UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-20443
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

ALFONSO CASTILLO-SANCHEZ,

Defendant-Appellant.

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

(CA-H-93-3292(CR-H-91-0049-2))

(March 3, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

Alfonso Castillo-Sanchez was indicted for conspiracy to possess in excess of five kilograms of cocaine with intent to distribute, and aiding and abetting in the possession of in excess of five kilograms of cocaine with intent to distribute. Sanchez

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

pleaded guilty to a superseding criminal information charging money laundering. The Presentence Report (PSR) calculated an offense level of 25 and a criminal history category of I, resulting in a guideline sentencing range of 57 to 71 months. Based upon the subsequent review of seized records which indicated that Sanchez and his co-defendants were responsible for laundering approximately $4 million, the probation officer issued a supplemental PSR which increased Sanchez's offense level to 31, resulting in a guideline sentencing range of 108 to 135 months. Sanchez filed a motion to withdraw his guilty plea. The district court denied Sanchez's motion, but did not consider the sentencing recommendation of the Supplemental PSR, and sentenced Sanchez to a 71-month term of imprisonment, followed by a three-year term of supervised release. On appeal, this court affirmed Sanchez's conviction and sentence. United States v. Vasquez, No. 91-2993 (5th Cir. June 10, 1992) (unpublished).

Sanchez then filed this motion to vacate his sentence under 28 U.S.C. § 2255 alleging that (1) his guilty plea was involuntary due to ineffective assistance of counsel[1]; and (2) his counsel was ineffective. The district court determined that an evidentiary hearing was not necessary, and denied Sanchez's motion. Sanchez filed a timely notice of appeal.

OPINION

Sanchez maintains that his counsel was ineffective in that he:

[1] Sanchez does not raise or brief this issue on appeal. However, he does argue that his counsel was ineffective because he failed to advise Sanchez of the elements of the offense.

(1) failed to advise Sanchez of the required knowledge and other elements of the offense; (2) miscalculated the applicable guideline sentence; (3) failed to advise Sanchez to accept responsibility; (4) failed to object to the PSR's recommendations regarding acceptance of responsibility and Sanchez's minor participant status; and (5) had a conflict of interest. Whether counsel rendered effective assistance is a mixed question of law and fact which should be reviewed de novo. United States v. Faubion, 19 F.3d 226, 228 (5th Cir. 1994).

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). 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.

Sanchez first alleges that his counsel failed to advise him of the knowledge and other elements of the money laundering offense. He maintains that he did not understand that the offense required knowledge that the money was obtained illegally.

To satisfy Strickland's requirements in the guilty plea context, "the defendant 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." Hill v. Lockhart, 474 U.S. 52, 60 (1985). The prejudice inquiry will require the court to consider whether the counsel would have changed his recommendation as to the plea if he had not made the alleged error. Id. This assessment, in turn, will depend upon whether the proposed action or potential affirmative defense likely would have changed the outcome of the trial. Id.

Prior to the entry of Sanchez's guilty plea, the district court advised him of the elements of the offense in accordance with Fed. R. Crim. P. 11(c)(1), explaining that the offense required knowledge that the property was the proceeds of unlawful activity. Thus, the record indicates that Sanchez was aware of the elements of the offense because he stated in open court that he understood the nature of the charges. Although such statements carry a strong presumption of verity, Blackledge v. Allison, 431 U.S. 63, 75 (1977), Sanchez has alleged sufficient facts to overcome the presumption. Sanchez alleged that, when he came to court for his suppression hearing, he learned that his two co-defendants had agreed to plead guilty to money laundering. As only one defendant had been charged with that count, the other was going to plead to a superseding information. Sanchez alleged that his attorney negotiated a deal whereby Sanchez would plead to the same superseding information, and the original charges would be

dismissed. Sanchez further alleged that he protested his innocence and asked for a new attorney, but that the district court denied his request and gave him 15 minutes to decide whether to plead or go forward with his suppression hearing and trial. Sanchez, feeling pressured and having lost confidence in his attorney, agreed to plead guilty. He contended that prior to the rearraignment his counsel had not advised him that the offense required knowledge that the money was obtained illegally. The record supports the basic allegations that the plea agreement was a spur-of-the-moment deal and that, after hearing from Sanchez and counsel, the judge denied the motion for new counsel and a continuance. Sanchez's statements to the probation officer also support his allegations; he stated that he volunteered to carry the suitcase to the car for his co-defendant's wife and did not know what the suitcase contained.

Even if his allegations are true, however, Sanchez has failed to show that his counsel's alleged error prejudiced him. His counsel probably would not have changed his advice to Sanchez to plead guilty, even if he had advised Sanchez of the knowledge element of the offense. Further, Sanchez pleaded guilty to money laundering in exchange for the dismissal of conspiracy and drug possession charges; if Sanchez had refused to plead guilty and insisted on going to trial, he would have been tried for the conspiracy and drug possession offenses, not the money laundering offense. The potential affirmative defense that he lacked the criminal intent to commit the money laundering offense would not

have been relevant in a trial of the conspiracy and drug possession offenses. Thus, Sanchez has failed to establish that he would not have pleaded guilty and would have insisted upon going to trial if his counsel had advised him of the knowledge and other elements of the money laundering offense.

Sanchez next contends that his counsel failed to advise him to accept responsibility; and failed to object to the PSR's recommendations regarding acceptance of responsibility and Sanchez's "minor" participant status.[2] "[I]n deciding an ineffectiveness claim [in the sentencing context], a court must determine whether there is a reasonable probability that but for trial counsel's errors the defendant's noncapital sentence would have been *significantly* less harsh." Spriggs v. Collins, 993 F.2d 85, 88 (5th Cir. 1993). In Spriggs, the court noted "one foreseeable exception to this requirement would be when a deficiency by counsel resulted in a specific, demonstrable enhancement in sentencing ... which would have not occurred but for counsel's error." Id. at 89 n.4.

Sanchez might have accepted responsibility for his actions if he had been advised to do so by his counsel. The government agreed to recommend a two-level reduction for acceptance of responsibility as part of the plea bargain. A reduction for acceptance of responsibility would have resulted in a lower sentencing range of 46 to 57 months, instead of 57 to 71 months. However, Sanchez was

[2] Although Sanchez raised these arguments in the district court, the district court did not directly address them in its memorandum opinion.

not entitled to representation at the interview with his probation officer. United States v. Kinsey, 917 F.2d 181, 183 (5th Cir. 1990). Further, Sanchez has never accepted responsibility for his actions; he continues to maintain that he did not know that the money was obtained illegally. Based on Sanchez's subsequent conduct and the absence of any assertion that he would have fully admitted his guilt if so advised, this court holds that Sanchez was not prejudiced by his counsel's alleged error.

Sanchez next contends that his counsel was ineffective because he failed to object to his "minor" participant status. However, Sanchez has failed to demonstrate how his counsel's alleged error prejudiced him. A defendant who is "plainly among the least culpable of those involved in the conduct of the group" is characterized as a minimal participant. U.S.S.G. § 3B1.2, comment. (n.1). For example, minimal participant status would be appropriate for a person who merely unloaded a single drug shipment of a "very large" organization or acted as a courier of a small amount of drugs in a single smuggling transaction. Id., comment. (n.2). Sanchez's conduct is not the type of conduct described as minimal in the guideline comments. The record indicates that Sanchez played an integral role in the money laundering operation. His fingerprints were found on the financial records. He was observed placing a suitcase, which was later found to contain over $150,000, into the trunk of an automobile; he appeared to be nervous and was looking around. Sanchez and his co-defendants were apprehended a short time later while they were attempting to flee

upon learning that another apartment used in the operation was being searched by police. Because the PSR is reliable, it may be considered as evidence by the trial court when making sentencing determinations. United States v. Lghodaro, 967 F.2d 1028, 1030 (5th Cir. 1992). None of the evidence suggests that Sanchez had a minimal role in the offense in comparison to his co-defendants. Thus, Sanchez has failed to show that he was prejudiced by his counsel's alleged error because the record indicates that Sanchez's counsel would not have been successful in challenging his "minor" participant status. Sanchez next contends that his counsel was ineffective because he incorrectly advised Sanchez that he would receive a sentence of about forty months, when the actual guideline sentencing range was 57 to 71 months. However, at the sentencing hearing, Sanchez stated that he had not received any promises of any kind, such as possible leniency or offers of probation, to persuade him to enter a guilty plea. To receive federal habeas corpus relief based on alleged promises that are inconsistent with representations made in open court when a guilty plea was accepted, a prisoner must "`prove (1) exactly what the terms of the alleged promise were; (2) exactly when, where, and by whom such a promise was made; and (3) the precise identity of an eyewitness to the promise.'" United States v. Smith, 915 F.2d 959, 963 (5th Cir. 1990)(citation omitted). This court also considers the facts confronting the defendant at the time that he made the decision to plead guilty, and the fundamental fairness of the proceeding. United States v. Fuller, 769 F.2d 1095, 1098-99 (5th Cir. 1985).

Sanchez has failed to show that his counsel's alleged error prejudiced him, or undermined the fairness of the proceeding. He alleges his counsel told him to expect to receive a sentence of about forty months, but has not shown that there was a witness to his counsel's alleged promise. A "prediction" of a certain sentence is not a "promise," and an inaccurate prediction does not constitute ineffective assistance. See United States v. Rivera, 898 F.2d 442, 447 (5th Cir. 1990); United States v. Stumpf, 827 F.2d 1027, 1030 (5th Cir. 1987). As noted above, there was substantial evidence against Sanchez. At the rearraignment hearing, Sanchez stated that he understood the maximum penalty for the charge and that the guideline sentence could not be determined until after a PSR was developed. He stated that he had had ample opportunity to discuss the case with his attorney and was satisfied with his attorney's representation. Sanchez also conceded that he had not received any promises of any kind to persuade him to enter a guilty plea. Under the circumstances, even if Sanchez's allegations are accepted as true, he has not shown that but for his counsel's alleged error he would not have pleaded guilty and would have insisted on going to trial.

Finally, Sanchez contends that his counsel was ineffective because he had a direct conflict of interest. Specifically, he alleges that he initially retained Joe Hernandez. Hernandez withdrew from his case to represent his co-defendant, Emery Estupinan-Vasquez. He then retained Arnold Govella, who allegedly

practices law with the same firm as Hernandez. Even after Hernandez withdrew from the case, he continued to handle Sanchez's telephone calls. Hernandez and Govella maintain that they merely share office space and do not practice law in the same firm. Hernandez volunteered that he continued to talk to Sanchez and his family after Govella took over the representation.

Although Sanchez has raised some factual allegations to indicate that his counsel may have had an actual conflict of interest, he has not established that he was prejudiced by his counsel's alleged conflict. To establish an ineffective assistance of counsel claim based upon a conflict of interest, a petitioner must show that his counsel "actively represented conflicting interests." Cuyler v. Sullivan, 446 U.S. 335, 349 (1980). "Prejudice is presumed . . . only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsel's performance." United States v. McCaskey, 9 F.3d 368, 381 (5th Cir. 1993)(citation omitted), cert. denied, 114 S. Ct. 1565 (1994). Sanchez has neither shown that his counsel actively represented conflicting interests, nor demonstrated how the alleged conflict of interest adversely affected his counsel's performance. McCaskey, 9 F.3d at 381. Therefore, Sanchez has not established that he was prejudiced by his counsel's alleged conflict of interest.

Sanchez argues that the district court erred in denying his Section 2255 motion without holding an evidentiary hearing because there are unresolved issues of fact. "Section 2255 provides that

a hearing is required `unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" United States v. Plewniak, 947 F.2d 1284, 1290 (5th Cir. 1991), cert. denied, 112 S. Ct. 1239 (1992). This court reviews such determinations for abuse of discretion. United States v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992). The district court did not abuse its discretion in holding that an evidentiary hearing was not necessary because Sanchez's claims could be resolved through review of the record.

AFFIRMED.