

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-2547
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RICHARD EARL FREENY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-3236(CR-H-89-313))

(May 16, 1994)

Before DAVIS, JONES AND DUHÉ, Circuit Judges.

PER CURIAM:¹

Freeny challenges the district court's dismissal of his § 2255 petition. Because we find that the district court erred in dismissing Freeny's motion based on his claim that he was denied effective assistance of counsel, we vacate the district court's order and remand for further proceedings.

I.

Richard E. Freeny, a federal prisoner, filed a 28 U.S.C.

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

§ 2255 motion to vacate the district court's sentence imposed after he pled guilty to conspiracy to alter a vehicle identification number and to possession with intent to knowingly sell a motor vehicle with an altered identification number. Freeny did not directly appeal his conviction and the district court denied his Fed. R. Crim. P. Rule 35 motion to reduce his sentence.

Freeny asserted that the district court violated his due process rights by: (1) failing to sentence him under the United States Sentencing Commission Guidelines; (2) failing to notify him of his right to appeal; (3) failing to resolve a factual dispute raised at sentencing pursuant to Fed. R. Crim. P. 32(c)(3)(D); and (4) illegally imposing a fine of \$10,000 despite Freeny's demonstration that he was unable to pay the fine.

Freeny also argued that he was entitled to relief due to ineffective assistance of counsel. According to Freeny, his attorney, Michael Wallace, failed to notify the court that he should have been sentenced under the Sentencing Guidelines and failed to object at sentencing to the introduction of a supplemental victim impact statement. Freeny also complained that Wallace failed to perfect an appeal and erroneously advised Freeny that his only option to challenge his sentence was to file a Fed. R. Crim. P. Rule 35 motion to correct or reduce sentence. The district court granted the government's motion for summary judgment and denied Freeny's § 2255 motion.

In this appeal Freeny argues that the district court abused its discretion by denying his motion for § 2255 relief and granting

the government's motion for summary judgment. Freeny raises the same due process and ineffective assistance of counsel arguments on appeal. We consider Freeny's arguments below.

II.

A.

Freeny argues first that his conspiracy offense extended "into and beyond the effective date of the Sentencing Reform Act," and that he should have been sentenced under the guidelines.

"[P]rovisions of the new sentencing laws apply only if the underlying offense was committed [on or] after November 1, 1987." **Hernandez v. Garrison**, 916 F.2d 291, 294 (5th Cir. 1990). Freeny asserts that he did not effectively withdraw from the conspiracy until September 13, 1989, the date he was indicted. However, Freeny pled guilty to count one and counts 14 through 18 and none of these counts involve conduct that occurred after November 1, 1987. Thus, the sentencing court did not err in failing to apply the sentencing guidelines.

Freeny argues next that the facts alleged in the indictment did not encompass the full extent of his criminal activity. This argument is non-jurisdictional in nature. A valid guilty plea waives Freeny's right to challenge any non-jurisdictional defects in the proceedings leading to the conviction. **United States v. Smallwood**, 920 F.2d 1231, 1240 (5th Cir.), **cert. denied**, 111 S.Ct. 2870 (1991). Because Freeny does not challenge the voluntariness of his guilty plea, this claim is without merit.

B.

Freeny argues next that the district court violated Rule 32(a)(2) by failing to inform him of his right to appeal the sentence and of his right to proceed **in forma pauperis** on appeal. The district court has no duty to advise a defendant who pleads guilty to an offense committed prior to November 1, 1987, of any right of appeal. The revised rules requiring the district court to notify a defendant of his right to appeal apply only to offenses committed after November 1, 1987. Because the court was also under no obligation to inform Freeny of his right to appeal, the court was not obligated to explain that he had the right to proceed IFP on appeal.

C.

Freeny asserts next that the district court violated Fed. R. Crim. P. 32(c)(3)(D) at the sentencing hearing because the court failed to resolve a factual dispute concerning Freeny's leadership role in the offense and allowed the government to introduce evidence concerning the monetary effect on the victims that was not contained in his presentence report.

At the sentencing hearing, Freeny only objected to being characterized as a leader of a stolen car operation. The court overruled Freeny's objection without explanation. Freeny contends that in failing to state reasons for its ruling, the district court violated Rule 32's requirement that the court "make a determination as to the controverted matter." Fed. R. Crim. P. 32(c)(3)(D).

Freeny also complains that the government added information to the victim impact statement that presumably was not contained in

the presentence report. Freeny did not make a contemporaneous objection to the added information. Freeny argues that the government's failure to disclose the financial loss information prior to sentencing violated his due process and equal protection rights.

Relief under § 2255 is limited to "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). "Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding." **Id.**

Neither the leadership-role issue nor the financial-loss issue amount to constitutional violations and both could have been raised on direct appeal. Freeny did not take a direct appeal, nor did he raise the issue of his leadership role or the government's use of the victim financial loss information in his Rule 35 motion. Thus Freeny cannot assert these arguments in a § 2255 proceeding.

Freeny contends next that the district court erred by imposing a \$10,000 fine during sentencing without making the findings required by 18 U.S.C. § 3572(a)(1). The requirements of § 3572 are statutory in nature and effective only for crimes committed after October 1987. 18 U.S.C. § 3572 (editorial note); 18 U.S.C. § 3551 (editorial notes). Thus, § 3572 does not apply to Freeny's offense because this issue does not implicate Freeny's constitutional rights and because it could have been raised on direct appeal. **See**

Vaughn, 955 F.2d at 368. Therefore, the \$10,000 fine imposed by the district court does not state a claim cognizable under § 2255.

E.

Freeny asserts next that he received ineffective assistance of counsel because Wallace: (1) failed to investigate the applicability of the sentencing guidelines and to notify the court of "the proper sentencing scheme"; (2) did not object to the inclusion of false information at the sentencing hearing as described above; and (3) failed to object to the \$10,000 fine.

Counsel's assistance is ineffective if the defendant can show that his performance was deficient and that this substandard representation prejudiced the defense. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If the defendant fails to demonstrate either prejudice or deficient performance, the court need not consider the other prong. **Strickland**, 466 U.S. at 697.

Strickland applies to ineffective-assistance claims arising out of plea negotiations. **Hill v. Lockhart**, 474 U.S. 52, 57-58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). To satisfy the prejudice requirement, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." **Id.** at 59. Because the sentencing guidelines and § 3572 did not apply to Freeny, he was not prejudiced by his counsel's failure to argue these issues to the district court. Moreover, Freeny does not argue that he would have insisted on going to trial but for the

\$10,000 fine and therefore cannot make out an ineffective assistance of counsel claim under **Strickland** on this basis.

Finally, Freeny asserts that he received ineffective assistance of counsel because Wallace failed to file a notice of appeal despite Freeny's request that he do so.

"[A] petitioner is entitled to [habeas relief] if he directed his attorney to take an appeal and his attorney disregarded those instructions." **Norris v. Wainwright**, 588 F.2d 130, 134 (5th Cir.), **cert. denied**, 444 U.S. 846 (1979). The **Strickland v. Washington**² ineffective assistance of counsel analysis does not apply when there has been a complete denial of any assistance of appellate counsel. **Sharp v. Puckett**, 930 F.2d 450, 451-52 (5th Cir. 1991) (citing **Penson v. Ohio**, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988)). In other words, "[i]f a petitioner can prove that the ineffective assistance of counsel denied him the right to appeal, then he need not further establish--as a prerequisite to habeas relief--that he had some chance of success on appeal." **United States v. Gipson**, 985 F.2d 212, 215 (5th Cir. 1991). In such cases, prejudice is presumed and neither the **Strickland** analysis nor the harmless-error analysis is appropriate. **Sharp**, 930 F.2d at 452.

Wallace filed an affidavit stating that he notified Freeny that he could file an appeal, but that he advised Freeny that an appeal would be frivolous and would undermine an attempt to reduce his sentence by a Rule 35 motion. According to Wallace, Freeny

² 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

"acknowledged" this advice and chose to pursue a Rule 35 motion "as the better course of action." Conversely, Freeny filed an affidavit stating that he requested Wallace to file an appeal, but that Wallace advised him that he had no right of appeal because he pled guilty and that his only option was a Rule 35 motion to reduce his sentence.

The district court found that Freeny made inconsistent assertions that Wallace failed to notify him of his right to appeal and that Wallace failed to file an appeal. The court found that Freeny waived his right of appeal "[b]ased on Freeny's own allegations and in light of Wallace's affidavit stating that he did inform Freeny that an appeal of the sentence could be taken and that Freeny did not specifically request Wallace to file an appeal."

Freeny asserts that the district court misunderstood his argument and misinterpreted his affidavit. He contends that he told Wallace to file an appeal, but that Wallace advised him that he could not file an appeal because he pled guilty. Freeny argues that Wallace's erroneous advice regarding his right to file an appeal amounts to a complete denial of appellate assistance of counsel and does not conflict with his claim that Wallace failed to file an appeal upon his request. We agree that the district court did not fully consider Freeny's argument and misinterpreted Freeny's affidavit as internally inconsistent. This being the case, Freeny's affidavit and Wallace's affidavit present a factual conflict. "With regard to resolution of factual issues in a

Section 2255 case, this Court has held that contested fact issues ordinarily may not be decided on affidavits alone, unless the affidavits are supported by other evidence in the record." **United States v. Hughes**, 635 F.2d 449, 451 (5th Cir. 1981). Therefore, we find it necessary to vacate the order dismissing Freeny's § 2255 motion and remand so that the district court can resolve whether Freeny's defense counsel advised him he had no right of appeal.

For the foregoing reason, the district court's order dismissing Freeny's § 2255 motion is VACATED and this matter is REMANDED for further proceedings.