UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-10734

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CANDIDO RAMOS-RODRIGUEZ,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(5:94-CV-072-C(5:92-CR-48))

(March 1, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Candido Ramos-Rodriguez appeals the district court's denial of his motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (1988). Finding error, we vacate and remand.

Ramos-Rodriguez plead guilty to possession with intent to distribute heroin, *see* 21 U.S.C. § 841 (1988); 18 U.S.C. § 2 (1988), possession with intent to distribute cocaine, *see* 21 U.S.C. § 841; 18 U.S.C. § 2, using a firearm during and in relation to a

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

drug trafficking crime, *see* 18 U.S.C. 924(c)(1) (1988), and money laundering, *see* 18 U.S.C. § 1956(a)(1) (1988). Ramos-Rodriguez was convicted and sentenced to concurrent terms of 120 months' imprisonment on three counts, with a consecutive 60 months on the firearm count.[1]

After the time to appeal his sentence had expired, Ramos-Rodriguez made a motion under Rule 32(d) of the Federal Rules of Criminal Procedure to withdraw his guilty plea on the firearm count. The district court denied his motion, and his appeal was dismissed without prejudice to his right to file a § 2255 motion. Ramos-Rodriguez then filed a § 2255 motion. The district court adopted the magistrate judge's recommendation and denied relief. Ramos-Rodriguez appeals the district court's denial of his motion. Because one of Ramos-Rodriguez' claims requires us to vacate the district court's dismissal and remand, we do not address the other grounds on which he appeals.[2]

Ramos-Rodriguez contends that his attorney's assistance was constitutionally ineffective because his attorney failed to file an appeal after Ramos-Rodriguez asked him to do so. Indeed, "the failure of counsel to timely file an appeal upon request of the defendant or to mislead the defendant or the court as to the filing

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[1] Ramos-Rodriguez was also sentenced to four years' supervised release and a $200 special assessment.

[2] The Government argues that Ramos-Rodriguez' appeal was untimely under Rule 4(b) of the Federal Rules of Appellate Procedure because it was filed 42 days after the filing of the district court's judgment. Although Rule 4(b) does set a 10-day filing deadline for a notice of appeal in a criminal case, § 2255 motions are civil in nature and are therefore governed by the 60-day deadline of Rule 4(a)(1). *United States v. Buitrago*, 919 F.2d 348, 349 (5th Cir. 1990).

of appeal would constitute ineffective assistance of counsel entitling the defendant to post-conviction relief in the form of an out-of-time appeal." *Barrientos v. United States*, 668 F.2d 838, 842 (5th Cir. 1982). This relief is not automatic, however; the defendant must have communicated his intention to exercise his right to appeal to his attorney. *See Childs v. Collins*, 995 F.2d 67, 69 (5th Cir.) ("The duty to perfect an appeal on behalf of a convicted client does not arise on conviction, but when the client makes known to counsel his desire to appeal the conviction."), *cert. denied*, ___ U.S. ___, 114 S. Ct. 613, 126 L. Ed. 2d 577 (1993); *Meeks v. Cabana*, 845 F.2d 1319, 1323 (5th Cir. 1988) (affirming waiver of right to appeal when defendant "did not communicate the desire to exercise this right to his attorney"). Although Ramos-Rodriguez clearly asserts on appeal that he did ask his attorney to file an appeal,[3] his contention was not as explicit in his argument to the district court.[4] Nonetheless, we construe pro se pleadings liberally,[5] and we therefore hold that Ramos-Rodriguez sufficiently raised the claim in the district court.

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[3] In his appellate brief, Ramos-Rodriguez states that "his trial attorney ignored his request to file an appeal."

[4] In his motion to the district court, Ramos-Rodriguez argued "his counsel's failure to preserve his appeal rights." He also contended that "[p]etitioner's counsel *arbitrarily failed* to file a timely notice of appeal . . . ," and he discussed "the procedure to be followed by counsel *who thought the filing of an appeal from a criminal case was frivolous*" (emphasis added).

[5] *See Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) (holding a *pro se* complaint, "however inartfully pleaded," to "less stringent standards than formal pleadings drafted by lawyers"); *Conley v. Gibson*, 355 U.S. 41, 46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957) (following the rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

The district court did not determine whether Ramos-Rodriguez' contention had any basis in fact. Instead, the district court applied the test for ineffective assistance of counsel claims dictated by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and denied Ramos-Rodriguez' motion because Ramos-Rodriguez had failed to establish that he would have been successful on appeal. There are two types of ineffective assistance of appellate counsel claims, however; those in which counsel fails to make an argument or raise an issue, and those in which *all* assistance of counsel has been effectively denied. *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)). To prevail on a claim of the second type, the petitioner need not show prejudice; it is presumed. *Penson*, 488 U.S. at 88-89, 109 S. Ct. at 354.[6]

Ineffective assistance of counsel resulting in a failure to file any appeal fits the second type of claim, and Ramos-Rodriguez has raised such a claim. Accordingly, he need not have shown that he would have been successful on appeal in order to warrant review

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[6] *See also United States v. Gipson*, 985 F.2d 212, 215 (5th Cir. 1993) ("In the context of the loss of appellate rights, prejudice occurs where a defendant relies upon his attorney's unprofessional errors, resulting in the denial of his right to appeal."); *United States v. Taylor*, 933 F.2d 307, 312 (5th Cir.) ("[T]here is a great difference between having a bad lawyer and having no lawyer: if the lawyering is merely ineffective, then the decision to grant relief turns on the degree of incompetence and prejudice to the defendant; if the defendant had no lawyer, prejudice is legally presumed . . . ."), *cert. denied*, 502 U.S. 883, 112 S. Ct. 235, 116 L. Ed. 2d 191 (1991); *Sharp*, 930 F.2d at 452 ("When, however, the defendant is actually or constructively denied any assistance of counsel, prejudice is presumed, and neither the prejudice test of *Strickland* nor the harmless error test of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), is appropriate.").

of his claim. *Gipson*, 985 F.2d at 215 ("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."); *see also Lombard v. Lynaugh*, 868 F.2d 1475, 1480 (5th Cir. 1989) (distinguishing types of ineffective assistance claims and refusing to require showing of prejudice when actual or constructive complete denial of assistance of appellate counsel had occurred). Because the district court applied an incorrect legal standard to Ramos-Rodriguez' claim of ineffective assistance of counsel, the district court did not determine whether any factual basis for the claim existed. We therefore VACATE the district court's denial of Ramos-Rodriguez' § 2255 motion and REMAND for further proceedings consistent with this opinion.