

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-20751  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JOSE ENRIQUE MALDONADO  
a/k/a JUAN CARLOS SABOOGAL,

Defendant-Appellant.

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Appeals from the United States District Court  
for the Southern District of Texas  
(CR-H-94-57)

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(June 9, 1995)

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

PER CURIAM:\*

Jose Maldonado appeals his conviction of, and sentence for, conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846, and possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Finding no error, we affirm.

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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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Maldonado, a/k/a Juan Carlos Sabogal, was convicted following a jury trial and sentenced to terms of imprisonment of 235 months on each count, the terms to run concurrently. The terms of imprisonment were to be followed by concurrent five-year terms of supervised release.

II.

An undercover DEA agent was instructed to pick up a vehicle loaded with 150 kilograms of cocaine at a restaurant and to supply the driver of the vehicle with another car. Maldonado approached the agent in the restaurant, provided him with a key to a van, and told the agent that the vehicle was ready. The agent refused to give Maldonado the key to the agent's car until he showed the agent the merchandise in the van.

Maldonado reluctantly agreed to accompany the agent to the van. The agent confirmed Maldonado's statement that there were nine boxes in the van. The agent inspected one of the boxes and saw what appeared to be kilogram packages of cocaine. Maldonado walked to the agent's car, where he was subsequently arrested by other agents who had been surveiling the meeting.

III.

At the commencement of Maldonado's sentencing hearing, defense counsel, Richard Diaz, who had been retained by Maldonado, advised

the court that Maldonado had requested a continuance of the hearing. Diaz further advised the court that he was prepared to proceed with sentencing and that he did not know the basis for his client's motion.

The district court asked Maldonado his reason for desiring the continuance, and he responded that he had not been well represented by his counsel. The court asked Maldonado to be more specific, and Maldonado responded that there had been a lack of communication between him and Diaz. Maldonado stated that he had not had an opportunity to discuss the presentence investigation report ("PSR") with his counsel and requested that the court appoint him new counsel.

Diaz volunteered to withdraw but also asked the court to allow him to respond to Maldonado's assertion. Diaz stated that he had hired local counsel to assist him in the case and that he had flown to Texas to see Maldonado four to five times prior to trial. Diaz stated that he had sent Maldonado and local counsel a copy of the PSR when he received it, and Diaz understood that Maldonado and local counsel had discussed the PSR. Diaz also stated that he reviewed the PSR with Maldonado "line-by-line" and translated it from English to Spanish for him. Diaz related that he had discussed the objections with Maldonado by telephone after he had filed them and again on the day before the sentencing hearing.

The district court asked Maldonado whether he disagreed with any statements made by counsel concerning what he had told Maldonado about the case and his options. Maldonado stated that

the only problem he had was his lack of communication with Diaz and the fact that counsel did not have sufficient time to discuss the case with him. The district court denied Maldonado's motion for continuance.

#### IV.

##### A.

Maldonado argues that he was denied the effective assistance of counsel because his trial attorney denied him the right to testify on his own behalf. Maldonado argues that he had a due process right to tell the jury his side of the story. Maldonado relies upon Nichols v. Butler, 953 F.2d 1550, 1552-54 (11th Cir. 1992), which held that a defense counsel's performance was deficient and that the defendant was prejudiced because counsel refused to respect his client's decision to testify at trial.

Maldonado argues that, if he had testified, he would have contradicted the testimony of the agent who met with him on the night of the arrest and the circumstances surrounding his arrest. Maldonado argues that there were no other defense witnesses and that he was the only witness who could provide exculpatory evidence on his behalf. Maldonado argues that his counsel unilaterally decided that Maldonado would not testify despite the fact that Maldonado disputed counsel's decision.

"In this circuit, the general rule is that a claim of ineffective assistance of counsel cannot be resolved on direct appeal unless it has first been raised before the district court."

United States v. McCaskey, 9 F.3d 368, 380 (5th Cir. 1993) (internal quotations and citations omitted), cert. denied, 114 S. Ct. 1565 (1994). An exception to the rule is made only if the record is sufficiently developed with respect to the merits of the claim.

A criminal defendant has a constitutional right to testify on his own behalf. Rock v. Arkansas, 483 U.S. 44, 49-52 (1987). Such right is granted to the defendant and not to his counsel. Id. at 52-53. A determination must be made whether the defendant intentionally relinquished his known right to testify. See United States v. Teague, 953 F.2d 1525, 1533 (11th Cir.), cert. denied, 113 S. Ct. 127 (1992).

The record has not been sufficiently developed for this court to address the merits of this claim. Maldonado did not indicate that he wished to testify on his own behalf when his counsel stated that the defense would not be presenting any witnesses at trial. Nor did Maldonado raise the issue of his failure to testify at the sentencing hearing. The only reference to the issue during the sentencing hearing was Diaz's statement that the decision whether to present the defendant's testimony was difficult, but that he "simply was not satisfied with the testimony which he was ready to present to this Court. And I've been criticized for that decision, but I stand by it, nonetheless." Although the district court gave Maldonado the opportunity to present his objections to counsel's performance, Maldonado did not pursue the testimony issue even after counsel raised the issue.

Maldonado cannot rely upon the Nichols case to support an argument that this issue should be reviewed on direct appeal. Nichols was an appeal from a district court's order granting habeas relief after an evidentiary hearing had been held. 953 F.2d at 1552. Thus, the record had been adequately developed in Nichols. The record herein has not been adequately developed for this court to determine whether Maldonado knowingly and voluntarily waived his right to testify at trial. Therefore, this issue is not subject to review on direct appeal.

B.

Maldonado argues that he was denied the effective assistance of counsel because a conflict of interest developed between counsel and Maldonado at the sentencing hearing. Maldonado argues that the conflict arose when he asked the court to continue the sentencing hearing and counsel stated that he was ready to go forward and knew of no basis for a continuance. Maldonado argues that counsel began defending his own position once Maldonado made the court aware of his communication problem with counsel. Maldonado argues that counsel should have withdrawn after mounting a defense to a future § 2255 motion because he was no longer acting as Maldonado's counsel.

Whether the facts in a particular case give rise to a conflict of interest is a mixed question of law and fact that we review de novo. See Strickland v. Washington, 466 U.S. 668, 698 (1984). To establish a Sixth Amendment violation in this context, a movant

must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). "A conflict exists when defense counsel places himself in a position conducive to divided loyalties." United States v. Carpenter, 769 F.2d 258, 263 (5th Cir. 1985). Prejudice is not presumed unless the defendant shows "that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsel's performance." McCaskey, 9 F.3d at 381.

Maldonado did not argue in the district court that counsel developed a conflict of interest at the sentencing hearing. Because there was no development of this claim in the district court, the issue is not subject to review on direct appeal. McCaskey, 9 F.3d at 380.

C.

Maldonado asserts that the district court erred in failing to determine whether he and his counsel had an adequate opportunity to review the PSR. Maldonado argues that the district court did not address the contradictory testimony of Maldonado and his counsel.

FED. R. CRIM. P. 32(a)(1)(A) provides that before imposing sentence, the district court "shall determine that the defendant and defendant's counsel have had the opportunity to read and discuss the presentence investigation report . . . ." The district court "may draw reasonable inferences from court documents, the defendant's statements, and counsel's statements when determining

whether a defendant has `had the opportunity to read and discuss' the [PSR] with his counsel." United States v. Victoria, 877 F.2d 338, 340 (5th Cir. 1980).

The district court asked Maldonado whether he had received a copy of the PSR, and he acknowledged that he had received an English and a Spanish copy. Diaz stated that he had translated and reviewed the PSR with Maldonado line-by-line and that he understood that local counsel had also discussed the PSR with him. Diaz further stated that Maldonado had not called him with any questions about the PSR.

The district court asked Maldonado whether he disagreed with any of counsel's statements concerning what he had told Maldonado about the case. Maldonado did not deny that counsel had reviewed the report with him. Maldonado's response was that there had been a lack of communication during the entire proceeding and that there had not been sufficient time to discuss the report prior to sentencing.

The district court did not specifically state that it found counsel's testimony regarding his discussions of the PSR with Maldonado to be more credible than Maldonado's testimony. The court implicitly made such finding, however, in denying Maldonado's motion to continue the sentencing hearing.

However, even assuming that the district court failed to adequately comply with rule 32(a), a remand for resentencing is not necessary, as the error was harmless. See FED. R. CRIM. P. 52(a); United States v. Davila-Escovedo, 36 F.3d 840, 844 (9th Cir. 1994),



cert. denied, 115 S. Ct. 953 (1995) (holding that a technical violation of rule 32(a) does not require a remand for resentencing in the absence of a showing of prejudice).

The district court determined that counsel had raised all possible objections to the PSR and that Maldonado had not shown that counsel had overlooked any issues or had refused to do anything on Maldonado's behalf that could have resulted in a lower sentence. Maldonado did not demonstrate that he was prejudiced by his limited discussions with counsel in the district court, nor has new counsel on appeal made any specific arguments relative to any issues that counsel could have asserted if he had engaged in further discussions with Maldonado. Thus, any rule 32 violation was harmless error.

AFFIRMED.