deas, the court stated, because the statute failed to establish a maximum term of special probation, "there is no possible way in which a trial court can establish that a defendant subject to a special parole term understands the consequences of his plea." The reasoning of Moore goes to the validity of the plea colloquy.

Deas also argues that the sentencing court failed to comply with Fed. R. Crim. P. 11(c)(1) because he was not advised of the consequences of his plea. Deas admits that the trial court advised

him that he could be subjected to a maximum term of special parole of life. Deas argues that the trial court failed to advise him that he could be imprisoned for the rest of his life as a result of violating the terms of his special parole. The government contends that this issue is not cognizable on collateral review. Relief under § 2255 for a violation of Rule 11 is available only upon a showing of prejudice by the defendant. United States v. Armstrong, 951 F.2d 626, 629 (5th Cir. 1992); see United States v. Timmreck, 441 U.S. 780, 783-84 (1979). To show prejudice, Deas would have to show that he would not have pleaded guilty if the district court had fully explained the nature and consequences of the special parole term. United States v. Saldana, 731 F.2d 1192, 1193 (5th Cir. 1984). Deas did not contend in the district court and did not contend on direct appeal that he would not have pleaded guilty if the district court had advised him of the consequences of the special parole term.

Deas attempts to avoid the rule in Timmreck in his reply brief by recharacterizing his motion as a Rule 35 motion. If the motion was brought under Rule 35, as Deas suggests, the district court's denial of the motion would be affirmed because the motion was not timely filed.

AFFIRMED.