IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2086
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FREDDY ZAPATA-ROSA,

Defendant-Appellant.

- - - - - - - - - -
Appeal from the United States District Court
for the Southern District of Texas
USDC Nos. CA H-92-1782 & CR-H-91-16
- - - - - - - - - -
(December 15, 1993)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Freddy Zapata-Rosa (Zapata), also known as Lino Canon Gallego, pleaded guilty to a drug-related conspiracy charge. Zapata was represented by appointed counsel. In a 28 U.S.C. § 2255 motion Zapata argued that he received ineffective assistance of counsel because his attorney refused to follow his order to file an appeal. Because this issue implicates the constitution it may properly be addressed in the § 2255 context. U.S. v. Smith, 844 F.2d 203, 206 (5th Cir. 1988).

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

As an initial matter, because Zapata filed his post trial motion more than ten days after the judgment was entered, it is treated as a Fed. R. Civ. P. 60(b) motion rather than a Fed. R. Civ. P. 59(e) motion. Harcon Barge Co. v. D & G Boat Rentals, Inc., 784 F.2d 665, 667 (5th Cir.) (en banc), cert. denied, 479 U.S. 930 (1986). A denial of a Rule 60(b) motion is reviewed to determine whether the district court abused its discretion in denying the motion and does not automatically bring up the underlying judgment for review. Harrison v. Byrd, 765 F.2d 501, 503 (5th Cir. 1985). However, if the 60(b) motion is filed within the appeal period and if the court in granting the earlier judgment "overlooked and failed to consider some controlling principle of law, the district court may abuse its discretion" by not providing Rule 60(b) relief even if the losing party did not file a timely motion for a new trial or appeal. Id.

An appointed counsel is required to represent his client at every stage of the proceedings, including appeal, as long as the client is financially eligible. 18 U.S.C. § 3006A(c).

Zapata's § 2255 petition was not as clear as his Rule 60(b) motion for reconsideration or his brief on appeal in establishing the assertion that he directed his appointed counsel to file a notice of appeal. In his § 2255 petition Zapata asserted that he "did not appeal on the advice of counsel, even though I personally felt I was entitled to relief on appeal." Zapata explained that his defense counsel was "ineffective for failing

to file an appeal for Mr. Zapata, after giving neglegent [sic] advice, in violation of amendment six [sic]." Zapata stated that following sentencing his counsel told him that "there was little that could be accomplished by an appeal" and that "Zapata wanted an appeal as to the application of an enhanced sentence based upon obstruction of justice." In his § 2255 petition he argued that "[c]ounsel was ineffective for failing to raise the issue [concerning the obstruction enhancement] on a direct appeal to the Fifth Circuit, and was not acting under the direction of Mr. Zapata when he refused to do so."

It is not evident from Zapata's § 2255 petition whether he was asserting that his counsel explicitly rejected his request to file an appeal or whether his counsel informed him of the advantages and disadvantages of filing an appeal and that Zapata decided it would be futile to proceed further. "[A] petitioner is entitled to [habeas relief] if he directed his attorney to take an appeal and his attorney disregarded those instructions." Norris v. Wainwright, 588 F.2d 130, 134 (5th Cir.), cert. denied, 444 U.S. 846 (1979). Zapata's imprecise language leaves it susceptible to both interpretations. The former would amount to a constitutional violation warranting habeas relief, id., the latter would not implicate the constitution.

The district court's ruling is based on the assumption that Zapata did not direct his attorney to file an appeal. The district court found that "Zapata-Rosa does not allege . . . that explicit instructions to take an appeal were disregarded by his attorney." According to the court, "[a]bsent [this]

allegation[], defendant was obligated to proceed with an appeal either pro se or with new counsel."

In his memorandum in support of his Rule 60(b) motion Zapata explicitly stated that his attorney disregarded his instructions to file an appeal and thereby clarified any ambiguity that resulted from the language used in his § 2255 petition. The district court, in denying that motion, however, maintained his position that Zapata had not directed the appointed counsel to file an appeal. If Zapata did tell his attorney to file a notice of appeal and the attorney failed to do so, Zapata was in effect denied representation on appeal because the opportunity to pursue a direct appeal was foreclosed.

The ordinary analysis of an ineffective assistance claim under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) is not conducted when there has been actual or constructive complete denial of any assistance of appellate counsel. Sharp v. Puckett, 930 F.2d 450, 451-52 (5th Cir. 1991) (citing Penson v. Ohio, 488 U.S. 75, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988)). "If a petitioner can prove that the ineffective assistance of counsel denied him the right to appeal, then he need not further establish--as a prerequisite to habeas relief--that he had some chance of success on appeal." United States v. Gipson, 985 F.2d 212, 215 (5th Cir. 1993). In such cases, prejudice is presumed and neither the Strickland prejudice test nor the harmless error test is appropriate. Sharp, 930 F.2d at 452; but cf. Gipson, 985 F.2d at 215-17 (applying a Strickland prejudice analysis to the review of a case where it was

established that the convicted defendant informed his retained counsel of his desire to appeal and the attorney failed to perfect an appeal). Although Sharp and Penson take place in an Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967) context, they are analogous because they discuss what an attorney's obligations are when he is presented with what he perceives to be a frivolous appeal. In those cases the appellate attorney or trial counsel at least preserved the convicted defendant's right to appeal. See Lombard v. Lynaugh, 868 F.2d 1475, 1480 (5th Cir. 1989).

Because it is at least arguable that Zapata asserted that he directed his counsel to file an appeal in his § 2255 petition and because it is evident that he did so in his Rule 60(b) motion, it was an abuse of discretion for the district court to overlook this argument and deny Zapata's motion. The district court did not hold an evidentiary hearing and neither side offered affidavits from Zapata's defense counsel or others tending to prove or disprove his assertions. The judgment is VACATED and REMANDED and the district court is directed to resolve whether Zapata told his defense counsel to file a notice of appeal.