

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5751
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT LOPEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-92-CA-90(SA-89-CR-5))

(April 21, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Appellant Lopez, now serving a 70-month term of imprisonment for possession with intent to distribute over 100 kilos of marijuana, appeals the trial court's denial of his federal habeas petition. He asserts that his plea was unknowing and involuntary, that the search leading to his arrest was illegal, and that his attorney was ineffective. We find no error and affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Lopez's contentions center around the alleged illegality of the search and his attorney's alleged advice that on appeal, Lopez could prevail in challenging the search. Lopez thus asserts that his attorney misled him into pleading guilty by his erroneous legal advice. As the magistrate judge concluded, however, Lopez may not rest simply on his after-the-fact declarations that are specifically contrary to the guilty plea colloquy. See United States v. Piazza, 959 F.2d 33, 35-36 (5th Cir. 1992). This is particularly true given the lack of a conditional guilty plea, which would have allowed Lopez to contest the search on appeal, and his declarations that he was neither coerced into his plea nor was unsatisfied with his attorney's representation.

Second, Lopez's voluntary guilty plea forecloses his ability to litigate the allegedly unlawful search, for that action waived all non-jurisdictional defects in the proceedings leading to his conviction. Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602 (1973).

Finally, Lopez asserts that his trial counsel was ineffective for failing to request a jury trial and to pursue an entrapment defense. He also asserts that counsel was ineffective for failing to pursue the warrantless search issue at trial and on direct appeal. To succeed on these matters, Lopez must demonstrate both that his attorney's performance was seriously deficient and that these errors prejudiced the defense. Moreover, he must show 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, 106 S. Ct. 366 (1985).

From the standpoint of this difficult constitutional test, Lopez's assertions are meritless. To assert, as he does, simply that the jury might have found entrapment because the marijuana was supplied by a government informant proves nothing about the legitimacy of that defense. Furthermore, Lopez stated at the plea colloquy that he had fully discussed possible defenses with his attorney and he understood he was waiving the right to jury trial. There is no basis upon which to conclude that his attorney was ineffective for failing to pursue a jury trial, complete with an entrapment defense.

As for the warrantless search issue Lopez has not shown that even if he had entered a conditional guilty plea, the denial of suppression would have been reversed on appeal. The trial court's credibility-intensive findings of exigent circumstances and consent to search would not in reasonable probability have been overturned on appeal.

In any event, Lopez has not persuasively demonstrated prejudice by his attorney's alleged errors, because the guilty plea very favorably affected his potential sentence.

The judgment of the district court is **AFFIRMED**.