UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60403
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERT LEE JETT,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(3:93CV46OWN (J90-00068(W)))

(February 7, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[1]

Robert Lee Jett appeals from the denial of relief under 28 U.S.C. § 2255. We **AFFIRM**.

I.

Despite claiming entrapment, Jett was convicted of distribution of cocaine base within 1,000 feet of a school, and was sentenced, *inter alia*, to 36 months imprisonment. This court affirmed his conviction and sentence on appeal. ***United States v. Jett***, No. 91-7099 (5th Cir. 1992) (unpublished).

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 Pursuant to that rule, the court has determined that this opinion should not be published.

Jett filed a *pro se* motion under 28 U.S.C. § 2255, alleging, among other things, a ***Brady*** violation; insufficient evidence to overcome his entrapment defense; prosecutorial misconduct; and ineffective assistance of counsel.[2]

Five months after Jett filed his *pro se* motion, John Wesley Hall, Jr., an Arkansas lawyer, filed an entry of appearance as Jett's attorney in the post-conviction proceedings and a motion to appear *pro hac vice*. The district court denied Hall's motion, because Hall failed to comply with a local rule requiring him to obtain a local sponsor, but permitted Hall to resubmit the motion in the proper form.

A month and one-half later, the district court having received no further filings from Hall, and, without conducting an evidentiary hearing, denied Jett's § 2255 motion. Hall filed a motion to reconsider the denial, claiming that Jett was denied an opportunity to have counsel. The district court denied the motion to reconsider. Jett appeals from the denials of the § 2255 motion and the motion to reconsider.

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[2] Prior to filing the § 2255 motion, Jett filed a motion for a transcript at government expense under 28 U.S.C. § 753(f), stating his intention to file a § 2255 motion alleging denial of right to confront witnesses because the confidential informant did not testify; a Fourth Amendment violation because the officers executing the search warrant failed to comply with the "knock and announce" rule of 18 U.S.C. § 3109; prosecutorial misconduct; interference with his right to counsel; and ineffective assistance of counsel. This motion apparently was never ruled upon; some of the requested transcripts are included in the record.

Jett also filed a motion requesting that the issues raised in his motion for a transcript at government expense be incorporated in his § 2255 motion.

II.

A.

Jett claims that he was improperly denied counsel of choice in the § 2255 proceeding. The district court denied Hall's motion to appear *pro hac vice* without prejudice because Hall failed to comply with the local rule requiring him to obtain a local sponsor. Uniform Local D. Ct. R. 1. We review the district court's application of local rules in disposing of motions for an abuse of discretion. ***Victor F. v. Pasadena Indep. Sch. Dist.***, 793 F.2d 633, 635 (5th Cir. 1986). Although Hall contends that he was diligently attempting to obtain a local sponsor, he failed to inform the district court of those attempts. We find no abuse of discretion.

B.

In his § 2255 motion, Jett claimed for the first time that there was insufficient evidence to support his conviction, that he was entrapped as a matter of law, and that the government had committed a ***Brady*** violation. The government asserted, and the district court agreed, that the claims were procedurally barred.

A movant is procedurally barred from raising claims for the first time on collateral review unless he demonstrates both cause for failing to raise the issue on direct appeal and actual prejudice resulting from the error. *E.g.*, ***United States v. Pierce***, 959 F.2d 1297, 1301 (5th Cir.), *cert. denied*, 113 S. Ct. 621 (1992). Jett has not demonstrated either cause or prejudice. However, we will consider these issues to the extent they may be considered within the context of Jett's ineffective assistance of

counsel claim.

C.

Jett claims that he was denied effective assistance by his trial and appellate counsel for a variety of reasons. To establish ineffective assistance, Jett must demonstrate that his counsel's performance was deficient and that this prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984).

1.

Jett claims that counsel was ineffective for failing to ensure the presence of the confidential source (the source) at trial. The record, however, reveals that Jett consented to the strategic decision not to call the source as a witness.[3]

Counsel's performance was deficient only if it "fell below an objective standard of reasonableness." ***Kyles v. Whitley***, 5 F.3d 806, 818 (5th Cir. 1993) (internal quotations and citation omitted), *cert. denied*, 114 S. Ct. 1610 (1994). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic

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[3] Counsel believed that the source's testimony would incriminate Jett and would make it more difficult to obtain an entrapment instruction. Counsel preferred to use an "empty chair" tactic, highlighting the Government's failure to have the source testify. Jett contends, however, that this was an ineffective strategy because counsel had substantial impeachment material which could have been used to impeach the source's credibility.

Along that line, Jett claims that the Government withheld ***Brady*** material because it did not provide impeachment material within its possession. Counsel cannot be faulted for not using material which Jett alleges the Government withheld improperly.

choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." ***Black v. Collins***, 962 F.2d 394, 401 (5th Cir. 1991) (internal quotations and citation omitted), *cert. denied*, 112 S. Ct. 2983 (1992). The choice of witnesses enjoys a presumption of reasonableness. ***Kyles***, 5 F.3d at 818. Jett has not shown that his counsel's decision was professionally unreasonable.[4] ***Id***. at 818-19.

2.

Jett also claims that his counsel was ineffective for failing to move to suppress the evidence seized during the search of Jett's residence. He contends that his counsel should have challenged the search because the warrant contained material misstatements of fact in violation of ***Franks v. Delaware***, 438 U.S. 154, 98 S. Ct. 2674 (1978).[5] He maintains primarily that the statement in the affidavit that the source had seen controlled substances at Jett's

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[4] Jett also claims that his counsel was ineffective for failing to call a variety of other witnesses who allegedly would have supported his entrapment defense. Once again, the record reveals that this was a strategic decision made with Jett's knowledge and consent. Counsel was concerned that the Government may have been permitted to gain damaging testimony from these witnesses. Jett has not shown that this strategic decision was professionally unreasonable. *See* ***Kyles***, 5 F.3d at 818-19.

[5] Jett also contends that the officers failed to comply with the "knock and announce" rule in 18 U.S.C. § 3109 The search of Jett's residence was conducted by state officers, and therefore § 3109 does not apply. *See* ***United States v. Heacock***, 31 F.3d 249, 258 (5th Cir. 1994). The Fourth Amendment requires only that the search be reasonable and does not inflexibly incorporate the § 3109 "knock and announce" rule. *See* ***United States v. Sagaribay***, 982 F.2d 906, 909-10 (5th Cir.), *cert. denied*, 114 S. Ct. 160 (1993). Jett does not claim that the search was unreasonable under the Fourth Amendment.

residence within the past 24 hours was false because Jett and the source allegedly had no contact during that period and there were no controlled substances at the residence. To suppress evidence from a search because the affidavit in support of the warrant is false, a defendant must show that "the affiant made the statement with deliberate falsity or with reckless disregard for the truth." ***United States v. Ivy***, 973 F.2d 1184, 1188 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1826 (1993).

The record indicates that Jones wrote the affidavit on September 7, and that the source was present at Jett's residence on September 5, approximately 48 hours before the affidavit was written. Jett cannot establish from this record that Jones' statement that the source had seen the controlled substances within 24 hours was made with "deliberate falsity" or "reckless disregard for the truth." At most the record establishes that Jones stated 24 rather than 48 hours. In any event, there is no evidence that Jones knowingly relied on a false statement.[6] Consequently, Jett cannot establish ***Strickland*** prejudice from counsel's failure to move to suppress. *See* ***Lockhart v. Fretwell***, 113 S. Ct. 838, 844 (1993).

3.

As discussed, we review Jett's two insufficient evidence claims only within the context of his ineffective assistance of

[6] Jett also complains that the controlled substances referenced in the affidavit were actually references to "packages" which, in fact, contained no drugs. This contention does not suggest that Jones knowingly relief on a false statement.

counsel claim. Jett asserts first that the Government failed to prove that the drug transaction took place within 1,000 feet of school pursuant to 21 U.S.C. § 860. Jett raises this argument for the first time on appeal; therefore, we will not address it.[7] ***United States v. Borders***, 992 F.2d 563, 569 (5th Cir. 1993).

Jett claims also that his counsel failed to challenge the sufficiency of the evidence establishing that he was predisposed to commit the offense. Our review of the record reveals that the government's evidence of predisposition was sufficient to support the jury's verdict.[8] Consequently, Jett cannot demonstrate ***Strickland*** prejudice from counsel's failure to challenge the sufficiency of the evidence.

4.

Finally, for Jett's claim that the Government withheld exculpatory and impeachment material in violation of ***Brady v. Maryland***, 373 U.S. 83, 83 S. Ct. 1194 (1963), we fail to see, as

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[7] Similarly, Jett claims for the first time on appeal that his counsel was being investigated by the Federal Bureau of Investigation during his trial and therefore that he was operating under a conflict of interest. We need not consider this claim. ***Borders***, 992 F.2d at 569.

[8] We must "accept every fact in the light most favorable to [the] jury's guilty verdict, and may reverse only if no rational jury could have found predisposition beyond a reasonable doubt." ***United States v. Byrd***, 31 F.3d 1329, 1335 (5th Cir. 1994). There was evidence at trial that Jett was "bragging" about his involvement in drug-trafficking; and surveillance of Jett's residence indicated activity consistent with drug-trafficking. There was also evidence that Jett informed the source that he could obtain marijuana and cocaine. This evidence was sufficient to support the jury's finding that Jett was predisposed to commit the offense. *See* ***Lockhart***, 113 S. Ct. at 844; ***United States v. Mora***, 994 F.2d 1129, 1137 (5th Cir.), *cert. denied*, 114 S. Ct. 417 (1993).

discussed, how we may consider this in connection with Jett's ineffective assistance claim; therefore, we refuse to consider this otherwise procedurally barred claim.

C.

Finally, Jett claims he was entitled to an evidentiary hearing to resolve factual disputes in the record. A movant is not entitled to an evidentiary hearing if the claims are plainly refuted by the record. 28 U.S.C. § 2255; ***United States v. Green***, 882 F.2d 999, 1008 (5th Cir. 1989). As noted, the record establishes that Jett was not denied effective assistance of counsel; he was not entitled to an evidentiary hearing.[9]

III.

For the foregoing reasons, the denials of the § 2255 motion and motion to reconsider are

AFFIRMED.

[9] Jett also claims for the first time on appeal that the cumulative effect of the errors render his conviction fundamentally unfair. We need not address this issue. ***Borders***, 992 F.2d at 569.