

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50708
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BYRON LAMONTE MCCUTCHEON,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. W-95-CA-228
- - - - -

February 23, 1998

Before WIENER, BARKSDALE and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Byron Lamonte McCutcheon, federal prisoner # 60246-080, requests permission to proceed in forma pauperis (IFP) on appeal from the district court's judgment dismissing his 28 U.S.C. § 2255 motion. McCutcheon contends that counsel on direct appeal provided ineffective assistance by failing to challenge the district court's estimate of the drug quantity attributable to McCutcheon, the district court's alleged failure to make findings in accordance with Fed. R. Crim. P. 32, and the district court's

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

determination of McCutcheon's sentence by using crack cocaine rather than powder cocaine. McCutcheon also contends that the district court erred in determining that his ineffective assistance claims were procedurally barred and in dismissing his § 2255 motion without conducting an evidentiary hearing.

We have reviewed the record, the district court's thorough opinion, and McCutcheon's brief and find no nonfrivolous issues for appeal. See McCutcheon v. United States, No. W-95-Ca-228 (W.D. Tex. Jul. 2, 1996). McCutcheon abandoned any challenge to his claim that his conviction was barred by double jeopardy and to the district court's determination that his sentencing issues were procedurally barred by failing to assert and brief the issues in this court. See Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir. 1985)(errors not raised and not briefed on appeal are abandoned).

As an appeal would have no merit, the motion for leave to proceed IFP is DENIED. See Carson v. Polley, 689 F.2d 562, 586 (5th Cir. 1982). The appeal is DISMISSED. See 5th Cir. R. 42.2.

IFP DENIED. APPEAL DISMISSED.