

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-5550
No. 92-5585

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FRED G. SANDOVAL,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA 88 CR 76(3)) & (SA 89 CA 649)

(November 30, 1992)

Before REAVLEY, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

I.

A grand jury indicted appellant Fred Sandoval on April 6, 1988, charging violations of 21 U.S.C. §§ 841(a)(1) and 846. Sandoval initially pleaded not guilty, and the court appointed attorney Ben Steinhauser to represent him. Steinhauser told Sandoval he was not familiar with criminal law and obtained

* 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Sandoval's signature on a form releasing Steinhauser as counsel. The district court refused to accept this release and demanded that Steinhauser continue in his representation of Sandoval.

Sandoval reached a plea agreement with the government and entered a guilty plea to count one of the indictment on June 27, 1988; the state agreed to dismiss count two pursuant to the plea agreement. After discussing the plea with Sandoval, the district court entered a judgment of conviction and sentenced defendant on November 10, 1988, to 78 months in prison, followed by a five-year period of supervised release.

On January 17, 1989, Sandoval filed a pro se appeal after determining that Steinhauser had not filed one. We dismissed this appeal as untimely on March 8, 1989. Sandoval then filed a habeas corpus action collaterally attacking his conviction and sentence under 28 U.S.C. § 2255 and raising three issues: breach of the plea agreement by the government, coercion of the guilty plea, and ineffective assistance of counsel.

A magistrate reviewed the habeas petition, conducted an evidentiary hearing, and recommended that the petition be denied. Following de novo review in the district court, the court adopted the magistrate's recommendations and denied the petition. Sandoval then filed a pro se appeal from the order denying his section 2255 petition in No. 91-5550.

This court granted the government's motion to stay the appellate proceedings in cause No. 91-5550 and to remand for entry of findings on whether Sandoval had requested Steinhauser

to file an appeal and whether Steinhauser had agreed to do so. On remand, the magistrate judge conducted an evidentiary hearing and found that Sandoval had not requested Steinhauser to file an appeal but recommended that Sandoval be granted an out-of-time direct appeal. The district court adopted the magistrate judge's recommendations, and Sandoval filed a direct criminal appeal in No. 92-5585. We have consolidated the two appeals.

II.

The government moves to dismiss Sandoval's direct appeal in No. 92-5585, arguing that the district court had no jurisdiction to allow an out-of-time appeal. We agree. Pursuant to the government's motion, we stayed the appellate proceedings in No. 91-5550 and remanded for the limited purpose of "entry of findings on the issue of whether Sandoval requested his attorney to appeal his sentence and whether counsel agreed to [do] so" We retained jurisdiction over the appeal. Consequently, the district court had jurisdiction only to make findings of fact on those issues; it could not grant the defendant an out-of-time appeal. Accordingly, we vacate the district court's order and dismiss No. 92-5585 because that court lacked jurisdiction to grant the appeal.

III.

We now address the merits of Sandoval's habeas claims. He first alleges he was denied effective assistance of trial and

habeas counsel. We can easily dispose of the ineffective assistance claim as it pertains to habeas counsel, as a defendant has no right to counsel in a collateral attack on his conviction. Johnson v. Avery, 393 U.S. 483, 488 (1969); Pennsylvania v. Finely, 481 U.S. 551, 555 (1987). Consequently, where the state provides a defendant with counsel as a matter of courtesy, he may not bring a claim of ineffective assistance. Coleman v. Thompson, 111 S. Ct. 2546, 2566 (1991); Wainright v. Torna, 455 U.S. 586 (1982).

To succeed on a claim of ineffective assistance of trial counsel, Sandoval must show that counsel's performance was deficient and that such performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984).¹ In determining whether counsel's performance was defective, we apply an objective standard of reasonableness. Id. at 688. Our review under this standard is highly deferential, and we presume that counsel's conduct falls within the wide range of reasonable professional assistance. Id. at 689.²

Sandoval makes the following allegations of defective performance: (1) that counsel aided the government in coercing

¹ The government's reliance upon Lombard v. Lynaugh, 868 F.2d 1475 (5th Cir. 1989) is misplaced, as that case dealt with ineffective assistance of appellate counsel.

² Without departing from this deferential standard, we note that the decision made by counsel not to contact Sandoval when he was contemplating an appeal does not concern a strategic choice made for the benefit of the defendant. Although strategic choices are virtually unchallengeable, Strickland, 466 U.S. at 690, we look more closely at decisions not involving strategy, because imposing minor burdens on counsel outside the strategic realm will not likely dampen the "ardor [or] impair the independence of defense counsel, [nor] undermine the trust between attorney and client." See id.

Sandoval to accept a plea bargain; (2) that counsel never objected to Sandoval's sentence, as that sentence was allegedly above an agreed-upon term of imprisonment; (3) that counsel never objected to the sentencing enhancement for use of a firearm, an enhancement that supposedly violated the plea agreement; and (4) that counsel's negligence caused Sandoval to lose his right to appeal. We find no merit in the first three claims for the reasons expressed in the magistrate's helpful Memorandum and Recommendation filed March 1, 1990. We now address the fourth claim.

We remanded for consideration of whether Sandoval had ever asked Steinhauser to file a direct appeal. The district court found that although an appeal was discussed, Sandoval never so requested.

Two days after sentencing, Sandoval called Steinhauser and discussed his options for appeal. According to Steinhauser, that conversation consisted of long, rambling, and disjointed discourse. Sandoval expressed dissatisfaction with his sentence and became angry with both the district judge and Steinhauser. Steinhauser indicated that Sandoval had plenty of time to consider what he wanted to do, and Steinhauser explained when the time period for challenging the sentence would begin to run.

Apparently, Steinhauser never warned Sandoval of the deadline for filing on appeal. In fact, Steinhauser advised Sandoval to sit back, calm down, and make a rational decision about appeal rather than a "hasty one." Steinhauser left the

decision on an appeal up to Sandoval, with instructions to get back to Steinhauser if Sandoval wished to appeal the case, apparently leaving Sandoval with the impression that he had plenty of time to make up his mind.

Steinhauser testified that, in light of Sandoval's displeasure with his representation, he felt he was discharged after this conversation. In fact, Steinhauser knew he could not be discharged without permission of the court but never contacted Sandoval again to discuss the subject of appeal.

We now must decide whether Steinhauser's actions constitute ineffective assistance. "Representation of a criminal defendant entails certain basic duties." Strickland, 466 U.S. at 688. Counsel has the "overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Id. In analyzing Sandoval's claim, we examine all the facts and circumstances. Id.

Under the facts and circumstances of this case, we think counsel's performance was defective. When Sandoval contacted counsel two days after sentencing, he expressed anger over his sentence and raised the possibility of an appeal. Given the rambling, disjointed conversation and counsel's comments that Sandoval was perhaps irrational because of his anger, counsel should have realized Sandoval was in no condition to make a decision on whether to appeal. In fact, counsel did realize this

and suggested that Sandoval calm down for a few days before making his decision.

Counsel led Sandoval to believe he had plenty of time to file his appeal and need not make a hasty decision. Although he raised the issue of time limits, he apparently never told Sandoval exactly what the time limit was. Given Sandoval's anger, he obviously expressed a strong desire to appeal his sentence.

Under these circumstances, we think reasonably competent counsel would have contacted Sandoval after he had time to reflect and would have inquired as to whether Sandoval still desired to challenge his sentence. Our conclusion is buttressed by the fact that counsel lead Sandoval to believe, early in the case, that he did not want to be involved further. Considering all of these circumstances, we think counsel failed to consult with the defendant effectively on the decision of whether to appeal and failed to keep the defendant adequately informed of an important development in the case)) the running of the period for filing an appeal. See Strickland, 466 U.S. at 688.

We do not hold that counsel always has a duty to contact a defendant and inquire whether the defendant desires to appeal his sentence, as that would impose a constitutional code of conduct on counsel. Id. at 689. We hold only that under the unique circumstances of this case, a reasonable attorney would have contacted the defendant before the time period for filing an appeal had lapsed.

Given that the ineffective assistance of Sandoval's trial counsel lead to the loss of Sandoval's right to appeal, it constitutes constructive denial of appellate counsel, so we need not make the prejudice inquiry under the second prong of Strickland. See Lozada v. Deeds, 111 S. Ct. 860, 861-62 (1991) (per curiam); Penon v. Ohio, 488 U.S. 75, 88-89 (1988); Sharp v. Puckett, 930 F.2d 450, 451-52 (5th Cir. 1991).

IV.

Because Sandoval succeeded on his ineffective assistance of counsel claim, the proper course is to remand, to allow the district court to consider whether to grant an out-of-time appeal. See Perez v. Wainwright, 640 F.2d at 698. We realize the district court already granted permission for an out-of-time appeal in this case, but as we held above, it had no jurisdiction to do so. We REVERSE the denial of habeas relief and REMAND for further appropriate proceedings.