UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5597
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEPHEN A. GAGE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-91-CA-774 (SA-91-CR-58-(1))

(January 19, 1994)

Before POLITZ, Chief Judge, HIGGINBOTHAM and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:[*]

Convicted on a guilty plea of distribution of LSD, 21 U.S.C. § 841(a)(1), and sentenced to 85 months imprisonment, Stephen A. Gage withdrew his direct appeal and filed the instant *pro se* 28 U.S.C. § 2255 motion. The district court accepted the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

recommendations of a magistrate judge and denied relief. We affirm.

Gage made two sales of LSD to an undercover Army investigator, conveying 150 doses for $300 on February 8, 1991 and five days later selling 600 doses for $1050. On the second occasion he was arrested by civilian police. At the time of his arrest his vehicle contained nearly 150 more doses of the contraband.

Gage's motion seeks relief on four bases: ineffective assistance of counsel, involuntary guilty plea, improper involvement of the military, and breach of his plea agreement. We find no claim persuasive.

1. Ineffective assistance.

Gage contends that his counsel, the federal public defender, failed to interview witnesses, arrived at his rearraignment unprepared for trial, and incorrectly advised that his prior drug possession would be admissible if he pled entrapment.

To demonstrate ineffective assistance Gage must show both that his counsel's performance was deficient and that the deficient performance prejudiced his defense.[1] The first prong of the test, deficiency, requires a showing that counsel's representation fell below an objective standard of reasonableness,[2] overcoming the presumption that counsel exercised reasonable professional judgment.[3] The second prong, prejudice, requires Gage to

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[1]**United States v. Smith**, 915 F.2d 959 (5th Cir. 1990).

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

[3]**Smith** (quoting **Strickland**).

demonstrate "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[4]

Gage complains that his counsel did not interview witnesses. Gage did not inform counsel of these witnesses until immediately before the rearraignment. The witnesses purportedly would have supported an entrapment defense which counsel reasonably discounted. When Gage informed counsel of these potential witnesses a plea agreement already had been reached and Gage was scheduled for rearraignment in order that he might enter a guilty plea.

On the prejudice prong of the **Strickland/Hill** test, a charge of failure to investigate requires Gage to demonstrate that "discovery of the evidence would have led counsel to change his recommendation as to the plea."[5] The exculpatory evidence counsel allegedly ignored was evidence that Gage had been trying to remain drug-free, purportedly supporting an entrapment defense by implying that Gage lacked predisposition. Evidence that Gage was trying to or had stopped using drugs is not tantamount to a showing that he had no predisposition[6] to sell drugs. This complaint therefore fails.

The second ineffectiveness complaint, that counsel was

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[4]**Hill v. Lockhart**, 474 U.S. 52, 59 (1985).

[5]**Hill**, 474 U.S. at 59.

[6]**United States v. Mora**, 994 F.2d 1129 (5th Cir.), cert. denied sub nom. **Medina v. United States**, 114 S.Ct. 417 (1993).

unprepared for trial on March 28, 1991, at the time of the rearraignment, falls of its own weight. The March 28 proceeding had been scheduled by the court over three weeks before. It was scheduled for rearraignment and entry of a guilty plea. The formal setting followed Gage's signing of a plea agreement. Counsel had no need to prepare for a trial which would not and did not occur.

Finally, Gage complains that his counsel gave him erroneous advice about the admissibility of his prior drug convictions. The admissibility of related criminal history to rebut an entrapment defense is well established.[7] The precise contours of the law leave something to be desired but we are not prepared to say that counsel's advice to Gage on this legal issue fell below **Strickland**'s threshold of reasonableness.

2. Involuntary guilty plea.

Gage's complaint that his counsel's unpreparedness to go to trial compelled his guilty plea is disingenuous at best. On March 4, 1991 he signed a plea agreement and agreed to enter a guilty plea. On the following day the court ordered the March 28, 1991 proceeding for the tendering of that guilty plea. The colloquy at rearraignment contains a lengthy explanation and questioning of Gage by the court. The record makes abundantly clear that Gage's guilty plea was informed, free, and voluntary.

3. Improper Army involvement.

Gage maintains that the involvement of the undercover Army

[7] See, e.g., **United States v. White**, 972 F.2d 590 (5th Cir. 1992), cert. denied, 113 S.Ct. 1651 (1993).

investigator in his surveillance and arrest violated the Posse Comitatus Act[8] and the teachings of **Laird v. Tatum**.[9] Assuming *per arguendo* that the military investigator's participation went beyond the proper pale, in the case at bar it would not change the results for "application of an exclusionary rule [would] not [be] warranted."[10]

4. Breach of plea agreement.

In the plea agreement Gage agreed to cooperate with the government. He equates this agreement as tantamount to the government's commitment to move for a downward departure for his cooperation. The government did not so move. After meeting with Gage post-plea the government agents determined that he could be of little assistance in their investigation. He did not give substantial assistance to the government. There was no breach of the plea agreement.

The judgment of the district court is AFFIRMED.

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[8]18 U.S.C. § 1385. See generally **Hayes v. Hawes**, 921 F.2d 100 (7th Cir. 1990).

[9]408 U.S. 1 (1972).

[10]**United States v. Wolffs**, 594 F.2d 77, 85 (5th Cir. 1979). While some states have applied an exclusionary rule, e.g., **People v. Burden**, 288 N.W.2d 392 (Mich.App. 1979), rev'd, 303 N.W.2d 444 (Mich. 1991), **Taylor v. State**, 645 P.2d 522 (Ok.Cr. 1982), no state or federal court within our circuit has done so. In **Wolffs**, one member of the Army arranged a meeting to buy drugs from the defendant and Army investigator attended posing as a buyer. **Wolffs** remains our law, see **United States v. Harley**, 796 F.2d 112 (5th Cir. 1986), and on its relevant facts it is indistinguishable from the instant case.