UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-60419
Summary Calendar

Jose Gilberto Drummond,

Petitioner-Appellant,

VERSUS

United States of America,

Respondent-Appellee.

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

(CA-G-93-537)

(November 23, 1994)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

The Appellant, Jose Gilberto Drummond (Drummond), appeals from the dismissal of his claims brought pursuant to 28 U.S.C. § 2255. The district court determined that Drummond had not offered any reason why he had not presented his claims in his prior motion.[1]

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] The conviction and sentence assailed in appellant's instant motion was affirmed by this court on direct appeal. Likewise two previous appeals from adverse rulings on § 2255 claims brought by

Accordingly, his claims were dismissed for abuse of the writ pursuant to Rule 9(b) of the Rules Governing Section 2255 Proceedings.[2] We affirm.

In the context of 28 U.S.C. § 2254 petitions for habeas corpus relief, a second or subsequent habeas petition which raises a claim for the first time is generally regarded as an abuse of the writ. McCleskey v. Zant, 499 U.S. 467, 470, 111 S. Ct 1454, 113 L. Ed. 2d 517 (1991). However, the failure to raise a ground in an initial habeas petition will be excused if the petitioner can show cause for his failure to raise the claim, as well as prejudice from the errors which form the basis for his complaint, or that the refusal to hear the claim will result in a fundamental miscarriage of justice. Id. at 493-95. This Court applies the McCleskey test to § 2255 motions. U.S. v. Flores, 981 F.2d 231, 234-35. A district court's decision to dismiss a motion for abuse of procedure is reviewed for an abuse of discretion. Saahir v. Collins, 956 F.2d 115, 120 (5th Cir. 1992).

Drummond, apparently in an attempt to show "cause," argues that his pleadings are entitled to a liberal construction because he is a pro se litigant and that the refusal to address his claims would frustrate the interest of preventing unconstitutional convictions and sentences.

Drummond have been rejected by this court. The second such claim being found frivolous.

[2] The district court also dismissed without prejudice Drummond's claims insofar as they sought relief under 28 U.S.C. § 2241. Drummond does not address the dismissal of the § 2241 claims on this appeal.

Pro Se Litigant Argument

Drummond stated in his response to the Government's motion to dismiss in the district court that he was ignorant of the legal facts and theories underlying his claims of ineffective assistance of counsel and the court's misapplication of § 3B1.1 at the time that he filed his first motion. Drummond argued that he should not be held to the same standards as a lawyer.

The "cause" prong of the McCleskey test requires the movant to show that "some objective factor external to his defense prevented him from raising the claim in the initial motion." Flores, 981 F.2d at 235 (citation omitted). Ignorance of the legal significance of the facts supporting the claim does not constitute "cause" because it is not an objective factor external to the defense. Id. at 236. Drummond cannot rely on his ignorance of the law to establish "cause."

Miscarriage of Justice Argument

Drummond may nevertheless obtain review of a successive petition if failure to do so would result in a fundamental miscarriage of justice. McCleskey, 499 U.S. at 1470. Drummond also argues that the failure to review his claims that his plea was involuntarily entered and erroneously admitted into evidence at his trial, that he was subjected to double jeopardy as a result of an incorrect application of the sentencing guidelines, and his ineffective-assistance-of-counsel claim will result in a manifest miscarriage of justice. A miscarriage of justice is indicated if

a constitutional violation probably resulted in the conviction of an innocent person. McCleskey, 499 U.S. at 1470. "Actual innocence" in this context is factual, as opposed to legal innocence, resulting from a constitutional violation. Johnson v. Hargett, 978 F.2d 855, 859 (5th Cir. 1992) cert. denied, 113 S. Ct. 1652 (1993). To show "actual innocence," a defendant is required to show that "there is a fair probability that, in light of all the evidence, a reasonable trier could not find all the elements necessary to convict the defendant of [a] particular crime." Id. at 860.

Drummond's arguments, even if proved to be correct, do not demonstrate that Drummond is innocent of the drug offenses for which he was convicted. Drummond's arguments that he was incorrectly sentenced under the guidelines, that his guilty plea was rendered involuntary or was breached as a result of the district court's alleged Rule 11 violations at the time of his guilty plea, and his conclusional argument that his counsel was ineffective have no bearing on his "actual innocence."

Nor does Drummond's argument that as a result of being tried on two counts of the indictment he was subjected to double jeopardy raise a question concerning his actual innocence. See Sawyer v. Whitley, 112 S. Ct. 2514, 2519, 120 L. Ed. 2d 269 (1992) (the miscarriage of justice is concerned with actual as opposed to legal innocence); See Selsor v. Kaiser, 22 F.3d 1029, 1034 (10th Cir. 1994)(a double jeopardy claim that is not supplemented by claim of factual innocence does not satisfy the fundamental miscarriage of justice exception); Wallace v. Lockhart, 12 F.3d 823, 826-27 (8th Cir. 1994) (miscarriage of justice exception did not apply although

murder and kidnapping convictions violated double jeopardy because petitioner did not claim that he was innocent of the kidnapping offense).

Drummond also has failed to demonstrate that the district court's decision not to review his claim that he was prejudiced at trial by the admission of his guilty plea (to two counts of the four count indictment) will result in manifest injustice. Drummond has not argued that his guilty plea was inadmissible because he did not commit the offenses to which he pleaded guilty. Drummond argued that the plea was invalid because the district court gave him incorrect information concerning the maximum range of supervised release which could be imposed. Drummond has not demonstrated that the admission of evidence of his guilty plea resulted in his conviction for offenses of which he is factually innocent.

Drummond also asserts that he intends to raise the entrapment defense if his plea is set aside. This statement of intent to raise the entrapment issue in the future is not sufficient to support a colorable claim to factual innocence. Thus, Drummond has not demonstrated that the failure to hear the claim will result in manifest injustice.

We do not address Drummond's claim that his counsel coerced him to testify at trial that he sold two ounces of cocaine to the government agent because it is raised for the first time on appeal. See Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).

Finally, Appellant's Motion In Request for Injunctive Relief is **DENIED.**

The district court's Order of Dismissal is **AFFIRMED.**