

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7082
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES IRVIN WELCH,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR C 86 129 04) (CA C 90 1)

(December 1, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

James Welch appeals the denial of his 28 U.S.C. § 2255 motion asserting ineffective assistance of counsel. Concluding that an evidentiary hearing is needed, we vacate and remand.

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 Pursuant to that rule, the court has determined that this opinion should not be published.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

A jury found Welch guilty of conspiracy to possess with intent to distribute marihuana. He did not appeal but filed a pro se motion to reduce sentence pursuant to Fed. R. Crim. P. 35(b). The motion was denied as untimely. He then purportedly filed a motion to reconsider the denial of his rule 35(b) motion; the district court did not rule on the motion, as it was never received.

Welch filed a motion to vacate, set aside, or correct sentence, alleging that his counsel was ineffective in various respects during the trial, at sentencing, and in failing to file a rule 35(b) motion and a direct appeal. In his amended motion, Welch asserted that counsel was ineffective in the following aspects: (1) Counsel failed to refute the government's allegation that Welch had a long history of transporting drugs in his van when, in fact, he had purchased the van only ten days prior to his arrest; (2) counsel did not object to the district judge's body language, specifically "looking bored" and leaving the bench to walk around, which implied to the jury that the evidence in support of Welch's case was "not worthy of belief"; (3) counsel failed to object to the presentence investigation report, which was factually inaccurate and resulted in a more severe sentence; (4) counsel failed to file a notice of appeal, even though he had assured Welch that he would do so; (5) after an inmate informed Welch that he could file a rule 35(b) motion, counsel agreed to file the motion on Welch's behalf but failed to do so; and (6) when Welch filed the rule 35(b) motion, the district court denied the motion as

untimely.

The magistrate judge determined that there was no merit to Welch's claims and that an evidentiary hearing was unnecessary. The district court denied all requested relief.

II.

Liberally construed, Welch's argument is that he was deprived of effective assistance of counsel on appeal. The government asserts that, because Welch failed to invoke his right to appeal, he has effectively waived the right; therefore, there can be no denial of counsel on appeal.

The government's assertion of waiver is contrary to Welch's allegations and unsupported by the record. After sentencing on November 13, 1986, Welch's retained defense counsel, James Folsom, asked the district court whether Welch had a right to appeal. The following colloquy ensued:

THE COURT: Yes. You have the right to appeal by filing a notice of appeal within ten days. If you cannot afford an attorney or cannot afford the cost of appeal, your application to appeal should be made in forma pauperis [IFP] within ten day [sic] in writing to the clerk of this court.

MR. FOLSOM: Retained.

THE COURT: Would you assist him with the completion of those papers if he needs it?

MR. FOLSOM: Yes, your Honor.

In his section 2255 motion, Welch stated as follows:

Defendant was specifically told by his trial lawyer that the lawyer would file Notice of Appeal on his behalf, but then failed to do so. Further, Defendant had been told that he would be represented throughout the Rule 35(b)

stage of this case, but was then forced to try to file his own Rule 35(b) when he learned that the time limit was only over, and his Attorney was unreachable. According to this Court, Defendant has been prejudiced by losing the right to file a Rule 35(b) Motion.

After the magistrate judge ordered Welch to amend his motion to state further details, Welch filed a "Motion for Evidentiary Hearing" in which he rebutted the government's response. According to Welch, Folsom told him that he would file an appeal on his behalf and that Welch affirmed that he wanted an appeal. Further, he stated that he was interested in filing an appeal in order "to gain an extension of the time limit for filing a Rule 35(b)" motion. It was his understanding that a judge was more likely to reduce a sentence after some time had passed in which a portion of the sentence had been served. He requested a hearing because the section 2255 form "stress[d] the requirement that claims be stated only very briefly." Hence, the record provides no basis for the government's assertion that Welch waived his right to appeal.

The question then becomes whether the district court abused its discretion in denying Welch's section 2255 motion without a hearing. See United States v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992) (standard of review). "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." Id. (citation omitted).

Welch, as a criminal defendant, has a constitutional right to effective assistance of counsel in his first appeal as of right. See Evitts v. Lucey, 469 U.S. 387, 393-95 (1985). Counsel's

failure to file the requested appeal may amount to "a complete denial of any assistance of appellate counsel." Lombard v. Lynaugh, 868 F.2d 1475, 1480 (5th Cir. 1989) (citation omitted). In a case of complete denial, "prejudice is presumed, and neither the prejudice test of Strickland [v. Washington, 466 U.S. 668 (1984),] nor the harmless error analysis of Chapman v. California, 386 U.S. 18 . . . (1967), is appropriate." Id. (citation omitted).

A retained attorney has no obligation to file a notice of appeal absent an agreement to do so. See United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989). If counsel misleads the defendant into believing that the necessary steps would be taken to file an appeal, however, post-conviction relief in the form of an out-of-time appeal may be appropriate. Id. (citing Mack v. Smith, 659 F.2d 23, 25 (5th Cir. Unit A Oct. 1981) (per curiam)). Thus, as the government acknowledges, a petitioner is entitled to relief if he directed his attorney to take an appeal and counsel disregarded those instructions. Norris v. Wainwright, 588 F.2d 130, 135 (5th Cir. 1979).

From this record, it cannot be determined whether Folsom made a commitment to file an appeal. The colloquy concerning the IFP forms between the judge and counsel at sentencing indicates that there was some discussion to that effect, however. As a consequence, Welch may be entitled to relief in the form of an out-of-time appeal.

The government concedes that Welch's allegations that Folsom misled him, and that he could not perfect his own appeal because he

was suffering the effects of alcohol abuse, might have been enough to warrant an evidentiary hearing. The government asserts that his delay in raising this issue until most of his sentence has been served "evinces a knowing choice to select a remedy other than appeal." But this argument is non-dispositive of the question of whether Welch was denied the effective assistance of appellate counsel.

Therefore, without addressing the merits of the other issues Welch wishes to raise on appeal, we vacate the judgment and remand for an evidentiary hearing on the narrow issue of whether "there has been an actual or constructive complete denial of any assistance of appellate counsel," Lombard, 868 F.2d at 1480, as the record does not conclusively show that Welch is entitled to no relief. See Bartholomew, 974 F.2d at 41. In so doing, we express absolutely no view as to how the district court should decide this matter.

VACATED and REMANDED.