

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60343
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

OTIS FOSTER,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. CA3:93-105 (CR-3:91-1)

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(November 16, 1994)

Before JONES, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

Otis Foster argues that he is entitled to § 2255 relief because the district court erred in sentencing him by (1) upwardly adjusting his base offense level under U.S.S.G. § 2D1.1; (2) assessing criminal history category points for two DUI convictions for which he did not receive a prison term; and (3) denying him an additional one-point adjustment for acceptance of responsibility.

"Relief under 28 U.S.C.A. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

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 district court's technical application of the sentencing guidelines is not of constitutional dimension. Id. 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.) (en banc), cert. denied, 112 S. Ct. 978 (1992). Because Foster's arguments that the district court improperly calculated his guideline sentence do not raise constitutional claims and could have been resolved on direct appeal, the district court did not err in denying relief on those grounds. See United States v. Smith, 844 F.2d 203, 206 (5th Cir. 1988).

Foster also argues that his counsel was ineffective (1) because he failed to convince the district court that there should be no adjustment for possession of the firearm and (2) because he advised Foster to plead guilty without informing him that his base offense level could be increased because he possessed a firearm during the commission of the offense. This Court reviews ineffective-assistance claims 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). To establish "prejudice," the defendant is required to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694

104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993), the Court held that "[i]n order to avoid turning Strickland into an automatic rule of reversal in the non-capital sentencing context . . . a court must determine whether there is a reasonable probability that but for trial counsel's errors the defendant's non-capital sentence would have been significantly less harsh." The Court noted its belief that "`prejudice' must be rather appreciable before a new trial is warranted in view of counsel's error." Id. at n.4. To show deficient performance, the defendant must overcome the strong presumption that the attorney's conduct falls within a wide range of reasonable professional assistance. Strickland, 466 U.S. at 689. If the defendant makes an insufficient showing on one of the components of the inquiry, the court need not address the other. Id. at 697.

Foster's failure-to-convince argument is unavailing because he did not adduce any specific facts showing deficient performance or prejudice; the record establishes that Foster's lawyer prepared a written objection to the PSR on the firearm issue, and at the sentencing hearing he advocated Foster's reasons for possession of the gun during the December 7th deal. The district court's decision to accept the confidential informant's statements to the Government that Foster was wearing a gun and to conclude that Foster's otherwise legitimate reason for having the gun did not excuse the possession during the offense does not render counsel's performance deficient and outside the wide range of reasonable professional assistance.

See United States v. Cronin, 466 U.S. 648, 656 n.19, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Moreover, Foster made no allegations of prejudice. The district court did not err in denying § 2255 relief.

Foster's second ineffective-assistance argument, that his guilty plea was involuntary because his lawyer failed to advise him of the possibility of an upward adjustment, was not presented to the district court. An issue raised for the first time on appeal is not reviewable by this Court unless it involves a purely legal question and the failure to consider it would result in manifest injustice. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). This issue is not purely legal and thus cannot be considered by this Court.

AFFIRMED.