

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-10337
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JERRY LEE THOMPSON,
a/k/a Chief,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas

(6:93-CV-063-C(6:92-CR-007))

(January 3, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Jerry Lee Thompson and his codefendant, James Charles Edward Williams, were charged by indictment with conspiracy to possess with intent to distribute and distribution of five or more grams of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

cocaine base (Count 1) and possession with intent to distribute five or more grams of cocaine base or approximately 35.05 grams of cocaine base (Count 2). Thompson was convicted by guilty plea of Count 2 and was sentenced to a 120-month term of imprisonment, a \$50 special assessment, and an eight-year period of supervised release. 21 U.S.C. §§ 841(a)(1); 841(b)(1)(B)(iii). Prior to sentencing, the government filed enhancement information pursuant to 21 U.S.C. § 851, charging that because Thompson had a prior felony drug conviction for which he was sentenced to a 10-year term of imprisonment, he was subject to a minimum 10-year term of imprisonment for the instant offense.

In the written plea agreement, Thompson acknowledged that he was convicted of the felony drug offense charged in the enhancement information and that because of that prior conviction, he was subject to a minimum term of imprisonment of 10 years and of supervised release of eight years. Thompson also signed a factual resume agreeing that due to the enhancement, his term of imprisonment would be at least 10 years and his period of supervised release eight years. Thompson also filed an affidavit, providing that the plea agreement and factual resume were read to him by his attorney and that he understood that he faced a minimum term of incarceration of 10 years.

Thompson did not pursue a direct appeal but did file the instant § 2255 motion, arguing that 1) his counsel was ineffective for failing to investigate the facts before withdrawing a motion to suppress evidence; for failing to adequately inform him of the

consequences of pleading guilty; and for failing to investigate the constitutionality of the sentencing scheme for cocaine base, 2) his plea was involuntary due to his counsel's failure to inform him of the consequences of his plea, and 3) the punishment scheme for cocaine base was unconstitutional. The government filed an answer to the motion, attaching, among other things, the affidavit of one of Thompson's two trial attorneys.¹ The district court dismissed the motion with prejudice following the district court's adoption, over Thompson's objections, of the magistrate judge's report and recommendation.

OPINION

This Court reviews claims of ineffective assistance of counsel to determine whether counsel's performance was both deficient and prejudicial to the defendant. United States v. Gipson, 985 F.2d 212, 215 (5th Cir. 1993). To establish "prejudice," the defendant is required to show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (§ 2254 case). To show deficient performance, the defendant must overcome the strong presumption that the attorney's conduct falls within a wide range of reasonable professional assistance. If the defendant makes an insufficient showing on one of the components of the inquiry, the court need not address the other.

¹Thompson's trial counsel consisted of David C. Willingham, who was appointed, and Phil Wischkaemper, retained as co-counsel by Willingham.

Thompson argues that his counsel was ineffective for failing to inform him of the consequences of his guilty plea and for advising him to plead guilty. He argues that his guilty plea was not made voluntarily or intelligently and that he would not have pleaded guilty were it not for the flawed advice of his counsel. He argues that his counsel failed to explain to him 1) that the aiding and abetting charge depended on the conspiracy to possess charge; 2) that in order for him to be found guilty of conspiracy at trial, the government would have to prove that he had an agreement to possess cocaine base and the specific intent to further that agreement with one other person; 3) the difference between actual and constructive possession; 4) that the sentences for the conspiracy count and the aiding and abetting count would run concurrently, and "he would get the same minimum mandatory sentence without credit for acceptance of responsibility."

"[T]he two-part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (§ 2254 case). "To be successful in a claim of ineffective assistance of counsel in regard to a guilty plea, a petitioner must show not only that his counsel's performance was deficient, but also that the deficient conduct prejudiced him." Young v. Lynaugh, 821 F.2d 1133, 1140 (5th Cir. 1987) (§ 2254 case), cert. denied, 484 U.S. 986 (1987) and 484 U.S. 1071 (1988). The "prejudice" requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of

the plea process." Hill, 474 U.S. at 59. Thompson "must show that 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." Id. The defendant may not simply allege prejudice -- he must affirmatively prove it. Bonvillain v. Blackburn, 780 F.2d 1248, 1253 (5th Cir.) (§ 2254 case), cert. denied, 476 U.S. 1143 (1986). "[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." Hill, 474 U.S. at 59.

Although Thompson alleges that he would have gone to trial had his counsel not been ineffective, he has not shown a "reasonable probability" that he would have done so. See Hill, 474 U.S. at 59. The record reflects that a large amount of damaging evidence existed against Thompson. Thompson was the owner/driver of the car in which over 35 grams was found under the passenger seat. He had \$760 in cash, some of which contained trace amounts of cocaine. See PSR ¶¶ 8-12. The government had ample evidence to prove Thompson's possession without relying on an aiding-and-abetting theory. The plea agreement, furthermore, was hardly unfair: the government agreed to dismiss Count 1 and not to oppose Thompson's request for a 10-year sentence. Moreover, the state of Texas agreed that any charges pending against Thompson prior to the date of the signing of the plea agreement would be dismissed. Without the acceptance of responsibility adjustment, Thompson's guideline

range would have been 135 to 168 months. He could not, upon conviction of either count, have received a lesser sentence than he got. Despite his subjective statements, Thompson has failed to demonstrate the requisite prejudice.

To the extent that Thompson is arguing that his guilty plea was involuntary outside the context of his ineffective assistance of counsel arguments, his argument fails. A guilty plea involves the waiver of several constitutional rights, and, accordingly, it must be made knowingly and voluntarily. Boykin v. Alabama, 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). A federal habeas court will uphold a guilty plea if it was knowing, voluntary, and intelligent. Hobbs v. Blackburn, 752 F.2d 1079, 1081 (5th Cir.) (§ 2254 case), cert. denied, 474 U.S. 838 (1985). Before accepting a guilty plea, a trial court must ascertain that the defendant "has a full understanding of what the plea connotes and of its consequence." Boykin, 395 U.S. at 243-44.

At Thompson's re-arraignment, the district court judge, after placing Thompson under oath, summarized the plea agreement in open court, and Thompson acknowledged that those terms were the terms of the plea agreement as he understood them. The district court determined that Thompson understood the following: the nature of the charges to which the plea was offered, the maximum penalty provided by law, the import of a supervised-release term, that he would not be released on parole, his right to plead not guilty, his right to be tried by a jury with the assistance of counsel, his right to confront and cross-examine witnesses, his right against

self-incrimination, and that by pleading guilty he waived his right to a jury trial.

The court summarized the passages in the agreement providing that Thompson was satisfied with his counsel, that he went over all aspects of his case with his attorney, that he understood that the court was not required to sentence him to a particular sentence, that he understood that after the court accepted his plea, he had no right to withdraw his plea if the guideline range was higher than expected or if the court departed from the guideline range, that the government had not attempted to force him to plead guilty, and that he was pleading guilty because he was guilty. The district court, after determining that Thompson's plea was knowing and voluntary, accepted the plea. A defendant's solemn declarations in court carry a strong presumption of truth. Blackledge v. Allison, 431 U.S. 63, 74, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977) (§ 2254 case). The record reflects that Thompson's plea was knowing and voluntary.

Thompson's attorney filed a motion to suppress a search on Thompson's behalf to which the government filed a response. In the motion, Thompson argued that the search of his automobile by a police officer before a search warrant was obtained, which search resulted in the seizure of controlled substances, was unreasonable under the Fourth Amendment and that any evidence obtained by the unlawful search constituted fruit of the poisonous tree; alternatively, he argued that the officers lacked probable cause to

obtain a search warrant. Thompson's counsel later withdrew the motion.

The factual resume, signed by Thompson, provides the following regarding the purportedly unlawful search. Detective Haskins received a call from a "Crime Stoppers" caller, "who he had talked to in the past and whose information he had corroborated," stating that Thompson, accompanied by two black male passengers, would be traveling that night to Fort Worth, Texas, driving a blue 1970s Ford LTD automobile to pick up crack cocaine. Haskins and another investigator possessed information, of their own personal knowledge and by investigation, which served to corroborate the information provided by the caller about Thompson. That night, Haskins and the investigator located the vehicle described by the caller being driven on a highway consistent with a return from Fort Worth and occupied by two black males. Law enforcement officers stopped the vehicle and observed that Thompson was the driver and Williams the passenger. A search warrant for the automobile and Thompson's person was obtained. The officers seized a quantity of cocaine as well as marijuana cigarettes from the automobile. Currency seized from Thompson's pants pocket contained trace amounts of cocaine.

Thompson argues that his counsel was ineffective for withdrawing the motion to suppress without performing adequate legal and factual investigation. He argues that the affidavit, based solely on an anonymous call from Crime Stoppers, did not establish probable cause. He argues that the fact that his co-defendant was going to testify for the government at the trial was

not relevant to the inquiry whether the search was constitutional.

A Fourth Amendment claim is not precluded by Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), when it is raised in the context of a Sixth Amendment ineffective assistance claim. See Kimmelman v. Morrison, 477 U.S. 365, 382-83, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (§ 2254 case). To prevail on an ineffective assistance claim for withdrawal of a motion to suppress, a petitioner must prove that his Fourth Amendment claim is meritorious. See Kimmelman, 477 U.S. at 375 (where defense counsel's failure to litigate a Fourth Amendment claim competently is the ineffectiveness allegation, the defendant must also prove that the Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different in the absence of the excludable evidence). Because a knowing and voluntary guilty plea waives any contentions of ineffective assistance of counsel that do not relate to the voluntariness of the plea, Thompson must show that his counsel's withdrawal of the motion to suppress affected the voluntariness of his plea. Smith, 711 F.2d at 682.

Thompson's counsel's affidavit provided the following with regard to the withdrawal of the motion:

I thoroughly investigated [Thompson's] grounds for suppression of evidence under the Fourth Amendment. I obtained full open file discovery from the government. . . . [U]pon further review of the facts in this case including conferences with the investigating and arresting officers and review of the search warrant . . . I determined that it

would be in [Thompson's] best interest to discuss the possibility of foregoing the Fourth Amendment challenge. . . . Accordingly, . . . with full consent of my client, the Motion to Suppress was withdrawn.

The affidavit also provided that a contributing factor in the decision not to pursue the motion was the fact that Williams was prepared to testify to facts of the search in favor of the government, which facts were extremely damaging to Thompson's defense. The magistrate judge did not, however, rely on counsel's affidavit; such reliance was not necessary for the magistrate judge to determine that Thompson's counsel was not ineffective for withdrawing the motion to suppress. See Owens v. U.S., 551 F.2d 1053, 1054 (5th Cir.), cert. denied, 434 U.S. 848 (1977) (holding that in § 2255 case contested fact issues may not be decided on affidavits alone unless affidavits are supported by other evidence in the record).

The magistrate judge determined that whether the affidavit underlying the search warrant was sufficient to establish probable cause was immaterial because the exigent circumstances exception applied under the facts. He determined that when Thompson's counsel decided to withdraw the motion to suppress, there was no factual basis to support the motion. The record reflects that the decision to withdraw the motion was a reasonable tactical decision based on the unlikelihood of the motion's success. Thompson has failed to overcome the strong presumption that his attorney's decision to withdraw the motion to suppress fell outside of the

wide range of reasonable professional assistance. See Strickland at 689.

Thompson argues that his counsel was ineffective for failing to investigate the constitutionality of the sentencing scheme for cocaine base. Although his arguments are not specific, Thompson appears to raise equal protection and Eighth Amendment challenges. Thompson's argument lacks merit because this Court has rejected equal protection and Eighth Amendment challenges, as well as vagueness and due process challenges, to the sentencing scheme for cocaine base or "crack." United States v. Fisher, 22 F.3d 574, 579-80 (5th Cir.) (citing United States v. Watson, 953 F.2d 895 (5th Cir.), cert. denied, 112 S. Ct. 1989 (1992), and United States v. Thomas, 932 F.2d 1085 (5th Cir.), cert. denied, 112 S. Ct. 264, 428 (1991), and 112 S. Ct. 887 (1992)), cert. denied, No. 94-6487, 1994 WL 597037 (Nov. 14, 1994). As the sentencing scheme for cocaine base is not unconstitutional, Thompson's argument that his counsel was ineffective for failing to investigate the unconstitutionality of the sentencing scheme for cocaine base fails.

Thompson argues that his counsel was ineffective for failing to alert the court that he (Thompson) was illiterate. Thompson did not, however, raise this issue in the district court. This Court need not address issues not considered by the district court. "[I]ssues raised for the first time on appeal `are not reviewable by this [C]ourt unless they involve purely legal questions and failure to consider them would result in manifest injustice'."

Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991). Moreover, as the government notes, the record contradicts Thompson's assertion that the district court was unaware that he could neither read nor write.

Liberalizing Thompson's appellate arguments, see Price v. Digital Equip. Corp., 846 F.2d 1026, 1028 (5th Cir. 1988), we assume that he is arguing that the district court should have held an evidentiary hearing on the voluntariness of his guilty plea. He maintains that his counsel's affidavit was not adequate to determine the facts surrounding the voluntariness of his guilty plea. A movant is not entitled to an evidentiary hearing if the claims are either contrary to law or plainly refuted by the record. 28 U.S.C. § 2255; United States v. Green, 882 F.2d 999, 1008 (5th Cir. 1989). As discussed above, the record is "clearly adequate to dispose fairly" of Thompson's allegation that his guilty plea was not voluntary; we hold that an evidentiary hearing was not necessary. See United States v. Smith, 915 F.2d 959, 964 (5th Cir. 1990).

Thompson argues that the sentencing scheme for cocaine base is unconstitutional. As discussed above in the context of ineffective assistance of counsel, this Court has rejected equal protection and Eighth Amendment challenges, as well as vagueness and due process challenges, to the sentencing scheme for cocaine base. See Fisher, 22 F.3d at 579-80. Thus, Thompson's argument lacks merit.

AFFIRMED.