

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2605
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

RICHARD LEE HUNT,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
CR H 92 0044 1

May 27, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Richard Hunt appeals, on the ground of ineffective assistance of counsel, his conviction, following a plea of guilty, of distribution of a Schedule I controlled substance. We affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Hunt was charged in a two-count indictment for distributing two dosage units of methylenedioxyamphetamine, known as "MDMA" or "Ecstasy," and for conspiring to distribute 5,000 dosage units of the same, in violation of 21 U.S.C. §§ 841(a)(1) and 846. He consented to transfer the case for disposition of his plea of guilty. A one-count superseding criminal information was issued, charging him with the substantive violation contained in count one of the indictment, except that the controlled substance was identified as methylenedioxy amphetamine hydrochloride ("MDA"). Hunt then waived prosecution by indictment.

In a plea bargain with the government, Hunt agreed to plead guilty and submit voluntarily to interviews and cooperate with the government, in exchange for the government's agreement to drop the indictment and inform the district court of any cooperation by Hunt at or prior to sentencing. The government also indicated that it might, but was not bound to, move for downward departure in the event that Hunt provided "substantial assistance."

A presentence report (PSR) was issued, and the government responded, indicating no objections. Hunt responded to the PSR and submitted objections.

Hunt pleaded guilty to the charge in the criminal information, and the district court adopted the PSR, overruled Hunt's objections, and sentenced him to 105 months' imprisonment in a guideline range of 84-105 months. Hunt gave timely notice of appeal. Retained counsel for Hunt filed a motion to withdraw, stating that

"defendant may wish to allege ineffective assistance of counsel in this appeal." The magistrate judge appointed the Federal Public Defender to represent Hunt on appeal.

II.

Hunt argues that counsel was constitutionally ineffective because (1) he did not gain any benefit from pleading guilty to the superseding indictment, (2) counsel did not properly instruct him on the information the government could use as relevant conduct under the sentencing guidelines, (3) counsel's objections to the PSR indicated that he did not understand the sentencing guidelines, and (4) counsel's failure to object to comments of the prosecutor at the arraignment hearing demonstrated that he did not understand relevant conduct. Hunt argues that, but for counsel's ineffectiveness, he would not have pleaded guilty.

A claim that counsel has been ineffective will prevail only if the defendant proves that such counsel was not only objectively deficient, but also that the defendant was so prejudiced by counsel's errors that the proceedings were unfair or unreliable. Strickland v. Washington, 466 U.S. 668, 687 (1984). Effectiveness of counsel is presumed, and even counsel's unprofessional conduct will not constitute ineffective representation unless actual prejudice results sufficient to satisfy the second prong. Id. at 691; see Lockhart v. McCotter, 782 F.2d 1275, 1279 (5th Cir. 1986), cert. denied, 479 U.S. 1030 (1987).

In the context of a guilty plea, in order to satisfy the

"prejudice" part of the test, "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." Hill v. Lockhart, 474 U.S. 52, 59 (1985); United States v. Smith, 915 F.2d 959, 963 (5th Cir. 1990). Moreover, a defendant may not simply allege but must affirmatively prove prejudice. Bonvillain v. Blackburn, 780 F.2d 1248, 1253 (5th Cir.), cert. denied, 476 U.S. 1143 (1986) (citations omitted). Ineffectiveness claims that are speculative, United States v. Freeze, 707 F.2d 132, 139 (5th Cir. 1983), or conclusional, United States v. Navejar, 963 F.2d 732, 735 (5th Cir. 1992), will fail.

The ineffectiveness inquiry thus will usually involve a thorough consideration of the facts of each case and requires adequate development of the issue by the district court for proper appellate review. See United States v. Higdon, 832 F.2d 312, 313-14 (5th Cir. 1987), cert. denied, 484 U.S. 1075 (1988). For this reason, "a claim of ineffective assistance of counsel cannot be resolved on direct appeal when the claim has not been raised before the district court since no opportunity existed to develop the record on the merits of the allegations." Id. at 313-14; see United States v. Gracia, 983 F.2d 625, 630 (5th Cir. 1993) (reaffirming inability to conduct review without adequate record).

The only exception to the general rule against review of ineffectiveness claims on direct appeal lies in those rare cases where the record adequately allows appellate review of the merits even though the issue was not raised. Higdon, 832 F.2d at 314; see

United States v. Martinez-Perez, 941 F.2d 295, 301-02 (5th Cir.), cert. denied, 112 S. Ct. 1295 (1992) (nature of allegations render development of record unnecessary). Hunt argues that the record is sufficiently developed to show that counsel was ineffective.

A.

Hunt argues that his plea of guilty to the superseding information subjected him to the same exposure under the sentencing guidelines as if he had been found guilty under the original indictment at trial. The statutory maximum for the substantive offense was twenty years. In light of Hunt's criminal history, the likelihood of recidivism was high, exposing Hunt to a potential upward departure from the guideline range of 84-105 months. See 18 U.S.C. § 3553(b); United States v. Roberson, 872 F.2d 597, 601-06 (5th Cir.), cert. denied, 493 U.S. 861 (1989).

The prosecutor and the district court referred to the seriousness of Hunt's criminal history at the sentencing hearing. The plea agreement excluded any motion for upward departure and provided that Hunt's cooperation, if substantial, might result in a motion by the government for downward departure.

Although the district court was not convinced, Hunt's guilty-plea posture might also have earned him a two-point reduction for acceptance of responsibility. The court noted that, under the circumstances, Hunt's counsel "has argued for you the best way he knows how" and declared that Hunt's conviction and sentence was "probably as good [a] deal as you can get under these circum-

stances."

Contrary to Hunt's assertions, the record does not support his argument that he did not benefit from his guilty plea. Factual support, such as the conversations between counsel and Hunt leading to his guilty plea, is not in the record. See United States v. Jennings, 891 F.2d 93, 95 (5th Cir. 1989). Such details are necessary to review whether counsel was ineffective. Id.

B.

1.

Hunt argues that counsel's response to the PSR demonstrated that he did not understand the sentencing guidelines and was incapable of instructing Hunt regarding relevant conduct for purposes of sentencing. Hunt stated at the sentencing hearing that he thought that when he pleaded guilty to the one-count information alleging delivery of two doses of MDA, the government's promise to drop the conspiracy count effectively barred consideration of the 5,000 dosage units at sentencing. Hunt now argues that, but for his misunderstanding of this point, caused by counsel's unfamiliarity with the guidelines, he would not have pleaded guilty.

Hunt supports his ineffectiveness argument, in part, by referring to counsel's objection that the government did not add criminal history points for a conviction in state court. Although the PSR recommended that a conviction in state court for which Hunt was currently in state custody not be considered separately from the instant offense for purposes of computing criminal history

points, counsel stated in his objections to paragraph 26 of the PSR that "[t]his is a prior sentence that must be considered in criminal history not to establish base offense level."

The government counters that, although the record does not reveal counsel's reason for his unorthodox suggestion, it might have been a display of candor to enhance counsel's credibility. Although this might have comported with counsel's strategy to gain credibility, it is not evident from the record what motives the counsel had for objecting in this manner.

Hunt argues that counsel did not understand that each conviction was afforded three criminal history points. As countered by the government, Hunt apparently misconstrued "one criminal history be assessed" to mean "one criminal history point be assessed." The record also indicates that counsel was objecting to a computation of three criminal history points for each of two convictions that were related to a third conviction and that only one "criminal history" should have been assessed.

Hunt also argues that counsel's leaving blank, and later filling in, the guideline range indicated his ignorance regarding relevant conduct. This argument is speculative.

2.

Hunt argues that counsel's failure to object to the prosecutor's recitation at the guilty-plea hearing that Hunt distributed two doses of MDA to a confidential informant with the intent to induce him to purchase 5,000 additional dosage units proved that he

misunderstood relevant conduct. This argument is also speculative.

Hunt does not show that counsel's failure to object to the prosecutor's statement at the guilty-plea hearing)) immediately admitted as true by Hunt)) affected the calculation of his offense level or the outcome of the proceedings. The government argues that the prosecutor's statement was "consistent with the concept of relevant conduct." Hunt apparently raises the issue only to support his conclusional allegation that counsel misunderstood the guidelines.

Counsel's previous objection to the PSR's inclusion of 5,000 dosage units as relevant conduct was based upon Hunt's alleged inability to deliver any amount other than the two dosage units. Counsel's previous argument thus contradicts Hunt's contention that counsel did not understand relevant conduct. See U.S.S.G. § 2D1.4, comment. (n.1) (defendant must be reasonably capable of producing the amount attributed to him).

C.

Hunt also alleges that a "misunderstanding" occurred between counsel and the United States Attorney and that counsel was not able to inform Hunt about it until the morning of the guilty plea hearing. Hunt argues further that after conferring with his ineffective counsel, he decided to plead guilty to the superseding information, a step he now characterizes as meaningless because it had no effect on his sentencing. The government counters that the superseding information was not without purpose because, at least,

it served to charge Hunt with the correct controlled substance, identified as MDA after laboratory testing.

Hunt's argument is related to his contention that he did not benefit from the guilty plea and that, but for counsel's ineffectiveness, he would not have pleaded guilty. When counsel informed the district court of the misunderstanding, the court told Hunt that he could either plead guilty in that court or plead not guilty in New Orleans and face the charges there. It was at that point that counsel requested a meeting with Hunt during which they discussed what Hunt should do. Details of that meeting or of the misunderstanding with the United States Attorney are not in the record. Although subsequent comments made by Hunt at the sentencing hearing undermine his argument that he would have gone to trial but for counsel's ineffectiveness, it is uncertain what occurred in that meeting to influence Hunt to plead guilty.

D.

For reasons set forth above, the references Hunt makes to the record do not support his ineffectiveness claim. Had the issue been raised in district court, the events leading up to Hunt's guilty plea might have been addressed fully. Because this is not a case where the record allows adequate review of Hunt's claim, we affirm his conviction without prejudice to his right to seek relief in a 28 U.S.C. § 2255 proceeding.

Hunt requests alternatively that we remand for an evidentiary hearing to address any disputed issues. The request for an

evidentiary hearing is inappropriate, as it would render meaningless the general rule barring review of ineffectiveness claims not raised in district court. Hunt's request is denied.

The judgment of conviction is AFFIRMED.