

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10974
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MILTON LYNCH,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:93 CV 2378 R (3:88 CR 04))

June 21, 1995

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Milton Lynch was convicted by a jury of conspiracy to distribute and possess with intent to distribute cocaine and distribution of cocaine and is serving a 188-month term of imprisonment. In his federal habeas petition, he challenged several aspects of his counsel's effectiveness and the trial court's alleged failure to transcribe the suppression hearing. The

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

district court denied relief on these claims. Finding no error, we affirm.

Lynch contends his counsel was ineffective in that he: (1) failed to file a petition for writ of certiorari to the Supreme Court; (2) failed to object to the admission of co-conspirator Carla McDonald's testimony or to raise the issue on appeal; and (3) failed to object to the sufficiency of the evidence, or to raise the issue on appeal.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 689-94 (1984). To show Strickland prejudice, a defendant must demonstrate that counsel's errors were so serious as to "render[] the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 13 S. Ct. 838, 844 (1993). "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." Id. at 844. In evaluating such claims, the court indulges in "a strong presumption" that counsel's representation fell "within the wide range of reasonable professional competence, or that, under the circumstances, the challenged action `might be considered sound trial strategy.'" Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988) (citation

omitted). A failure to establish either deficient performance or prejudice defeats the claim. Strickland, 466 U.S. at 697.

A. Failure to File Petition for Writ of Certiorari

Lynch first contends that his counsel was ineffective in that he failed to file a petition for writ of certiorari despite his request that counsel do so. Whether or not counsel was seriously deficient for not filing a petition for certiorari Lynch had to show that he was prejudiced by the failure to file. This he has not done and cannot do. His direct appeal raised only an issue whether evidence seized from a companion at DFW Airport in December, 1987 should have been admitted. The Fifth Circuit affirmed the trial court's factual findings in a brief, unpublished opinion. The likelihood that Lynch's case would have been granted certiorari, much less been reversed, is nil.

B. Failure to Object to Admission of McDonald's Testimony

Lynch next contends that his counsel was ineffective in that he failed to object to the admission of McDonald's testimony and failed to raise this issue on appeal. In particular, Lynch contends that McDonald's testimony is inadmissible under the "fruit of the poisonous tree" doctrine because it was obtained as the result of an allegedly illegal arrest. Id.

Lynch's allegation is factually inaccurate. Counsel for both Lynch and a co-defendant filed motions to suppress all of the evidence obtained as a result of the allegedly illegal search of the car and subsequent arrest, including McDonald's testimony. The trial court ruled that each defendant would receive the benefit of

any motions or objections filed by the other defendant. After a hearing, the trial court determined that the search of the car and seizure of the cocaine in the brown bag was unreasonable because the bag was not in plain view. Because the unconstitutional search led to the subsequent arrest of McDonald, the trial court limited McDonald's testimony to the events leading up the arrest. Id. Because the trial court had already limited McDonald's testimony, any further objection to the admission of McDonald's testimony by Lynch's counsel would have been unsuccessful.

The magistrate judge correctly determined that Lynch's counsel was not ineffective for failing to appeal this issue because the issue lacks merit. The magistrate judge explained that the fruit of the poisonous tree doctrine bars the admission of evidence obtained as a direct result of an illegal search or other illegal actions of the police. Id. at 48 (citing Wong Sun v. United States, 371 U.S. 471, 485 (1963)). The magistrate judge emphasized Wong Sun requires the exclusion of evidence only if it is sufficiently connected to the government's illegal actions. Id., and that is not the case here. McDonald's trial testimony was not obtained solely through the unlawful search and subsequent arrest at the motel, as she was arrested for selling crack to an undercover officer prior to the unlawful search and arrest. Her testimony concerning the search of the car and arrest related thereto was suppressed. Because the issue lacks merit, any appeal of the issue would have been unsuccessful. No deficient performance or prejudice occurred.

C. Failure to Object to or Appeal Sufficiency of the Evidence Issue

Lynch next contends that his counsel was ineffective in that he failed to object to the sufficiency of the evidence or raise the issue on appeal. This contention is meritless. McDonald's testimony and other evidence abundantly established Lynch's guilt as charged. An appeal based on insufficiency would have been wasted effort.¹

For these reasons, the judgment of the district court is AFFIRMED.

¹ Lynch contends that the trial court's failure to have the suppression hearing transcribed in violation of 28 U.S.C. § 753 constitutes reversible error. He did not make this argument in the district court. Instead, in the district court, Lynch argued that his trial counsel was ineffective in failing to have the trial court transcribe the suppression hearing. This Court need not address issues not considered by the district court. Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991).