

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-10832
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOHNNY RAY HOPES,
a/k/a Johnny Ray Hops,
a/k/a Johnny Hope,
a/k/a Johnny R. Hopes,

Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(5:94 CV 98 C (5:93 CR 18 01))

(March 20, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Johnny Ray Hopes was indicted for, inter alia, possession with

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

intent to distribute five grams or more of cocaine base. The Government subsequently filed a Superseding Enhancement Information, seeking enhancement penalties pursuant to 21 U.S.C. § 851 based on Hopes' two prior drug-related felony convictions. Hopes changed his initial plea of not guilty, to guilty and signed a written plea agreement.

The plea agreement specifically stated that Hopes faced a minimum 10-year term of imprisonment and a maximum term of life. The plea agreement further stated that sentence was to be imposed by the district court, that the Government was making no prediction as to a sentence, and that Hopes would "not be allowed to withdraw his plea if the applicable guideline range is higher than expected." Hopes also signed a factual resume wherein he admitted knowingly and intentionally possessing 20.49 grams of cocaine base with the intent to distribute.

At sentencing, Hopes stated under oath that he understood that the district judge was not bound by the plea agreement and that neither his attorney, the judge, nor the Government could advise "with any degree of certainty which particular guideline" would apply. Hopes received a 165-month term of incarceration, an eight-year term of supervised release, and a \$50 special assessment.

On direct appeal, Hopes' counsel filed an Anders¹ brief, after which his withdrawal was authorized. Hopes' appeal was then dismissed as frivolous.

Hopes filed a 28 U.S.C. § 2255 motion alleging that trial

¹ Anders v. California, 386 U.S. 738 (1967).

counsel erroneously informed him that if he went to trial he would face a minimum 25-to-30-year sentence because of two prior drug convictions, and that the erroneous advice induced him to plead guilty. The matter was referred to a magistrate judge who recommended denial because Hopes had not shown the requisite prejudice. Hopes filed objections, which the district court overruled when it adopted the magistrate judge's report and entered judgment dismissing Hopes' § 2255 motion.

OPINION

Hopes contends that he pleaded guilty because counsel erroneously advised him that if he went to trial he would face a minimum 25-to-30-year sentence as a career offender. His argument is unavailing.

To prevail, Hopes must show that counsel's performance fell below an objective standard of reasonable performance and that he was prejudiced by that deficient performance. Lockhart v. Fretwell, 113 S. Ct. 838, 842 (1993). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland v. Washington, 466 U.S. 668, 697 (1984).

Hopes must demonstrate prejudice by showing that counsel's errors were so serious that they rendered the proceeding unfair or the result unreliable. Fretwell, 113 S. Ct. at 844. In the context of a guilty plea, Hopes must show that counsel's deficient performance prejudiced the defense to the extent that there is a reasonable probability that, but for an attorney's errors, he would

not have pleaded guilty, but would have gone to trial. Hill v. Lockhart, 474 U.S. 52, 60 (1985). A petitioner must "affirmatively prove" prejudice. Strickland, 466 U.S. at 693. The mere allegation of prejudice is insufficient to satisfy Strickland's prejudice requirement. Armstead v. Scott, 37 F.3d 202, 206 (5th Cir. 1994). Hopes' attorney, James Gorsuch, submitted an affidavit wherein he swore that he did not advise Hopes of a potential 25-to-30-year minimum sentence, nor did he advise Hopes that the career criminal provisions of the guidelines applied. Gorsuch also detailed the strength of the Government's case against Hopes, averring that he advised Hopes that the evidence included two offense reports and two audio tapes detailing hand-to-hand sales by Hopes to undercover officers, and statements from various individuals evidencing that Hopes ran a crack-cocaine house.

Gorsuch also averred that co-defendant Pernell Williams agreed to testify on behalf of the Government and that the factual resume prepared relative to Williams' plea agreement stated that Williams observed Hopes "in the process of `cutting' approximately 20.49 grams of Cocaine Base." Gorsuch further averred that he informed Hopes that a final guideline range could not be arrived at until after a presentence investigation report (PSR) had been prepared.

At his re-arraignment hearing, Hopes testified that he understood that: 1) the district court was not bound by the plea agreement; 2) neither his attorney, the court, nor the Government could advise him "with any degree of certainty" what his sentence would be until the PSR was conducted; 3) the facts stated in the

factual resume were true and correct; 4) his plea was freely and voluntarily made; and 5) he was fully satisfied with his attorney's representation.

Hopes has not established that, but for the alleged errors of counsel, he would not have pleaded guilty. He has offered only naked assertions in support of his contention. The evidence against him was solid and included a number of statements and tape recordings establishing his possession of 20.49 grams of cocaine base.

Hopes also contends that the district court improperly declined to conduct an evidentiary hearing, and that the magistrate judge applied the Hill standard in an improper manner when analyzing his claim. His arguments fail.

Because the district court could fairly resolve Hopes' ineffective-assistance-of-counsel claim with the record before it, no evidentiary hearing was necessary. See United States v. Smith, 915 F.2d 959, 964 (5th Cir. 1990).

Further, Hopes' argument that the magistrate judge improperly applied the Hill standard is factually frivolous. Hill governs claims of ineffective assistance of counsel in a guilty-plea context, and under Hill, no showing of prejudice has been made, as demonstrated above. Hill, 474 U.S. at 59-60.

AFFIRMED.