UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30590
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GINO SEVERIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-94-2532(CR-92-588-H))

(April 28, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:*

Gino Severin pleaded guilty to one count of possession with intent to distribute more than one gram of cocaine in violation of 21 U.S.C. § 841(a)(1). The district court sentenced Severin to 60 months' imprisonment and five years' supervised release. Severin did not object to the PSR or appeal his sentence or conviction.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Severin filed this § 2255 motion alleging that he received ineffective assistance of counsel and that the district court failed to document the factual basis of the crime to which he pleaded guilty. The district court denied relief without an evidentiary hearing, and Severin timely appealed.

Severin bases his ineffective-assistance claim on the ground that his trial counsel incorrectly advised him that the entrapment defense was not available in federal cases.

To establish an ineffective-assistance-of-counsel claim, Severin must demonstrate that his attorney's performance was deficient, in that it fell below an objective standard of reasonableness and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). A failure to establish either deficient performance or prejudice defeats the claim. To demonstrate prejudice in the context of a guilty plea, Severin must show with 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, 59-60 (1985); See Armstead v. Scott, 37 F.3d 202, 206 (5th Cir. 1994) (petition must "establish" that he would not have pleaded guilty). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

"[W]hen the alleged error of counsel is failure to advise of an affirmative defense, the outcome of the prejudice element of the test will depend largely on whether the affirmative defense likely would have succeeded at trial." Nelson v. Hargett, 989 F.2d

847, 850 (5th Cir. 1993) (internal quotations and citations omitted). An entrapment defense requires that the criminal design originate with officials or agents of the Government and that they implant in the mind of an innocent person the disposition to commit the offense. United States v. Menesses, 962 F.2d 420, 429 (5th Cir. 1992).

The district court determined that the record contained sufficient evidence of Severin's predisposition to commit the crime to conclude that a defense of entrapment would not likely succeed at trial. Severin alleges that, prior to his guilty plea, he requested that his trial counsel pursue the defense of entrapment and provided several witnesses to testify to that defense; however, his trial counsel misinformed him that the entrapment defense was not available in federal cases, and that, even if it was, he would be found guilty if he went to trial. Thus, Severin's allegation is not that his counsel failed to advise him of an affirmative defense, but that counsel incorrectly advised him on a point of law concerning the affirmative defense that Severin expressed interest in pursuing. By focusing only on the probable lack of success of an entrapment defense, the district court applied an incorrect legal standard in evaluating Severin's ineffective-assistance claim. Severin must show with a reasonable probability that but for counsel's misinformation he would not have pleaded guilty and would have proceeded to trial. See Hill, 474 U.S. at 59-60.

Severin alleged with specificity the facts underlying the alleged entrapment. Severin admitted that he had some drug

dealings in 1988 with Carl Caruso, who became an informant for the F.B.I. in 1992. Although Severin had not seen Caruso since February 1992, Caruso called Severin several times in late 1992 to inquire if he would help Caruso distribute cocaine. Severin declined each solicitation; however, the parties discussed previous drug transactions. The conversations were secretly recorded. Later, Severin brought a friend, Allen Daliet, into Caruso's motorcycle shop to purchase a motorcycle. Caruso again solicited drug distribution business from Severin and Daliet, to which both declined, indicating an interest in only purchasing a motorcycle. Upon leaving, Caruso then told Severin that he would give Severin two ounces of cocaine, and, if Severin sold them, Caruso would give Severin a motorcycle. Severin then accepted the solicitation, but Caruso stated he should return later when the cocaine was available. Caruso later contacted Severin, who returned to the motorcycle shop. Caruso gave Severin one kilogram of cocaine, secretly videotaping the transaction. Severin placed the drugs on the table in front of him, and F.B.I. agents then entered the room and arrested Severin. These attested facts suggest that Severin's offense was solicited and would not have otherwise been attempted. See Menesses, 962 F.2d at 429.

Severin attested to facts that, if true, are substantial evidence that his trial counsel may have been deficient and that this deficiency was prejudicial. Severin attested that he requested that his trial counsel pursue the entrapment defense, that he provided two witnesses to testify in his behalf, and that

counsel informed him that the entrapment defense was not recognized in federal courts. To the contrary, an entrapment defense is available to federal defendants. See United States v. Hudson, 982 F.2d 160, 162 (5th Cir.), cert. denied, 114 S. Ct. 100 (1993). If counsel gave Severin incorrect instruction, his conduct may have fallen below an objective standard of reasonableness.

The PSR corroborates Severin's attested facts. The PSR also affirms that Severin stated his belief that he was entrapped, even after pleading guilty. Severin alleged that he would not have pleaded guilty and would have proceeded to trial had his counsel not provided incorrect information concerning the entrapment defense. Severin also pleaded that counsel was deficient because he provided incorrect information on a crucial point of law. See Strickland, 466 U.S. at 687; Hudson, 982 F.2d at 162. Severin's pleaded facts, if proved, establish a reasonable probability, sufficient to undermine confidence in the outcome, that but for counsel's error, he would not have pleaded guilty and would have proceeded to trial under the entrapment defense. See Armstead, 37 F.3d at 206. The Government did not contradict Severin's allegation that counsel misinformed him on the entrapment defense or that Severin would not have pleaded guilty but for the erroneous advice. The Government's response consisted only of copies of the rearraignment and sentencing hearing transcripts.

The Government argues that the sentencing colloquy and Severin's statements to the probation officer undermine his argument that he was entrapped because Severin stated that he

"voluntarily participated in the offense" and admitted his guilt in committing the offense. However, Severin's belief that he was entrapped, in conjunction with his reliance on counsel's incorrect information, is not necessarily inconsistent with these admissions. The basis of the entrapment defense is not the defendant's admission of commission of a criminal offense, but insistence that the offense was wrongly solicited and would not have otherwise been attempted. See Menesses, 962 F.2d at 429. Severin alleges that he relied on his counsel's misinformation that the entrapment defense was unavailable and that he pleaded guilty, on the advice of counsel, in hopes of receiving a lesser sentence.

The Government argues that Severin's admission that he purchased drugs from the confidential informant several years earlier, recorded conversations regarding these previous drug dealings, the video tape of his receipt of the drugs, and his confirmation of the factual basis supporting his guilty plea established Severin's predisposition to commit the crime and eliminated any possible success of the entrapment defense at trial. The Government argues that Severin's defense would not have likely succeeded at trial, and, thus, he did not show prejudice. The evidence cited by the Government to support its argument does not contradict Severin's allegations of entrapment and that he discontinued using drugs, indicating a potential success at trial on the entrapment defense, if the jury believes Severin's testimony. See United States v. Osum, 943 F.2d 1394, 1405 (5th Cir. 1991)(jury is ultimate arbiter of witness credibility).

A district court considering a § 2255 motion may dispose of the motion without an evidentiary hearing if "`the motion and the files and records of the case *conclusively show* that the prisoner is entitled to no relief[.]'" United States v. Drummond, 910 F.2d 284, 285 (5th Cir. 1990) (quoting § 2255), cert. denied, 498 U.S. 1104 (1991). Severin does not contend that the district court should have held an evidentiary hearing on his ineffective-assistance contention. However, Severin's attested statement that counsel told him that the entrapment defense was not available, the attested factual allegations supporting the affirmative defense, and the PSR were sufficient to trigger the district court's obligation to develop the case further, at least to the point of obtaining an affidavit from appellant's trial counsel.

Because Severin alleges facts which, if proved, suggest a strong possibility that his counsel may have rendered constitutionally deficient advice regarding the entrapment defense, we VACATE and REMAND the district court's judgment for further proceedings consistent herewith on that sole issue. Otherwise, the judgment of the district court is AFFIRMED.[1]

AFFIRMED in part, VACATED and REMANDED in part.

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[1] Severin's claim that the district court failed to comply with Fed. R. Crim. P. 11(f) in his colloquy at the guilty plea hearing is frivolous and requires no discussion.