UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8698

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JACKIE EUGENE HINSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(SA-92-CA-984(SA-89-CR-57(14))

(May 3, 1995)

Before LAY,[1] DUHÉ and DeMOSS, Circuit Judges.

PER CURIAM:[2]

Jackie Eugene Hinson appeals the district court's denial of his motion to vacate his conviction brought under 28 U.S.C. § 2255. Hinson raises a Sixth Amendment ineffective assistance of counsel claim based on four separate alleged conflicts of interest. We affirm.

BACKGROUND

A grand jury indicted Hinson on drug conspiracy counts and ten counts of money laundering. The indictment alleged that the drug

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[1] Circuit Judge of the Eighth Circuit, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

conspiracy used aircraft from Hinson's air charter service to transport large amounts of cash. Hinson pled guilty of three counts of money laundering and agreed to serve an eight year sentence. In the plea agreement, Hinson waived his right to appeal. He files this § 2255 motion to set aside his conviction alleging that his attorney had a conflict of interest rendering his representation ineffective. A magistrate judge conducted a two-day evidentiary hearing and recommended that Hinson's claims be denied. The district court adopted the magistrate's recommendation and denied Hinson's motion.

DISCUSSION

To show ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). To show prejudice when a defendant pleads guilty, he must demonstrate a reasonable probability that, but for his counsel's errors, the defendant would have insisted on going to trial rather than plead guilty. Hill v. Lockhart, 474 U.S. 52, 59 (1985).[3]

In the conflict of interest context, we presume prejudice only if the defendant demonstrates that an actual conflict of interest adversely affected his counsel's performance. United States v. McCaskey, 9 F.3d 368, 381 (5th Cir. 1993), cert. denied, 114 S. Ct.

[3] We note at the outset that the Government does not allege procedural default. We will not inquire into cause and prejudice if the Government does not raise the procedural default bar. United States v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992).

1565 (1994). "A conflict exists when defense counsel places himself in a position conducive to divided loyalties." United States v. Carpenter, 769 F.2d 258, 263 (5th Cir. 1985). Whether a conflict of interest exists is a mixed question of law and fact, which we review de novo. Strickland, 466 U.S. at 698.

Hinson alleges four conflicts of interest by his attorney, Gerald Goldstein. First, Hinson alleges a conflict with Goldstein's previous representation of Margarito Flores, who was a potential witness against Hinson.[4] Second, Hinson alleges that Goldstein himself was a potential witness against Hinson. Third, Hinson points to a personal conflict between Goldstein and the AUSA responsible for the prosecution. Finally, Hinson alleges that a Government subpoena of Goldstein's business records created a conflict of interest. The first two alleged conflicts of interest were the basis for a Government motion to disqualify Goldstein. The district court denied the motion to disqualify.

Goldstein's prior representation of Flores does not create an actual conflict because Hinson does not show that Flores would have testified against him. An actual conflict exists when an attorney represents a criminal defendant after having previously represented a Government witness in a related matter. United States v. Casiano, 929 F.2d 1046, 1052 (5th Cir. 1991). Although the Government listed Flores as a potential witness, Goldstein had the AUSA's assurances that Flores would not testify against Hinson.

[4] Flores had originally been indicted along with Hinson, but the Government dropped its case against Flores.

Furthermore, neither Goldstein nor Hinson thought that Flores could testify adversely to Hinson. We conclude that Goldstein's prior representation of Flores did not create a conflict of interest.[5]

Likewise, Goldstein himself would not have testified against Hinson because his testimony was cumulative. An attorney should not call the opposing attorney as a witness unless his testimony is both necessary and unobtainable from other sources. United States v. Crockett, 506 F.2d 759, 760 (5th Cir.), cert. denied, 423 U.S. 824 (1975). Goldstein's possible testimony concerned a telephone conference during which he spoke to Hinson and several of his pilots. Two pilots testified at the disqualification hearing to the contents of the telephone conference. The Government intended to call several pilots as witnesses in its case against Hinson. Goldstein's testimony would have been merely cumulative to the pilots' testimony. Because the contents of Goldstein's testimony could be obtained through other sources, the Government would not have called him as a witness. Consequently, no actual conflict exists.

Goldstein's personal conflict with the AUSA is not a conflict of interest. It is unfortunate in this day and age that opposing attorneys often do not like one another. Goldstein informed Hinson of the personal conflict, and Hinson maintained Goldstein as his attorney. We do not see how the personal conflict could amount to an actual conflict.

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[5] Because Flores would not have testified against Hinson, we need not consider the validity of Hinson's and Flores's waivers of Goldstein's successive representations.

Finally, Hinson contends that the Government's subpoena of Goldstein's business records for this case amounts to a conflict of interest. The Government, however, withdrew its subpoena after Goldstein moved to quash it. The subpoena was withdrawn five months before Hinson pled guilty, and Goldstein never produced any of his records for the Government. We see no conflict of interest.

CONCLUSION

For the foregoing reasons, the district court's denial of Hinson's motion to set aside his conviction is

AFFIRMED.