

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-10746
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FERMAN WAYNE WRIGHT,

Defendant-Appellant.

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

(3:94-CV-1229-R(3:86-CR-274-R))

(March 1, 1995)

Before KING, HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Ferman Wayne Wright pleaded guilty to possession of a firearm by a convicted felon. Prior to sentencing, Wright filed a motion for a new trial which the district court construed as a motion to withdraw his guilty plea. The district court denied Wright's

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

motion and sentenced him to 15 years of imprisonment. This court affirmed.

In his first § 2255 motion, Wright argued, inter alia, that counsel failed to advise him that the evidence "most probably" was insufficient to warrant a conviction. The district court rejected all of Wright's contentions on their merits and dismissed the motion. This court affirmed.

In his second § 2255 motion, Wright argued, inter alia, that his indictment was defective because ATF Special Agent Danny DeWitt told him that he (DeWitt) had neither filed nor signed the original complaint. The district court denied the motion, noting that Wright's arguments either had been rejected previously, or were patently frivolous. Wright's appeal was dismissed for want of prosecution.

Wright's third § 2255 motion was dismissed pursuant to Rule 9(b) of the Rules Governing § 2255 Proceedings. This court affirmed.

In the instant § 2255 motion, Wright, represented by retained counsel, filed numerous grounds for relief.¹ The district court ordered Wright to show cause why his motion should not be barred under Rule 9(b). Wright responded that the merits of the specific claims he raised in his fourth motion had not been presented in any of his previous motions, and that he had made a colorable showing

¹Wright argued: (1) that his guilty plea was not entered voluntarily; (2) that he received ineffective assistance of counsel; (3) that the prosecutor intentionally misled Wright's counsel into believing that Wright had confessed; and (4) that he was innocent.

of factual innocence. Upon recommendation of the magistrate judge, the district court dismissed Wright's motion with prejudice under Rule 9(b). Wright timely appealed.

Wright, who is represented on appeal by retained counsel, argues that the district court erred by dismissing his motion under Rule 9(b) because (1) his fourth § 2255 motion raised "entirely different matters" than those raised in his previous motions; (2) he has made a colorable showing of actual innocence; and (3) the Government failed to plead abuse of process.

Under Rule 9(b), a motion arising under § 2255 may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits, or if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure. A district court's dismissal under Rule 9(b) is reviewed under the abuse-of-discretion standard. United States v. Flores, 981 F.2d 231, 234 (5th Cir. 1993).

Wright's assertion that his motion could not be dismissed under Rule 9(b) because it raises "entirely different" grounds is without merit. A district court may dismiss a successive motion if it finds that the movant has raised new grounds for relief and the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure. Rule 9(b); Flores, 981 F.2d at 235. However, if a movant can show cause for failing to raise the claims earlier, and prejudice from the errors of which he

complains, the motion is not subject to dismissal. Flores, 981 F.2d at 235. This court applies the cause-and-prejudice test espoused in McCleskey v. Zant, 499 U.S. 467, 493 (1991)(petition for habeas corpus under 28 U.S.C. § 2254), to § 2255 motions. Flores, 981 F.2d at 234-35.

Wright argues that his failure to raise his new grounds for relief in his earlier motions should be excused because he was acting pro se in the earlier motions. However, a movant's pro se status does not amount to "cause" under the cause-and-prejudice test. See Flores, 981 F.2d at 236. Because Wright has not shown cause for his failure to raise his claims in his previous motions, this court need not consider whether he has shown prejudice. Id.

Even if a movant does not meet the cause-and-prejudice test for failing to bring newly raised claims in his previous motion, those claims will be heard if failing to do so will result in a fundamental miscarriage of justice. Id. A fundamental miscarriage of justice is indicated if a constitutional violation probably resulted in the conviction of an innocent person. Id.

Wright argues that he has made a colorable showing of actual innocence. He argues that there is no evidence to connect him to the firearm he was convicted of possessing. He notes that the firearm was in the trunk of a car that did not belong to him, and that he was not in the car when the firearm was seized. He argues that the district courts, in both the instant and the previous § 2255 motions, have "assumed" that the evidence against him was sufficient, and that this assumption can be "traced back" to

testimony given by Wright's trial attorney during the hearing on Wright's motion to withdraw his guilty plea. He suggests that, at the hearing, Wright's attorney confused facts regarding the offense to which Wright pleaded guilty, with those regarding the first count of the original indictment, to which Wright did not plead guilty and to which the evidence was stronger.² He argues that the district court "picked up that theme" in rejecting his first § 2255 motion.

Wright further contends that, contrary to what was stated in the Government's factual resume, he did not admit to A.T.F. Special Agent Danny DeWitt that he possessed the firearm. The factual resume provided in part that the firearm upon which Wright's conviction was based was found in a vehicle and that Wright "admitted to A.T.F. Agent Danny Dwight [DeWitt] in a later interview . . . that he had been in possession of the firearm." Wright argues that DeWitt acknowledged, in a telephone conversation with Wright's present attorney, that he did not recall Wright ever admitting that he had possessed the firearm in question. Wright argues that "ATF bureaucracy" would not allow Agent DeWitt to sign an affidavit stating that DeWitt had no memory of such admission.

To show actual innocence, a movant 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

²Count one of the indictment charged Wright with possessing a firearm in Dallas County on April 22, 1986. Count two, the count to which Wright pleaded guilty, charged Wright with possessing a firearm in Kaufman County on October 2, 1986.

convict the defendant of that particular crime." Johnson v. Hargett, 978 F.2d 855, 859 (5th Cir. 1992)(§ 2254 case), cert. denied, 113 S. Ct. 1652 (1993). Thus, a movant must show that it is "more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." See Schlup v. Delo, __ U.S. __ (U.S. Jan. 23, 1995, No. 93-7901), 1995 WL 20524 at *14 (§ 2254 death penalty case). Because Wright pleaded guilty, the record does not contain an abundance of evidence relative to Wright's guilt. Nevertheless, Wright's arguments in support of his claim of actual innocence fail to demonstrate that a reasonable trier could not find all the elements necessary to convict.

At the hearing to withdraw his guilty plea, Wright testified that the statement in the factual resume that he had confessed to Agent DeWitt the possession of the firearm was false. Wright acknowledged, however, that he signed the factual resume, but he maintained that he did not read it. In response to Wright's testimony, Wright's trial counsel testified that Wright had contested his statement to Agent DeWitt with regard to another case and that Wright was confusing the two cases. Regarding the evidence in support of Wright's guilt, counsel acknowledged that the evidence supporting the offense to which Wright pleaded guilty "was the much weaker case of the two[,]" but that he advised Wright to plead guilty because Wright "was there on that occasion. He was in that car and in that car the gun was found. Now, that's not actual possession in your hand but that's constructive possession and the knowledge is the issue."

Wright's allegations do not establish that he is innocent. See Johnson, 978 F.2d at 859. Moreover, Wright's guilty plea and its accompanying admissions of guilt carry a strong presumption of verity.³ See United States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994).

Wright also argues that the district court erred by dismissing his motion without authorizing the taking of Agent DeWitt's deposition, or scheduling an evidentiary hearing. Even assuming that Agent DeWitt confirmed Wright's allegation that he (DeWitt) did not recall Wright confessing to possession of the firearm, Wright's actual innocence would not be established. Because Wright would not have been entitled to relief even if his allegations were confirmed, the district court did not err by denying his motion without an evidentiary hearing. See United States v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992).

Wright argues that dismissal under Rule 9(b) was in error because the magistrate judge raised the issue of abuse of procedure sua sponte. He argues that the Government has the burden of pleading such abuse. Id. (citing McCleskey, 499 U.S. at 477 ("The parties agree that the government has the burden of pleading abuse of the writ[.]"))).

If the movant is afforded an adequate opportunity to explain why his motion should not be barred under Rule 9(b), the district

³Wright argues that the magistrate judge concluded that his sworn statements of guilt were, per se, evidence of guilt. The magistrate judge concluded only that Wright's uncorroborated assertions of innocence contradicted his sworn statements of guilt.

court may raise the issue sua sponte. See Williams v. Whitley, 994 F.2d 226, 231-32 (5th Cir.)(§ 2254 case), cert. denied, 114 S. Ct. 608 (1993). "The Supreme Court's clarification of the state's responsibilities in pleading abuse of the writ in McCleskey does not affect the validity of this well-established rule." Id.

The district court afforded Wright an adequate opportunity to explain why his motion should not be barred under Rule 9(b). Thus, the magistrate judge did not err by raising the issue sua sponte. The district court's dismissal of Wright's fourth § 2255 motion under Rule 9(b) was not an abuse of discretion.

AFFIRMED.