

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-5066  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY BURGINS,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Eastern District of Texas  
USDC No. 6:92CV159

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August 20, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:\*

Federal collateral relief is available only for constitutional violations and "that narrow compass of other injury that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." United States v. Perez, 952 F.2d 908, 909 (5th Cir. 1992) (quoting United States v. Capua, 656 F.2d 1033, 1037 (5th Cir. 1981)).

Larry Burgins asserts that he received ineffective

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\* Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

assistance of counsel because his guilty plea was unlawfully induced by his court appointed attorney and not made with an understanding of the nature of the charge or consequences. To prevail on his claim, counsel's performance must have been both deficient and prejudicial to the defendant. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts indulge a strong presumption that counsel's performance was not deficient. Id. at 689. In order to establish prejudice, Burgins must demonstrate a reasonable probability that, but for his attorney's errors, he would not have pleaded guilty, but would have gone to trial. Nelson v. Hargett, 989 F.2d 847, 851 (5th Cir. 1993) (citing Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

Burgins has failed to allege deficient performance. At his arraignment Burgins stated that he understood the nature of the charges against him and the consequences of pleading guilty and that he was entering his guilty plea voluntarily and free of any promises or inducements. He was also informed about the elements of the offense, and he told the district court that he had sufficient time to discuss his case and any possible defenses with his attorney and that he was satisfied with his attorney's representation.

Burgins admitted during his plea agreement that he met with persons who had amphetamine for sale, arranged for them to sell

the drug to a third party, and was aware that amphetamine was an illegal drug. Such evidence would have been sufficient to prove the offense of attempted distribution of amphetamine. See United States v. Mandujano, 499 F.2d 370, 378-79 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975) (request and receipt of advance payment for unpossessed heroin sufficient to establish intent to engage in criminal conduct and substantial step towards commission of the offense).

The real possibility that Burgins could be convicted of attempted distribution of amphetamine and the other offenses with which he was charged is not a "threat" which invalidates his guilty plea. See Brady v. United States, 397 U.S. 742, 750, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1969). Additionally, Burgins is not entitled to an evidentiary hearing on his issue because he has failed to refute his sworn testimony at his plea hearing with an affidavit of a reliable third party. See United States v. Fuller, 769 F.2d 1095, 1099 (5th Cir. 1985).

Burgins' attorney did not misinform Burgins regarding what he would receive in exchange for pleading guilty. With Burgins' guilty plea to attempted distribution of amphetamine, the Government dismissed the remaining three counts in the indictment against Burgins and Burgins received a sentence of 46 months of imprisonment for an offense with a statutory maximum of 20 years of imprisonment. Consequently, the district court's denial of Burgins' § 2255 motion is AFFIRMED.