UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-30329
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT WALSH,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA 91-3055 A (CR 81-38 A
c/w CR 84-404 A))

(February 9, 1995)

Before POLITZ, Chief Judge, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

POLITZ, Chief Judge:[*]

Finding no error in the district court's denial of Robert E. Walsh's 28 U.S.C. § 2255 motion to vacate his convictions and sentences, we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

In 1981 Walsh was named in 14 counts of a 17-count indictment charging conspiracy, false statements in loan applications, and false bank entries. Guilty pleas were entered and then withdrawn and the case was set for trial. Walsh jumped bail and the trial was continued. In 1984 Walsh was arrested in Florida and returned to New Orleans for trial on the earlier charges to which was added an indictment for bail jumping. Counsel for Walsh filed multiple pretrial motions, including a motion to withdraw as counsel. Counsel was excused and the trial was continued.

With the assistance of new counsel Walsh entered into a plea agreement and, based thereon, entered pleas of guilty to four counts of conspiracy, false statements on a loan application, false bank entry, and bail jumping. He was sentenced to 15 years imprisonment. When he asked about his appeal rights the court referred him to his counsel. Six days after sentencing, counsel wrote Walsh a letter advising of his right to appeal but noting a lack of any tenable basis for an appeal. Counsel advised Walsh that he was "free to pursue the matter as you see fit." No appeal was taken.

Walsh subsequently filed a *pro se* motion to revisit sentencing which was outside the 120-day period permitted under then Fed.R.Crim.P. 35. The motion was denied as untimely. Nearly six years later Walsh filed the instant section 2255 motion alleging, *inter alia*, that he had been denied both effective assistance of counsel and his right to an appeal. The district court denied

relief; we vacated and remanded for an evidentiary hearing to examine the appeal issue.[1] The evidentiary hearing was conducted by a magistrate judge who reported to the district court. As a consequence of Walsh's objections, the district court made a *de novo* review and found that Walsh had not directed counsel to notice an appeal and that counsel had given his advice on the potential appeal after a conscientious examination of the relevant record. Walsh timely appealed.

Analysis

Walsh maintains that the district court was clearly erroneous in finding that he did not request an appeal and that his attorney conducted an appropriate review of the case before advising against an appeal. Our examination of the record does not lead to the definite and firm conclusion that the trial judge erred in his factual findings.[2]

At the evidentiary hearing Walsh testified that he instructed his attorney to appeal the sentence. Counsel testified, however, that there was no request for an appeal and he wrote Walsh to reduce to writing previous discussions he had with Walsh regarding an appeal. The district court credited counsel's testimony. The critical findings in this case are obviously based on the trial

[1]**United States v. Walsh**, 979 F.2d 1535 (5th Cir. 1992) (unpublished opinion).

[2]**United States v. United States Gypsum Co.**, 333 U.S. 364 (1948).

court's credibility calls to which we grant great deference.[3] We find no basis for reversing the trial court's factual findings.

We likewise view Walsh's claim that the trial court was clearly erroneous in finding that court-appointed counsel acted conscientiously and competently when he reviewed the record and advised Walsh of the futility of taking an appeal. The testimony of counsel reflects his familiarity with the case and the basis for his conclusion about the lack of any meritorious issue for an appeal of the sentences imposed. The seemingly disparately severe sentence Walsh received, as compared to his codefendants, was accounted for by Walsh's bail-jumping, his failure to accept responsibility for his acts, and his criminal history. The trial court's assessment of counsel's performance was not in error.

Finally, Walsh claims that his attorney's failure to either file an appeal or an **Anders**[4] motion to withdraw, attaching a brief detailing any conceivable valid grounds for appeal, constituted ineffective assistance of counsel. To succeed in any ineffective assistance claim Walsh must demonstrate that his attorney's performance was deficient and that the deficient performance prejudiced him.[5]

Although an attorney's failure to file or perfect an appeal when directed to do so by a client constitutes ineffective

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[3]**Fontenot v. Global Marine, Inc.**, 703 F.2d 867 (5th Cir. 1983).

[4]**Anders v. California**, 386 U.S. 738 (1967).

[5]**Strickland v. Washington**, 466 U.S. 668 (1984).

assistance of counsel,[6] Walsh's failure to communicate his desire to appeal vitiates his assertion of this claim.[7]

Walsh's alternative contention that his attorney's failure to file an **Anders** motion and brief constitutes ineffective assistance also lacks merit. To warrant an **Anders** motion and brief there must be a valid appeal pending from which withdrawal is sought. In the case at bar there was no such appeal.

AFFIRMED.

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[6]**Barrientos v. United States**, 668 F.2d 838 (5th Cir. 1982).

[7]**Childs v. Collins**, 995 F.2d 67 (5th Cir.), cert. denied, _____ U.S. _____, 114 S.Ct. 613 (1993).