

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7519
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ARMANDO RAFAEL FEBLES,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
CA 91 240

April 16, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

DAVIS, Circuit Judge.¹

Febles appeals the dismissal of his § 2255 petition. We affirm.

I.

Armando Rafael Febles, along with Gustavo Gutierrez, was convicted by a jury and sentenced for conspiracy to distribute marijuana, possession with the intent to distribute approximately nineteen kilograms of marijuana, and using or carrying a firearm

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

during and in relation to a drug-trafficking crime. Their convictions were affirmed by this Court. **United States v. Gutierrez**, No. 90-2028 (5th Cir. July 30, 1990) (unpublished).

Febles filed **pro se** his § 2255 motion in the district court claiming ineffective assistance of counsel, at trial and on appeal, in three ways: failure to argue sufficiency of the evidence on the conspiracy count, failure to contest an alleged illegal search, and failure to challenge the application of the sentencing guidelines on the amount of marijuana attributable to Febles. After receiving the Government's answer and Febles' response, the magistrate judge issued a report recommending that the motion be denied.

The district court adopted the report and denied the § 2255 motion. The district court denied the motion. This appeal followed.

II.

Febles argues that the district court erred in denying his § 2255 motion on all three claims of ineffective assistance of counsel. Under the two-prong test enunciated in **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Febles must show that counsel's assistance was deficient and that the deficiency prejudiced his defense. Deficiency "requires showing that counsel made errors so serious that counsel was not functioning as the `counsel'" **Id.**

Counsel's performance is presumed "within the wide range of reasonable professional assistance." **Id.**, 466 U.S. at 689. The second prong "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." **Id.**, 466 U.S. at 687; **see Lockhart v. Fretwell**, No. 91-1393, 1993 WL 10366, at *3 (U.S. Jan. 25, 1993) Moreover, "[a]n insufficient showing of prejudice pretermits addressing the adequacy prong." **U.S. v. Pierce**, 959 F.2d 1297, 1302 (5th Cir.), **cert. denied**, 113 S.Ct. 621 (1992).

Febles' first ineffectiveness claim concerns the sufficiency of the evidence on the conspiracy count. Febles argues that, although trial counsel made the appropriate motions for judgment of acquittal, counsel failed to litigate fully the motion by "argu[ing] that there was **NO** evidence demonstrating the existence of a conspiratorial agreement." The record belies Febles's argument. The record shows that counsel did make this argument at the close of the Government's case. Moreover, counsel renewed his motion for judgment of acquittal and argued sufficiency of the evidence for conspiracy to the jury.

Febles also argues that counsel was ineffective for failing to appeal the sufficiency of the evidence for conspiracy. To show prejudice, Febles "must show[, at least,] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

A reasonable probability is a probability sufficient to undermine confidence in the outcome." **Strickland**, 466 U.S. at 694.

Febles' codefendant, Gutierrez, unsuccessfully appealed the sufficiency of the evidence for his conspiracy conviction.

Gutierrez, No. 90-2028. In upholding the conspiracy conviction as to Gutierrez, this Court referred to Febles' conspiratorial involvement.

In this case, the evidence indicates that both Febles and Gutierrez participated in the rental of the car containing the contraband. Febles was driving Gutierrez's car. Gutierrez admitted that Febles and he knew each other and were traveling together. The note pad suggests they were sharing expenses on the trip.

Id. at 145. In light of this decision in Gutierrez's appeal, it is not reasonable to believe that Febles's conviction would have been overturned on the sufficiency issue had his counsel raised it. Therefore, Febles has not shown the necessary prejudice on his claim.

Febles' second claim of ineffective assistance of counsel concerns counsel's failure to litigate an alleged illegal search of the vehicle Febles was driving at the border patrol checkpoint.

At trial, Border Patrol Agent Slowinski testified that a Jeep with Florida tags driven by Febles came through the checkpoint and that, because the driver appeared nervous and because Agent Slowinski could smell marijuana, he ordered the

vehicle into secondary inspection. The inspection of the vehicle revealed the note pad and marijuana debris. Based upon his experience, Agent Slowinski advised the other agent to be alert for another Floridian driving through the checkpoint. Border Patrol Agent Strong testified that a Chevy rental driven by Gutierrez came through the checkpoint, that Gutierrez consented to the secondary search, and that the search disclosed the car-rental agreement, the gun, and the nineteen kilos of marijuana.

In his affidavit attached to his § 2255 motion, Febles alleges that Agent Slowinski physically intruded into the Jeep at the primary inspection without Febles's permission and that this was an illegal search. He argues on this appeal that Agent Slowinski's testimony at trial supports his contention that Slowinski smelled marijuana when Slowinski was in the Jeep. Based upon this alleged illegal search, Febles argues that his counsel was ineffective for failing to litigate the legality of the Jeep search.

Agent Slowinski's testimony does not support Febles's assertion that Slowinski was inside the Jeep before he smelled the marijuana. Further, once Slowinski smelled the marijuana, he had probable cause to search the vehicle. **United States v.**

Marshall, 878 F.2d 161, 163 (5th Cir. 1989).

Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth

Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Febles therefore failed to demonstrate that counsel had a factual basis to urge that the search was illegal.

Febles also argues that counsel was ineffective for failing to appeal the Fourth Amendment issue. The Fourth Amendment issue was not preserved for appeal in the lower court and, in light of the dubious merit to the argument, counsel cannot be characterized as deficient for failing to raise the issue on appeal. **See Sharp v. Puckett**, 930 F.2d 450, 452 (5th Cir. 1991) ("counsel is not ineffective for failing to raise every possible point on appeal").

Febles' third claim of ineffective assistance of counsel concerns the application of the sentencing guidelines. He argues that U.S.S.G. § 2D1.4 requires the district court to make a specific finding on the amount of drugs within the conspiracy reasonably foreseeable to each defendant. **See United States v. Puma**, 937 F.2d 151, 159-60 (5th Cir. 1991), **cert. denied**, 112 S.Ct. 1165 (1992). Febles argues that because his counsel failed to object to the amount of drugs attributed to Febles on the conspiracy conviction, failed to request the sentencing court to

make a specific finding, and failed to appeal this sentencing issue, he received ineffective assistance of counsel.

Febles does not challenge the amount of drugs attributed to him for his conviction on the possession-with-intent-to-distribute-marijuana count. In determining the sentences on the three counts of conviction, the district court grouped the conspiracy and the possession counts together for an offense level. **See** U.S.S.G. §§ 3D1.1, 3D1.2(b). The offense level for the group was "the highest offense level of the counts in the [g]roup." U.S.S.G. § 3D1.3. Even if the amount of drugs attributable to Febles on the conspiracy count would result in a lower offense level for that count, this lower number would be irrelevant because the offense level for the grouped counts would be calculated from the drugs attributable to Febles on the possession count. Febles was charged with and convicted of possession of approximately nineteen kilos of marijuana. Therefore, Febles has not shown the requisite prejudice to prove ineffective assistance of counsel on the guideline issue.

AFFIRMED.