IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3083
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ROBERT E. WALSH,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 01 3055 J)

(November 27, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Robert Walsh appeals the district court's denial of his 28 U.S.C. § 2255 motion attacking his conviction and sentence. Concluding that he was denied effective assistance of counsel, we vacate and remand.

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 Pursuant to that rule, the court has determined that this opinion should not be published.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

Walsh pleaded guilty to conspiracy, making false statements in a loan application, making a false bank entry, and bail-jumping. During the sentencing hearing, his counsel objected to portions of the information contained in the presentence investigation report (PSI), claiming that it was based upon the unsubstantiated opinions of government agents. Walsh also personally denied the implications in the PSI to the effect that he was involved in the Mafia or with drug trafficking. The district court observed that it did not accept all of the information in the PSI as fact and dwelled on Walsh's prior convictions and the fact that he had jumped bail on two previous occasions.

Following the imposition of sentence, Walsh inquired whether he was entitled to appeal, and the district court referred him to counsel for advice. Walsh did not file a direct appeal but filed a pro se Fed. R. Crim. P. 35 motion for reduction of sentence, which was dismissed as untimely.

Walsh then filed the instant section 2255 motion, arguing that his conviction and sentence should be vacated because he was sentenced in violation of Fed. R. Crim. P. 32 and was denied effective assistance of counsel and the right to appeal. He attached to his motion a copy of a letter addressed to him by his appointed counsel, dated five days after sentencing, in which the attorney advised Walsh that his sentence was subject to review only if it was outside the maximum statutory penalty or imposed in violation of a constitutional prohibition, such as race or sex

discrimination.

The lawyer further advised Walsh that he did not believe that he had any grounds upon which to contest his sentence but that he could pursue the matter "as you see fit." Counsel instructed Walsh that his only alternatives were to contest the voluntariness of his guilty plea or to file a rule 35 motion for reduction of sentence at a later date. There is no motion to withdraw as counsel for the defendant filed in the record. The district court denied the motion, finding that Walsh was not sentenced on the basis of the challenged information in the PSI and that his counsel had informed him of his right to appeal his sentence.

II.

A.

Walsh contends that he instructed his counsel to file an appeal following the sentencing, that counsel failed to do so, and that counsel did not file an Anders brief.[1] He points out that counsel wrote him six days after the sentencing and advised him that his sentence was not illegally imposed. Walsh claims that he did not receive the letter until after the appeal time had lapsed, as he had been transferred to a different prison following the sentencing.

The government argues that Walsh claimed in the district court that his counsel did not advise him of his right to appeal but that, for the first time on appeal, Walsh argues that his counsel

[1] Anders v. California, 386 U.S. 378 (1967).

failed to file a timely notice of appeal. Walsh listed denial of effective assistance of counsel and denial of his right to appeal as grounds for relief in his motion.

Walsh did argue that his counsel failed to advise him of his right to appeal a rule 32 violation, but he also claimed that he plainly evinced his intent to appeal on the record immediately after the sentencing and that his counsel did not file a brief in accordance with Anders. He also argued that where there is actual or constructive denial of assistance by appellate counsel, prejudice is presumed. Affording Walsh's pro se motion a liberal construction, we conclude that he alleged facts sufficient to raise the claim that he was denied effective assistance of appellate counsel as a result of his counsel's failure to file a notice of appeal. See Martin v. Texas, 694 F.2d 423, 425 (5th Cir. 1982).

The district court found that Walsh was not denied effective assistance of counsel, as counsel advised him of his right to appeal. The district court, relying upon the Strickland prejudice prong,[2] found that counsel was not ineffective in failing to advise Walsh to appeal on the basis of a rule 32 violation, as the court determined that no violation had occurred.

A defendant is entitled to appeal his sentence. 18 U.S.C. § 3742(a). "An accused is constitutionally entitled to effective assistance of counsel on direct appeal as of right. Lofton v. Whitley, 905 F.2d 885, 887 (5th Cir. 1990) (citation omitted). While a court-appointed attorney may advise his client not to

[2] Strickland v. Washington, 466 U.S. 668, 687 (1984).

appeal because there are no meritorious issues to be raised, the advice must be effective, and the client's decision not to appeal must be voluntary. Jones v. Estelle, 584 F.2d 687, 691 (5th Cir. 1978). In the absence of such a waiver, counsel was required to conduct "a conscientious examination of the case" to determine whether there is "anything that might arguably support the appeal." Moss v. Collins, 963 F.2d 44, 46 (5th Cir. 1992) (per curiam) (on petition for rehearing). See Jones, 584 F.2d at 691; Lofton, 905 F.2d at 887 (citation omitted). Furthermore, because counsel was appointed, his representation of Walsh continued "through appeal." 18 U.S.C. § 3006A(c).

"A motion brought under 28 U.S.C. § 2255 can be denied without a hearing only if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." United States v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992). An evidentiary hearing in this case is required to determine whether counsel's advice not to appeal was made after a conscientious examination of the case. The record is insufficient to show conclusively that Walsh is entitled to no relief.

B.

Walsh additionally argues that his sentence should be overturned based upon the district court's failure to make specific findings in accordance with rule 32. He also makes several other arguments, some of which he raises for the first time on appeal, which bring into question the voluntariness of his guilty plea. We

do not address these issues in this section 2255 context, as Walsh, on remand, might be granted an out-of-time direct appeal in which these issues may be properly raised.

VACATED and REMANDED.