UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-3747

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM L. OSORIA,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
CR 89 274 G

May 10, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

William L. Osoria was convicted, on his plea of guilty, of several drug and firearm offenses. Osoria appeals, claiming that he was deprived of his right to a knowing and voluntary plea because the district court failed to provide him with an interpreter during his plea hearing. Osoria also contends that he received ineffective assistance of counsel because his counsel misrepresented the sentencing procedure and failed to request an

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

interpreter for him. Finding that the district court did not commit plain error in not providing an interpreter for Osoria, and because Osoria failed to show a reasonable probability that he would not have plead guilty and exercised his right to trial, but for the alleged misrepresentations of his court-appointed counsel, we affirm.

I

Osoria, a Cuban native, plead guilty to conspiracy to possess with intent to distribute cocaine, possession of cocaine with intent to distribute, unlawful acquisition of a firearm by false statement, and possession of a firearm by a felon.[1] *See* 21 U.S.C. §§ 846, 841(a)(1) (1988); 18 U.S.C. §§ 2, 922(a)(6), 922(g)(1) (1988). Subsequently, Osoria moved pro se to withdraw his guilty plea and to dismiss his court-appointed counsel on the ground that his counsel was ineffective. At the hearing upon these motions, Osoria requested the assistance of an interpreter. The district court granted Osoria's request for an interpreter, but denied his motion to withdraw the guilty plea. Additionally, the district court informed Osoria that it would not appoint another counsel to replace Osoria's counsel, and that Osoria could proceed either with or without his court-appointed counsel. Osoria chose not to abandon his court-appointed counsel. Osoria was sentenced to 120

[1] Osoria plead guilty to Counts I, V, VI, and VII of the superseding indictment. As part of the plea agreement, the government agreed to dismiss the original indictment and Counts II, III, IV, VIII, and IX of the superseding indictment.

months imprisonment on Counts I and V, 60 months on Count VI, and 97 months on Count VII, all sentences to run concurrently.[2]

More than two years later, Osoria moved pro se to vacate his sentence pursuant to 28 U.S.C. § 2255 (1988), contending that his counsel was ineffective. The district court vacated Osoria's original sentence and ordered that he be resentenced because the district court failed to advise him of his right to appeal pursuant to Fed. R. Crim. P. 32(a)(2). The district court re-imposed the original sentence, and Osoria appeals his convictions.[3]

II

A

Osoria first argues that the district court deprived him of his right to a knowing and voluntary plea by not providing him with an interpreter at his plea hearing once he informed the district court that he did not have a complete understanding of the English language. Osoria raises this issue for the first time on appeal. Therefore, we will review Osoria's claim only for plain error. *See United States v. Paz*, 981 F.2d 199, 201 (5th Cir. 1992), *petition for cert. filed,* (U.S. Mar. 26, 1993) (No. 92-8126).

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[2] In addition, Osoria was ordered to pay a fine of $12,500.00 and a special assessment of $200.00. Osoria was also placed on supervised release for a term of eight years as to Counts I and V and three years as to Counts VI and VII. All terms of supervised release were to run concurrently.

[3] Generally, the failure to timely appeal a sentence bars appellate review of the merits underlying the guilty plea. Fed. R. App. P. 4(b); *see United States v. Scott*, 688 F.2d 368, 369-70 (5th Cir. 1982). When a sentence is vacated, however, a defendant's right to direct appeal is renewed. *See Johnson v. United States*, 619 F.2d 366, 368-69 (5th Cir. 1980). Because Osoria's original sentence was vacated we may review Osoria's guilty plea on direct appeal. *See id.* at 369.

"`Plain error' is error which, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Lopez*, 923 F.2d. 47, 50 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2032, 114 L. Ed. 2d 117 (1991) (quoting *United States v. Guzman*, 781 F.2d 428, 431-32 (5th Cir.), *cert. denied*, 475 U.S. 1143, 106 S. Ct. 1798, 90 L. Ed. 2d 343 (1986)). We will reverse only to prevent a grave miscarriage of justice. *United States v. Cardenas Alvarado*, 806 F.2d 566, 573 (5th Cir. 1986).

Because a guilty plea is an admission of guilt which constitutes a waiver of the defendant's constitutional rights, it must be made intelligently and voluntarily. *Boykin v. Alabama*, 395 U.S. 238, 243-44, 89 S. Ct. 1709, 1712, 23 L. Ed. 2d 274 (1969). The district court must ensure that the defendant understands the consequences of the plea and that the defendant is specifically instructed on the rights and privileges waived by entering the guilty plea. *Id.*; *see also* Fed. R. Crim. P. 11(c), (d). An adequate understanding of the English language is necessary for a voluntary plea. *United States v. Perez*, 918 F.2d 488, 490 (5th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2055, 114 L. Ed. 2d 460 (1991). Accordingly, Congress has provided that certified or otherwise qualified interpreters be used during judicial proceedings involving persons not proficient in English. *Id.*; *see also* 28 U.S.C. § 1827 (1988) (Court Interpreters Act). The right to an interpreter is triggered only upon a judicial finding that

the defendant's ability to comprehend the proceedings or to communicate with counsel or the court is inhibited by language or hearing problems. 28 U.S.C. § 1827(d); *Perez*, 918 F.2d at 488.

A review of the record, however, demonstrates that Osoria had an adequate understanding of the English language. Although born in Cuba, Osoria has lived in the United States for over twenty years prior to his indictment. *See* Brief for Osoria at 4. Neither Osoria nor his counsel requested that the magistrate judge provide Osoria with an interpreter at his initial appearance, detention hearing, or original arraignment))all of which were conducted in English with no objections from Osoria or his counsel or indication of any difficulty in communication.[4] *See* Record on Appeal, vol. 1, at 190, 210-11, 244. After his original counsel withdrew, Osoria requested appointment of counsel in a handwritten letter in English to the district court.[5] *See id.* at 177. Furthermore, the hearing to determine counsel was conducted in English without Osoria indicating any difficulty in communicating in English. *See id*. at 171. Numerous motions were filed by the court-appointed counsel, none of which indicated that Osoria had a language deficiency. *See id*. at 1-9, 13-15, 97-165. In addition, at a suppression hearing Osoria testified in English on his own behalf and responded to

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[4] On the date of Osoria's initial appearance, Osoria indicated on the district court's form requesting "defendant information" that he could not "read and write English." Record on Appeal, vol. 1, at 245. However, there was no indication that Osoria could not understand spoken English. *See id.*

[5] It is unclear whether Osoria actually wrote the letter since he had previously indicated that he could not read and write English. *See supra* note 1.

cross-examination without demonstrating a language deficiency. *See id*. vol. 6, at 21-29, 31-32. The plea agreement was also negotiated in English, with no objections and no request for an interpreter by Osoria. *See id*. vol. 3, at 753-56. At Osoria's plea hearing, the district court inquired into Osoria's comprehension of the English language,[6] and urged Osoria to inform the court if he had difficulties in understanding or communicating in English so that an interpreter could be provided.[7] Osoria's

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[6] The district court and Osoria engaged in the following colloquy:

> THE COURT: . . . Do you read, write and understand the English language?
> MR. OSORIA: I understand and speak a little bit, but I don't write too much.
> THE COURT: You don't write much?
> MR. OSORIA: No.
> THE COURT: Your education was received where?
> MR. OSORIA: Cuba.
> THE COURT: In Cuba? Do you have any problem with the English language, do you understand?
> MR. OSORIA: Well, some words, you know, I don't understand, you know, that good. But I can communicate, you know, the three ways, you know.

Record on Appeal, vol. 12, at 12.

[7] The following discussion took place:

> THE COURT: Well, Mr. Osoria, if you don't understand anything that I say to you, please don't hesitate to stop me so that I can explain to you as best I can or we can obtain the services of a translator if it's necessary.
> MR. OSORIA: All right.
> THE COURT: All right?
> MR. OSORIA: Okay.

Id. at 13.

Relying on this colloquy, Osoria argues that the district court improperly "placed the burden" on him to request clarification or an interpreter if he did not understand. *See* Brief for Osoria at 5-10. Osoria's argument is meritless. *See Perez*, 918 F.2d at 490. The district court was satisfied that Osoria could communicate in English, and absent any indication from Osoria to the contrary, the district court properly imposed upon Osoria the duty to inform the court if he had difficulty communicating in English. In *Perez*, during the defendant's initial appearance, the magistrate judge inquired into the defendant's English language abilities and informed him that an interpreter would be provided should he encounter any difficulties in comprehending English during the proceedings. *Id*. at 490. During the defendant's plea hearing, the district court did not inquire into the defendant's English language abilities. *Id*. The defendant appealed his subsequent conviction, claiming that he did not enter a knowing and voluntary guilty plea because he was not provided an interpreter. Affirming the

court-appointed counsel, George Simno, also assured the district court that Osoria could understand and communicate in English.[8] Moreover, the district court instructed Osoria on the consequences of his guilty plea and on his rights and privileges waived by entering into the plea. *See id*. vol. 12, at 20-25.

Not until his initial sentencing hearing did Osoria first request an interpreter. *See id.* vol. 4, at 985; *id.* vol. 13, at 3. In addition, at the hearing upon his motion to withdraw his guilty plea and dismiss counsel Osoria requested in English an interpreter so that he could "be more specific." *See id*. vol. 13, at 3. The district court judge and Osoria's counsel, having had no trouble communicating with Osoria previously, indicated surprise at Osoria's requests for an interpreter. *See id*. at 3. Even after an interpreter was provided, Osoria responded to questioning without

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defendant's conviction, we held that the district court did not err by relying on the defendant to inform the court if he failed to comprehend the proceedings. We stated:

> The magistrate's inquiry and [the defendant's] response sufficiently reflect that [the defendant] was capable of understanding the judicial proceedings and was aware that a translator was available to him if needed. *The district court was not required to repeat inquiries regarding [the defendant's] competency in English absent a request for assistance from [the defendant] or some indication in that he failed to understand the questions asked [during the plea hearing].*

Id. at 490 (emphasis added).

[8] The following questioning took place:

> THE COURT: Mr. Simno, do you have any difficulty in))
> MR. SIMNO: I've had no difficulty, Your Honor, communicating with Mr. Osoria in English whether it be spoken word or written word of which we have done a lot of in both correspondence and revealing documents and speaking and preparing for trial. At no time have I been under the impression that he did not understand fully or was I not able to explain to him perhaps changing the words exactly what we were trying to communicate to each other.

Record on Appeal, vol. 12, at 12-13.

the benefit of the interpreter's translation,[9] and often responded in English.[10] *See id*. at 16-17, 20, 23, 24, 27, 30-31, 34.

Accordingly))since the record does not indicate that Osoria lacked adequate English comprehension or communication skills which inhibited his ability to comprehend the proceedings or to communicate with counsel or the court, and since Osoria never requested an interpreter during the plea hearing))the district court did not deny Osoria his right to a knowing and voluntary plea by failing to provide him, sua sponte, with an interpreter.[11] *See Perez*, 918 F.2d at 491 (district court did not err in failing to provide defendant with an interpreter during plea hearing because

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[9] The district court judge had to tell Osoria to wait until his interpreter translated the court's questions before responding:

> THE COURT: Well Mr. Osoria, you have to wait until [the interpreter] translates. I know that you do understand, and you have a tendency because of that to speak before he has the opportunity to speak. So you have to wait, all right?

Id. vol. 13, at 16-17.

[10] At one point when Osoria paused to consult his interpreter, the district court judge interjected the following:

> THE COURT: You can speak English, Mr. Osoria. It's perfectly all right. If you don't understand))
> THE DEFENDANT: Some words I can, you know))
> THE COURT: All right, but you go ahead and speak English. It seems easier for you, and its certainly easier for me.

Id. at 5.

[11] In arguing that the district court erred in failing to provide him with an interpreter, Osoria cites to *United States v. Tapia*, 631 F.2d 1207 (5th Cir. 1980). Osoria's reliance on *Tapia* is misplaced. In *Tapia*, the district court failed to inquire into the defendant's ability to communicate in English. *Id*. at 1209. We held that the district court erred in failing to do so because the defendant was arraigned through the use of an interpreter, and therefore the district court was put on notice that a finding on the defendant's ability to comprehend English was necessary. *See id*. at 1209-10. In *Tapia*, we expressed no opinion on whether an interpreter should have been provided. Here, the district court inquired into Osoria's ability to communicate in English and found that he did not need an interpreter because he could communicate adequately in English. The facts in *Tapia* are therefore inapposite to the facts in the instant case.

numerous proceedings had been conducted in English with no objection or request for an interpreter by defendant, despite fact that the district court))after inquiring into the defendant's English language abilities))informed the defendant that an interpreter would be provided should he encounter any difficulties in comprehending English). We find no error, plain or otherwise.

B

Osoria also contends that he received ineffective assistance of counsel due to his court-appointed attorney's alleged misrepresentations concerning the sentencing guidelines and procedure.[12] We disagree.

A claim that counsel was so ineffective as to justify reversal of a conviction requires the showing of two components: that counsel was deficient compared to prevailing professional norms; and that counsel's performance was so deficient as to prejudice the defense, depriving the defendant of a fair and reliable trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). Effectiveness of counsel is presumed, and even unprofessional conduct by counsel will not constitute ineffective representation unless actual prejudice results. *Id*. at

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[12] Osoria also argues that his counsel was ineffective by failing to request an interpreter at the plea hearing. This aspect of Osoria's ineffective assistance argument is raised for the first time on appeal, which would normally preclude this Court from addressing the argument "since no opportunity existed to develop the record on the merits of the allegations." *See United States v. Higdon*, 832 F.2d 312, 313-14 (5th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1051, 98 L. Ed. 2d 1013 (1988). However, in this rare instance where there is a sufficient factual basis in the record to allow a fair evaluation of the merits, this Court will address the issue. *Id*. Nonetheless, Osoria's argument is without merit because the record indicates that Osoria could adequately understand and converse in English, thereby negating the need for his attorney to request an interpreter. *See* discussion *supra* part II.A.

691, 104 S. Ct. at 2066. "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Lockhart v. Fretwell*, ___ U.S. ___, ___, 113 S. Ct. 838, 844, ___ L. Ed. 2d ___ (1993). The Supreme Court has held that the *Strickland* test applies to allegations that a guilty plea was due to ineffective assistance of counsel. *See Hill v. Lockhart*, 474 U.S. 52, 59-60, 106 S. Ct. 366, 370-71, 88 L. Ed. 2d 203 (1985). In the context of challenges to guilty pleas based on claims of ineffective assistance of counsel, prejudice occurs if "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Id*.

Osoria claims that his court-appointed attorney failed to adequately explain to him that because the statutorily required minimum sentence for Counts I and V was greater than the maximum of the applicable guideline range, the statutorily minimum sentence would be the guideline sentence. *See* United States Sentencing Commission, *Guidelines Manual,* § 5G1.1(b)(1992). We disagree. Osoria's court-appointed counsel explained to Osoria that in no event would the court impose a sentence of less than ten years, even if the sentencing guidelines might call for less.[13] *See* Record on Appeal, vol. 12, at 20.

[13] In addition, Osoria was informed both in the written plea agreement and at his plea hearing that the minimum sentence the district court could impose for a plea of guilty to Count I or Count V of the superseding indictment was ten years. *See* Record on Appeal, vol. 3, at 753; *id.* vol. 12, at 7, 20.

Osoria also claims that his court-appointed counsel was ineffective because his attorney told him that he faced a sentence of twelve or more years under the guidelines. However, the record shows that Osoria had discussed his decision to plead guilty with his appointed counsel and that he understood the minimum (ten years) and maximum possible sentences the court could impose upon him. *See id*. at 5, 15, 19-20, 45-47. Even assuming his attorney told him that he faced a sentence of twelve or more years under the guidelines, we find it unlikely that Osoria plead guilty upon the belief that he faced a minimum sentence of twelve years imprisonment, but would not have plead guilty had he known that the minimum sentence was actually ten years.

Osoria lastly appears to contend that he received ineffective assistance of counsel because his counsel failed to explain to him the difference between actual and constructive possession of cocaine. *See* Brief for Osoria at 11; *see also* Record on Appeal, vol. 5, at 1136-38. We fail to see how Osoria was prejudiced: Osoria admitted at his plea hearing that he had sold five ounces of cocaine and had actually possessed one kilogram of cocaine. *See* Record Excerpts for Government at 25. Accordingly, Osoria has failed to show a reasonable probability that he would not have plead guilty and exercised his right to trial, but for the alleged errors of his court-appointed counsel.

III

For the foregoing reasons, we **AFFIRM** the judgment of the district court.