

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

SEP 03 1991

ROBERT L. HOECKER
Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ROBERT DOUGLAS COOK,
Defendant-Appellant.

No. 91-1172
D.C. No. 90-CR-372
(D. Colo.)

ORDER AND JUDGMENT*

Before LOGAN, MOORE and BALDOCK, Circuit Judges.**

On November 7, 1988, defendant-appellant Robert Douglas Cook was convicted of possession with intent to distribute a controlled substance. See 18 U.S.C. § 841(a)(1) & (b)(1)(b). Defendant did not file a direct appeal. He now seeks to have the conviction set aside or vacated pursuant to 28 U.S.C. § 2255. The district court

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case therefore is ordered submitted without oral argument.

dismissed the petition on the ground that defendant failed to state a basis for relief. We affirm.

Prior to defendant's trial he moved for suppression of key evidence seized from his home contending that the government violated his fourth amendment rights by executing a search warrant which was not supported by probable cause. The district court suppressed the evidence, but we addressed the matter on interlocutory appeal and found no violation. United States v. Cook, 854 F.2d 371 (10th Cir. 1988), cert. denied, 488 U.S. 1006 (1989). Defendant now alleges that the government (1) violated the "knock and announce" rule, 18 U.S.C. § 3109, in executing the warrant, and (2) violated his fourth amendment rights by failing to obtain a separate warrant to search a sealed container within his home. He also contends that his sixth amendment right to effective assistance of counsel was violated because counsel failed to raise the above arguments at trial.

Defendant has waived the "knock and announce" argument and the "separate warrant" argument because he failed to raise the arguments at the suppression hearing. See Fed. R. Crim. P. 12(b)(3) & (f). He therefore is procedurally barred from bringing the claims now in his § 2255 habeas petition unless he is able to demonstrate cause for the failure to raise the arguments below and prejudice resulting therefrom. See Davis v. United States, 411 U.S. 233 (1973) (applying cause and prejudice standard to procedural bar in § 2255 context to claim waived pursuant to Fed. R. Crim. P. 12(b)(2) & (f)).

Defendant argues that ineffective assistance of counsel constitutes cause in this case, yet he has not directed our attention to an "objective factor external to the defense" which caused his counsel to fail to raise either claim before the district court. Murray v. Carrier, 477 U.S. 478 (1986) (§ 2254 petition). See also Coleman v. Thompson, 111 S. Ct. 2546 (1991). Defendant has not demonstrated that the "factual or legal basis" of the two claims was unavailable to counsel. Murray, 477 U.S. at 488.

With regard to the "knock and announce" argument, defendant makes only the bare allegation that the government violated the rule. In any event, the record belies defendant's conclusory allegation, and therefore, he has not demonstrated prejudice. Upon review of the testimony at the suppression hearing which centered on the probable cause supporting the warrant, we find preliminary testimony which indicates that the searching officer announced his presence before entering the defendant's home. I R. doc. 4 at 20.

Regarding defendant's second argument, defendant cannot demonstrate prejudice because the government need not obtain separate warrants to search containers within premises described in a search warrant. See United States v. Ross, 456 U.S. 798, 821 (1982); United States v. Gentry, 642 F.2d 385 (10th Cir. 1981). Defendant has not challenged the warrant's particularity of description of the premises or items to be seized. Instead, he

flatly contends that separate containers within searched premises necessitate separate warrants. This argument is legally baseless.

In sum, even construing defendant's pro se pleadings liberally, see Haines v. Kerner, 404 U.S. 519 (1972), we find no basis for either of defendant's arguments. Therefore, in addition to his failure to demonstrate cause, defendant has not demonstrated prejudice from counsel's failure to raise the claims. And the failure to raise the claims does not constitute an independent claim of ineffective assistance of counsel under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984).

AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge