

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50724
Summary Calendar

UNITED STATES of AMERICA,
Plaintiff-Appellee,
versus
DIONICIO ANTHONY CRUZ,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(93 CR 105 2 (SA 94 CA 640))

June 19, 1995

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Dionicio Anthony Cruz was convicted by a jury verdict for conspiracy to possess cocaine with intent to distribute, use of a communication facility in causing or facilitating the commission of felonies, and attempt to possess cocaine with intent to distribute. 21 U.S.C. §§ 841(a)(1), 843(b), and 846. We affirmed the convictions on direct appeal. United States v. Cruz, No. 93-8788 (5th Cir. June 24, 1994) (unpublished). Cruz now

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeals the district court's denial of his motion under 28 U.S.C. § 2255, claiming that counsel rendered ineffective assistance and the government failed to disclose that an audiotape had been altered. We affirm.

CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

Cruz raises four grounds of ineffective assistance of counsel. As set forth below, Cruz has failed to demonstrate the prejudice required under Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984). We therefore need not determine whether counsel's performance was deficient. Id. at 700, 104 S.Ct. at 2071.

Cruz contends that counsel was ineffective for failing to have an audiotape of a conversation between Ralph Balmez (a confidential informant) and himself examined for tampering. The substance of a post-arrest conversation with Balmez, whom Cruz then believed was a government informant, is of limited probative value compared with the overwhelming evidence of Cruz's guilt. Even if the jury believed that certain information was omitted from the tape, it is probable that Cruz would have been convicted.

Cruz next contends that the attorney rendered ineffective assistance by failing to impeach Balmez with evidence of prior arrests and criminal conduct. As the district court explained, absent a conviction, the evidence would have been inadmissible for purposes of impeaching Balmez. In any event, had counsel inquired on cross-examination regarding such conduct, the

impeachment evidence would not have undermined the government's case sufficiently to affect the outcome of the trial in that Cruz could have been convicted on the basis of DEA agent Salazar's testimony alone.

Cruz also contends that counsel should have rebutted the testimony of Balmez and Salazar which indicated that Trevino was present during the initial meeting between Salazar and Cruz. Contrary to Cruz's assertions, the presence of Trevino at a meeting where he did not participate in the conversation was unnecessary to the government's case.

Cruz finally contends that counsel should have objected to factual discrepancies between the testimony of two government witnesses regarding events which occurred at Bennigan's restaurant. The contradiction between the testimony of the surveillance officers was before the jury. As stated by the district court:

a review of the record shows that the evidence against Cruz was overwhelming. Investigator Salazar testified to face-to-face drug negotiations with Cruz and this testimony was corroborated by audio tapes of the conversations. Furthermore, Cruz was arrested in an automobile in which Trevino, his co-defendant, had only seconds earlier delivered \$10,000 in cash to Investigator Salazar as payment for one-half kilogram of cocaine.

Cruz has failed to show a reasonable probability that the outcome of the proceeding would have been different.

CLAIM OF NONDISCLOSURE

In regard to the claim that the government failed to disclose to him that the audiotape he admitted into evidence

(Defendant's Exhibit # 2) was altered, the district court properly found that, because Cruz knew of the alleged alteration at the time of his direct appeal but did not raise the claim, he is precluded from raising it in this § 2255 proceeding. See United States v. Shaid, 937 F.2d 228, 231-32 (5th Cir. 1991) (en banc), cert. denied, 502 U.S. 1076, 112 S.Ct. 978 (1992). Moreover, Cruz has not shown that the complained of error resulted in the conviction of an actually innocent man. Id. at 232.¹

The judgment of the district court therefore is AFFIRMED.

¹ Cruz raises certain claims that he did not present to the court below. Because failure to consider them would not result in manifest injustice, we decline to review them. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).