**UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 94-50795
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

TERRENCE JACKSON SMITH,

Defendant-Appellant.

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

(June 20, 1995)

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( A 94 CA 557 & A 89 CR 110 (01))

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

Per curiam:[*]

Terrence Jackson Smith ("Smith") appeals from a final judgment denying relief under 28 U.S.C. § 2255. We affirm.

FACTS

Smith entered into a plea agreement whereby he pleaded guilty

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

to count one of an indictment in return for dismissal of the remaining counts. Smith was convicted of conspiracy to distribute marijuana and sentenced to an 82-month term of imprisonment, a five-year period of supervised release, a $12,500 fine, and a $50 special assessment.

The Government filed objections to the original pre-sentence report ("PSR"), which attributed 201 pounds of marijuana to Smith for sentencing purposes, arguing that an additional 1,000 pounds of marijuana should be attributed to Smith for sentencing purposes because Smith and his brother, Thomas Smith, received that amount in January of 1989. The amended PSR held Smith accountable for the additional 1,000 pounds of marijuana. Smith moved to withdraw his guilty plea, which, following an evidentiary hearing, the district court denied.

This court affirmed Smith's conviction and sentence on direct appeal. Smith filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Smith alleged that: (1) the evidence did not support a finding that he was capable of producing or intended to produce more than 201 pounds of marijuana; (2) the evidence did not support that he was responsible for an additional 1,000 pounds of marijuana; (3) he was denied effective assistance of counsel because his counsel failed to introduce readily available testimony or cite portions of the record which would have supported a finding that he neither intended to produce nor had the ability to produce more than 201 pounds of marijuana; his attorney failed to argue that he could not be held responsible for more than

201 pounds of marijuana under U.S.S.G. § 2D1.4; and his attorney failed to insist upon the use of the appropriate version of the guidelines to determine his base offense level; and (4) the district court unlawfully imposed a five-year term of supervised release. Following a de novo review, the district court partially granted Smith's motion, revising Smith's term of supervised release from five years to three years, but denied the motion in all other respects. Smith appealed.

DISCUSSION

A. The amount of marijuana to be considered for sentencing.

In ruling on Smith's § 2255 motion, the district court determined that Smith's arguments that the court erred in sentencing him on the basis of 1,000 pounds of marijuana and that he was not capable of and did not intend to produce more than 201 pounds of marijuana had been disposed of in Smith's direct appeal to this court. This court will not reconsider an issue in a § 2255 motion that was disposed of on direct appeal. *United States v. Kalish*, 780 F.2d 506, 508 (5th Cir.), *cert. denied*, 476 U.S. 1118 (1986).

In Smith's direct appeal, he argued that the district court erred in considering the 1,000-pound transaction as part of his relevant conduct for sentencing purposes. This Court stated, although arguably in dicta, that the 1,000-pound drug quantity was not clearly erroneous and rejected Smith's challenge to computation of his base offense level based on the aggregation of the drug quantities. As Smith correctly notes, however, this court also

stated that, "Smith does not challenge the district court's finding as clearly erroneous, but instead argues that the 1,000-pound shipment was not, as a matter of law, relevant to the offense of conviction."

Even assuming that this court did not dispose of Smith's arguments that the court erred in sentencing him on the basis of 1,000 pounds of marijuana and that he was not capable of and did not intend to produce more than 201 pounds of marijuana, the claim is not cognizable. "Relief under 28 U.S.C.A. § 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. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992). A nonconstitutional claim that could have been raised on direct appeal, but was not, may not be raised in a collateral proceeding. *United States v. Shaid*, 937 F.2d 228, 232 n.7 (5th Cir. 1991) (en banc), *cert. denied*, 502 U.S. 1076 (1992).

B. U.S.S.G. §2D1.4

Smith argues that the district court erred in failing to properly determine the drug quantity for sentencing purposes pursuant to U.S.S.G. § 2D1.4, comment (n.1) (1989). Smith argues that the district court erred in failing to sentence him under the 1989 version of § 2D1.4, the version in effect at his sentencing, rather than the 1988 version. Assuming that these arguments were not disposed of by this court on direct appeal, they are not cognizable in a § 2255 proceeding as a district court's technical

application of the guidelines does not give rise to a constitutional issue. *Vaughn*, 955 F.2d at 368. As Smith also raises these issues in the context of ineffective assistance of counsel arguments, these issues are considered in that context below.

C. Did the district fail to make a necessary factual finding?

Smith argues for the first time on appeal that the district court erred in failing to make a factual finding regarding the 1,000 pounds of marijuana in violation of Fed. R. Crim. P. 32(c)(3)(d). 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 purely legal. Thus, this court should not consider this issue for the first time on appeal.

D. Ineffective assistance of counsel

This court reviews claims of ineffective assistance of counsel to determine whether counsel's performance was both deficient and prejudicial to the defendant. *United States v. Gipson*, 985 F.2d 212, 215 (5th Cir. 1993). For this ineffective-assistance claim in the context of a non-capital sentencing proceeding, the burden Smith must meet on the prejudice prong is "whether there is a reasonable probability that but for trial counsel's errors [Smith]'s non-capital sentence would have been significantly less harsh." *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993)

(footnote omitted).

Smith argues that his counsel was ineffective for failing to insist upon the use of the appropriate version of the guidelines for determining his base offense level. Smith was sentenced on September 17, 1990. Section 1B1.11 (1994) instructs the sentencing court to use the guidelines manual in effect on the date that the defendant is sentenced unless the court determines that "the use of the [g]uidelines [m]anual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution." *See United States v. Davidson*, 984 F.2d 651, 655 (5th Cir. 1993). Thus, in the instant case, barring an *ex post facto* clause violation, the district court should have used the 1989 version of the guidelines, effective November 1, 1989, rather than the 1988 version. As neither the original PSR nor the amended PSR forms part of the appellate record, it is unclear which version, if either, the district court used in computing Smith's sentence. As discussed below, even if the district court did not use the 1989 version of the guidelines, Smith has failed to show prejudice resulting from his counsel's failure to insist upon the use of the 1989 version.

Smith argues that his counsel was ineffective for failing to argue at sentencing or on direct appeal that he could not be held responsible for more than 201 pounds of marijuana under § 2D1.4, comment. (n.1) (1989). Smith argues that his counsel was ineffective for failing to introduce readily available testimony or cite portions of the record which would have supported a finding

that he neither intended to produce nor had the ability to produce more than 201 pounds of marijuana. Smith suggests that the purpose of the 1989 amendment to application note one of § 2D1.4 was to prevent "inflated offense levels in uncompleted offenses where a defendant is merely `puffing,' even though the court is then authorized to address the situation by a downward departure." U.S.S.G. App. C, 136 (1989).

U.S.S.G. § 2D1.4 (1989), provides that "[i]f a defendant is convicted of a conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed." Application note 1 to § 2D1.4, amended November, 1989, provides that

> If the defendant is convicted of a conspiracy that includes transactions in controlled substances in addition to those that are the subject of substantive counts of conviction, each conspiracy transaction shall be included with those of the substantive counts of conviction to determine scale. If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

The 1989 amendment deleted the following: "[w]here the defendant was not reasonably capable of producing the negotiated amount, the court may depart and impose a sentence lower than the sentence that would otherwise result," and inserted, "[h]owever, where the court finds that the defendant did not intend to produce and was not

reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing." U.S.S.G. App. C, 136 (1989). "The purpose of this amendment is to provide a more direct procedure for calculating the offense level where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount." *Id*.

At sentencing, the Government offered the testimony of Richard Coulter, a cooperating individual. Coulter testified that Smith delivered a total of 110 pounds of marijuana to him over a period of weeks. Coulter testified that all of the marijuana he received from Smith appeared to originate from a single load. He asked Smith the size of the load, and Smith stated that the size was 1,000 pounds. Coulter testified that Smith stated that he and his brother ordered the 1,000-pound load of marijuana for some Canadians who later backed out of the deal. Coulter testified that he believed Smith's statement about the 1,000-pound load because Smith supplied Coulter with marijuana from the same load for five or six weeks. Smith testified that he never had a conversation with Coulter regarding 1,000 pounds of marijuana. Smith's testimony did not suggest that he boasted or engaged in "puffing" about 1,000 pounds of marijuana to Coulter.

At sentencing, Smith's counsel did object to the reliability of the testimony regarding the thousand-pound quantity of marijuana. The district court determined that there was "reliable

and credible evidence that . . . Smith . . . [was] involved in a transaction with some Canadians involving a thousand pounds of marijuana." The court noted that it had heard Coulter testify "on a number of occasions and heard him being cross-examined by several more than competent attorneys, and he has an incredible accurate memory." Further, the amended PSR apparently recommended that Smith be held accountable for the additional 1,000 pounds of marijuana.

Smith has failed to demonstrate a reasonable probability that even under the 1989 application note to § 2D1.4 the district court would have determined that he did not intend to produce and was not reasonably capable of producing the 1,000-pound amount of marijuana. Thus, even assuming Smith's counsel's performance was deficient at sentencing and on direct appeal for failing to argue the above points, Smith has failed to show prejudice because he has failed to demonstrate a reasonable probability that but for his counsel's errors his sentence would have been significantly less harsh, *Spriggs*, 993 F.2d at 88, and also has failed to demonstrate a reasonable probability that but for his counsel's errors, the result of his direct appeal would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's judgment denying in part Smith's 28 U.S.C. § 2255 Motion to Vacate, Set Aside or Correct Sentence.