IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2767
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

KETTY PERRETGENTIL,

Defendant-Appellant.

No. 93-2225
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

KETTY PERRETGENTIL,

Defendant-Appellant.

Appeals from the United States District Court
for Southern the District of Texas
(CA-H-92-2733 (CR-H-89-415-6))

(April 5, 1994)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

---

* Local Rule 47.5.1 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

In these two consolidated matters, Ketty Perretgentil appeals, respectively, the denial of her federal prisoner's motion made pursuant to 28 U.S.C. § 2255 and the denial of her federal prisoner's motion made pursuant to 18 U.S.C. § 3582(c)(2). Finding no error, we affirm in both appeals and deny Perretgentil's motion for appointment of counsel.

I.

Perretgentil pleaded guilty to one count of conspiracy to possess cocaine with intent to distribute and one count of money laundering. She was sentenced to concurrent terms of 120 months' imprisonment on each count, concurrent terms of five years' supervised release on the money-laundering count, and a $100 special assessment.

On direct appeal from her conviction, Perretgentil argued that she had not been convicted on the money-laundering count, which was count three of the indictment, and therefore the district court improperly sentenced her on that count. She contended that because the district court pronounced her guilty on counts one and two, there was no conviction on count three. This court rejected Perretgentil's argument and affirmed her conviction. United States v. Perretgentil, No. 90-2919 (5th Cir. Mar. 19, 1992) (unpublished).

Perretgentil filed a § 2255 motion alleging that her sentence

---

on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

was imposed in violation of the law because prosecutors have the "unbridled" discretion to decide whether to prosecute in state or federal court; that the trial judge improperly sentenced her on the money-laundering count because she was not convicted on that count; and that she was denied effective assistance of counsel. The district court summarily dismissed the motion under rule 4(b) of the rules governing proceedings under § 2255.

Perretgentil then filed a motion under § 3582(c)(2) challenging the denial of the two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1 and arguing that she was entitled to an additional one-level reduction because § 3E1.1 had been amended since she was sentenced. The district court denied the motion.

II.

A.

Perretgentil argues that her sentence on the money-laundering count is invalid because she was not convicted on that count. This issue was raised and rejected on direct appeal and therefore may not be raised again in her § 2255 motion. See United States v. Kalish, 780 F.2d 506, 508 (5th Cir.), cert. denied, 476 U.S. 1118 (1986).

For the first time on appeal, Perretgentil challenges the quantity of cocaine used to calculate her base offense level. Issues raised for the first time on appeal are reviewable only if they involve purely legal questions and failure to consider them

would result in manifest injustice. United States v. Garcia-Pillado, 898 F.2d 36, 39 (5th Cir. 1990). We will not address this issue, as challenges to the technical application of the sentencing guidelines are not cognizable in a § 2255 motion, United States v. Vaughn, 955 F.2d 367, 368 (5th Cir. 1992), and therefore failure to consider the issue will not result in manifest injustice.

Finally, Perretgentil argues that she was denied effective assistance of counsel. To establish an ineffective-assistance-of-counsel claim, Perretgentil must demonstrate that her counsel's performance was deficient and that his deficient performance prejudiced her defense. Strickland v. Washington, 466 U.S. 668, 687 (1984).

Perretgentil argues that her counsel was ineffective because he permitted the district court to sentence her on the count two of the indictment. This argument is essentially a reworking of her argument that the district court improperly sentenced her on the money-laundering count because she was not convicted on that count. This argument was rejected on direct appeal, see United States v. Perretgentil, No. 90-2919 (5th Cir. Mar. 19, 1992) (unpublished), and therefore Perretgentil cannot demonstrate that her counsel was ineffective for failing to object to the district court's action.

Also for the first time on appeal, Perretgentil argues that her counsel was ineffective for failing to object to the quantity of cocaine used to calculate her base offense level. Claims of ineffective assistance of counsel raised for the first time on appeal will not be considered. United States v. Borders, 992 F.2d

563, 569 (5th Cir. 1993).

B.

A defendant can move for a reduction in sentence if his sentence was based upon a sentencing range that subsequently has been changed by the Sentencing Commission. 18 U.S.C. § 3582(c)(2). By Perretgentil's own admission, she was denied the two-level reduction for acceptance of responsibility under § 3E.1, and therefore because the adjustment under § 3E1.1 was not used to determine Perretgentil's base offense level, any amendment to § 3E1.1 would not change her sentence. Consequently, under the plain language of the statute, a motion under § 3582(c)(2) is not the appropriate means for Perretgentil to challenge her sentence. See Vaughn, 955 at 368 (challenges to technical application of the guidelines should be raised on direct appeal).

Even if, arguendo, Perretgentil can challenge the denial of the two-level reduction in a § 3582(c)(2) motion, to the extent that she argues that she should be entitled to the additional one-level reduction, all of the circuits that have addressed this issue have determined that the amendment to § 3E1.1 does not apply retroactively. See United States v. Cueto, 9 F.3d 1438, 1440-41 (9th Cir. 1993); Ebbole v. United States, 8 F.3d 530, 539 (7th Cir. 1993), cert. denied, 1994 WL 31942 (1994); United States v. Avila, 997 F.2d 767, 768 (10th Cir. 1993); United States v. Dowty, 996 F.2d 937, 938-39 (8th Cir. 1993); United States v. Desouza, 995 F.2d 323, 324 (1st Cir. 1993); United States v. Cadeda,

990 F.2d 707, 710 (2d Cir.), cert. denied, 114 S. Ct. 312 (1993).

C.

Perretgentil has filed a motion for appointment of counsel on appeal from the denial of her § 2255 motion. A movant seeking post-conviction relief, however, has no constitutional right to appointed counsel. Pennsylvania v. Finely, 481 U.S. 551, 555 (1987). The issues raised by Perretgentil are not complex, and her pro se brief adequately highlights them; the motion for appointment of counsel is DENIED. Schwander v. Blackburn, 750 F.2d 494, 502 (5th Cir. 1985).

AFFIRMED.