IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10984
Summary Calendar

United States of America,

Plaintiff/Appellee,

versus

Billy Delbert Dickey,

Defendant/Appellant.

Appeal from the United States District Court
For the Northern District of Texas
(1:93-CV-167 (1:91-CR-004))

(June 15, 1995)

Before JOHNSON, HIGGINBOTHAM, and SMITH, Circuit Judges.[*]

JOHNSON, Circuit Judge:

Federal prisoner, alleging that his trial counsel was constitutionally ineffective for various reasons, filed a Motion to Vacate, Set Aside, or Correct his sentence pursuant to 28 U.S.C. § 2255. Without holding an evidentiary hearing, the district court denied relief. Finding that some of prisoner's contentions warranted a hearing, we AFFIRM in part, VACATE in part and REMAND.

I. FACTS AND PROCEDURAL HISTORY

Billy Delbert Dickey was named in a twelve-count criminal

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

complaint along with eleven other co-defendants. The charges stemmed from the defendants' alleged manufacture, possession and distribution of methamphetamine and from possession of firearms during those drug trafficking offenses. On March 4, 1991, a plea agreement was reached wherein the government agreed to dismiss all of the counts in the indictment except the first count. This was a charge for conspiracy to manufacture, to possess with intent to distribute and distribution of one kilogram or more of methamphetamine.[1]

Pursuant to the agreement, Dickey was debriefed by the prosecutor and other federal officers. At that debriefing, the prosecutor questioned Dickey about glassware a co-conspirator had purchased which was shipped from Florida to Texas. After the debriefing, the prosecutor informed Dickey that he could file a charge of money laundering based on the financial transaction concerning the glassware shipped from Florida to Texas. Dickey objected to this new charge. However, Dickey's attorney, after he had conferred with the prosecutor, counseled Dickey that he would have to plead guilty to the money laundering count to finalize the agreement. Dickey acceded and thus Dickey was convicted of the conspiracy count and one count of money laundering.

The court sentenced Dickey to 155 months of imprisonment on each count, to be served concurrently. Additionally, the Court imposed a five-year term of supervised release and a special assessment of $100. Dickey did not appeal.

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[1] The inclusive dates of this conspiracy were January 1, 1990, through and including January 4, 1991.

On November 9, 1993, Dickey filed a Motion to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. In the motion, Dickey alleged that his trial counsel was ineffective because he failed to investigate whether his conviction was based upon dextro-methamphetamine or levo-methamphetamine, failed to object to the use of the amended version of 21 U.S.C. § 841 as an ex post facto violation, and erroneously advised Dickey to plead guilty to the money laundering count because the information regarding that count was obtained in violation of the plea agreement. Further, in a supplemental pleading, Dickey argued that his counsel was ineffective for failing to file a notice of appeal. The matter was referred to a magistrate judge who, without holding any hearing, recommended that Dickey's claim for relief be denied. The district court adopted this recommendation and denied the motion. Dickey now appeals.

II. DISCUSSION

A. Ineffective Assistance of Counsel Standard

In his brief to this Court, Dickey makes several arguments all of which are couched in terms of ineffective assistance of counsel. To obtain relief under § 2255 based on ineffective assistance of counsel, a defendant must show not only that his attorney's performance was deficient, but also that the deficiencies prejudiced the defense. *United States v. Smith*, 915 F.2d 959, 963 (5th Cir. 1990); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). If proof of one element is lacking, we need not examine the other. *Kirkpatrick v. Blackburn*, 777 F.2d 272, 285 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 2907 (1986).

In order to show that his counsel's performance was constitutionally deficient, a convicted defendant must show that his counsel's representation "fell below an objective standard of reasonableness." *Darden v. Wainwright*, 477 U.S. 168, 184, 106 S.Ct. 2464, 2473 (1986). In evaluating such claims, this Court indulges in a "strong presumption" that counsel's representation fell "within the wide range of reasonable professional competence," *Bridge v. Lynaugh*, 838 F.2d 770, 773 (5th Cir. 1988), and the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *Strickland*, 104 U.S. at 2065. The prejudice prong of *Strickland* requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[2] *Id.* at 2068.

B. Breach of Plea the Agreement

In his first point of error, Dickey argues that his counsel was ineffective because he erroneously advised Dickey to plead guilty to one count of money laundering. Dickey maintains that the plea agreement proffered by the government contained only the conspiracy charge, and a promise that any self-incriminating information provided by Dickey pursuant to the agreement would not be used as a basis for further prosecution. He contends that the government then obtained the information regarding the money laundering offense during his debriefing pursuant to the plea agreement, and used that

[2] In the context of a guilty plea, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, he would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985).

information in violation of the plea agreement. Thus, Dickey contends that the agreement was breached and that his attorney's ineffective assistance in advising him to plead guilty and in failing to hold the government to the plea agreement rendered his plea involuntary.

The government counters by arguing that the agreement was not breached because all of the information needed to prosecute Dickey for money laundering was known to the government prior to the plea agreement. To establish this, the government provided the joint affidavit of two special agents which detailed the investigative steps taken by the agents and identified when they discovered each piece of information necessary for the money laundering charge. Relying on this affidavit, the district court, without holding any evidentiary hearing, denied Dickey's motion.

A district court may dismiss a section 2255 motion without a hearing if "the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992) (citation omitted). In this case, there is a contested fact issue as to whether the plea agreement was breached. The government seeks to resolve that contested issue by resort to the affidavit of the two special agents. However, in section 2255 cases, contested issues of fact may not be decided on the basis of affidavits alone unless the affidavits are supported by other evidence in the record. *United States v. Hughes*, 635 F.2d 449, 451 (1981); *Owens v. United States*, 551 F.2d 1053, 1054 (5th Cir.), *cert. denied*, 98 S.Ct. 155 (1977).

No other evidence in the record supports the facts set out in the affidavit. All that the record reveals is that there was no money laundering charge before the debriefing pursuant to the plea agreement and that there was immediately afterward. These facts raise the question of whether information from the debriefing was used in formulating the money laundering charge. We conclude that the government should not be able to answer that question with evidence from an affidavit that Dickey cannot test by cross-examination. Thus, as this issue cannot be resolved on the basis of the record, we find that Dickey was entitled to a hearing on this issue.

c. What Type of Methamphetamine?

Dickey argues that his counsel was ineffective for failing to investigate the differences between the two types of methamphetamine--dextro-methamphetamine (d-meth) and levo-methamphetamine (l-meth). As the punishments under the Sentencing Guidelines based on d-meth are greater than the punishments based on l-meth, Dickey argues that his counsel was deficient for failing to require the government to meet its burden of establishing that Dickey's offense involved the more potent type of methamphetamine for which he was sentenced. Nowhere does Dickey ever contend, however, that the substance involved in his offense was, in fact, l-meth as opposed to d-meth.[3]

[3] Moreover, it seems clear that the substance was d-meth. Dickey admitted in his factual resume that he manufactured methamphetamine using phenylacetone. He also admitted to his probation officer that he used methylamine. According to the affidavit of Don Taylor, a criminalist for the Texas Department of Public Safety and an expert in forensic chemistry, when methamphetamine is manufactured using both of these chemicals the

In *United States v. Acklen*, 47 F.3d 739, 743 (5th Cir. 1995), this Court determined that a habeas petitioner's mere conclusory allegation that "conclusive evidence" exists that the methamphetamine involved was actually l-meth as opposed to d-meth was not sufficient to establish that, or even put in genuine issue whether, the substance was l-meth, absent which no prejudice can be shown. In this case, Dickey has not even alleged that the substance was l-meth. Thus, he cannot show the prejudice needed to obtain relief for ineffective assistance of counsel. *See Smith*, 915 F.2d at 963. Hence, his claim must fail.

d. Ex Post Facto

In this point of error, Dickey contends that his counsel was ineffective for failing to object to his being sentenced under the amended version of 21 U.S.C. § 841 (amended effective November 29, 1990) rather than the version that was in effect at the time he was arrested on November 16, 1990.[4] Dickey argues that he would have received a more favorable sentence under the version of the statute

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end product will always contain d-meth.

[4] Prior to the 1990 amendment, the United States Code provided two different penalties for the same offense. *United States v. Kinder*, 946 F.2d 362, 367 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1677 (1992). Section 841(b)(1)(A)(viii) provided for a sentence of 10 years to life if the offense involved at least 100 grams of methamphetamine, or at least 100 grams of a mixture containing methamphetamine. Section 841(b)(1)(B)(viii) provided for a sentence of only 5 to 40 years if the offense involved at least 10 grams of methamphetamine, or at least 100 grams of a mixture containing methamphetamine. This duplication was a clerical error that was corrected by an amendment that went into effect on November 29, 1990. *Id*. This correction amended subsection (A)(viii) by substituting 1 kilogram (1000 grams) in place of the 100-gram mixture provision.

in effect at the time of the commission of his offense and thus to sentence him under the more onerous provisions of the later-amended statute violates the Ex Post Facto Clause. *See United States v. Bermea*, 30 F.3d 1539, 1577 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1113 (1995) (an increase in sentence based on an amendment effective after an offense is committed would be a clear violation of the Ex Post Facto Clause).

The difficulty with Dickey's argument, though, is that he was convicted of conspiracy. Conspiracy is a continuing offense and, if there is evidence that the conspiracy continued after the effective date of the amendment, the Ex Post Facto Clause is not violated by sentencing under the amendment. *Id.*; *United States v. White*, 869 F.2d 822, 826 (5th Cir.), *cert. denied*, 109 S.Ct. 3172 (1989). In this case, Dickey pled guilty to a conspiracy running from January 1, 1990, through and including January 4, 1991--beyond the effective date of the amendment to section 841. Thus, Dickey can avoid use of the amended statute only if he can show that he withdrew from the conspiracy before November 29, 1990. *Bermea*, 30 F.3d at 1578.

The only thing in the record suggesting that Dickey was no longer in the conspiracy was his arrest on November 16, 1991. However, ordinarily, a defendant is presumed to continue involvement in a conspiracy unless that defendant makes a substantial affirmative showing of withdrawal, abandonment, or defeat of the conspiratorial purpose. *United States v. Hill*, 42 F.3d 914, 917 (5th Cir. 1995); *United States v. Puig-Infante*, 19 F.3d 929, 945 (5th Cir.), *cert. denied* 115 S.Ct. 180 (1994); *United States v. Branch*, 850 F.2d 1080,

1082 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 816 (1989). To withdraw from a conspiracy, a defendant bears the burden of demonstrating that he has committed "[a]ffirmative acts inconsistent with the object of the conspiracy [that are] communicated in a manner reasonably calculated to reach coconspirators." *United States v. US Gypsum Co.*, 438 U.S. 422, 464, 98 S.Ct. 2864, 2887 (1978). A defendant's arrest and incarceration are not affirmative acts on the part of the defendant that, by themselves, constitute withdrawal or abandonment. *Puig-Infante*, 19 F.3d at 945. Moreover, Dickey has offered no other evidence to show that he had withdrawn from the conspiracy prior to November 29, 1990. Thus, as it was proper for the district court to sentence Dickey under the amended version of section 841, Dickey's attorney was not deficient for failing to question that action.

e. Failure to File a Notice of Appeal

Finally, Dickey contends that he received ineffective assistance of counsel because his attorney failed to file a notice of appeal when Dickey requested that he do so. According to Dickey, his counsel told him that he could not appeal, that the issue he wanted to appeal had no merit, and that he was no longer representing Dickey.

In *Penson v. Ohio*, 488 U.S. 75, 88, 109 S.Ct. 346, 354 (1988), the Supreme Court distinguished between two types of denial of effective assistance of appellate counsel: *first*, when the deficiency consists of the failure to raise or properly argue certain issues on appeal, and *second*, when there has been actual or complete denial of

any assistance of appellate counsel. The first type of case requires a showing of *Strickland* prejudice. *Sharp v. Pucket*, 930 F.2d 450, 452 (5th Cir. 1991). In the second type of case, though, where the defendant is actually or constructively denied any assistance of counsel, prejudice is presumed. *Id.*

The District court herein denied relief on this issue because it determined that Dickey had failed to show sufficient prejudice. However, we conclude that Dickey's contention does not fall under the first type of case where prejudice must be shown. Dickey is not arguing that his counsel failed to raise or properly argue certain issues on appeal. Instead, Dickey is arguing that he was completely denied the assistance of counsel because, despite his request, his attorney failed to file a notice of appeal. This claim would come under the second type of case where prejudice should be presumed. *See United States v. Gipson*, 985 F.2d 212, 215 (5th Cir. 1993) (If petitioner can show that the ineffective assistance of counsel denied him the right to appeal, then he need not further establish any prejudice as a prerequisite to habeas relief).

Indeed, the failure of counsel to timely file an appeal upon the request of the defendant would normally 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). That relief is not automatic, though. The defendant must have communicated his intention to exercise his right to appeal to his attorney. *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*, 114 S.Ct. 613 (1993).

It is not clear from the record in this case, however, that Dickey clearly communicated to his attorney that he desired to appeal.[5] Thus, we conclude that the district court should have granted a hearing to determine this issue.

III. CONCLUSION

We AFFIRM the district court's denial of relief as to whether Dickey was properly sentenced under the amended version of 21 U.S.C. § 841 and as to whether he was properly sentenced for an offense involving d-meth. However, we VACATE the judgment of the district court as to whether Dickey's counsel was ineffective for failing to hold the Government to the terms of the plea agreement and for failing to file a notice of appeal and we REMAND this case to the district court for an evidentiary hearing on those issues.

[5] In fact, Dickey's counsel provided an affidavit stating that at no time did Mr. Dickey request that he perfect an appeal for Dickey.