

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50110
Conference Calendar

JESUS D. CALVILLO,

Petitioner-Appellant,

versus

WAYNE SCOTT, TDC, ET AL.,

Respondents-Appellees.

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Appeal from the United States District Court
for the Western District of Texas
USDC No. SA-93-CV-124
- - - - -

(July 19, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:*

Jesus D. Calvillo argues that his plea of nolo contendere was involuntary because he received ineffective assistance of counsel.** Calvillo contends that his counsel was ineffective because he failed to investigate adequately available defense theories and also asserts that his counsel failed to investigate an incriminating statement made by his son, Daniel Calvillo, which Daniel later recanted.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

**Under Texas law, a plea of nolo contendere has the same legal effect in a criminal proceeding as a plea of guilty. Cook v. Lynaugh, 821 F.2d 1072, 1075 (5th Cir. 1987).

"[T]he two-part Strickland v. Washington [466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)] test applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). "To be successful in a claim of ineffective assistance of counsel in regard to a guilty plea, a petitioner must show not only that his counsel's performance was deficient, but also that the deficient conduct prejudiced him." Young v. Lynaugh, 821 F.2d 1133, 1140 (5th Cir. 1987), cert. denied, 484 U.S. 986 (1987), and 484 U.S. 1071 (1988). To establish prejudice in the guilty-plea context, a petitioner must show that a reasonable probability existed that, but for his attorney's alleged errors, he would not have pleaded guilty and would have insisted on proceeding to trial. Hill, 474 U.S. at 59.

Judicial scrutiny of counsel's performance must be highly deferential, and courts must make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and a defendant must overcome the presumption that the challenged action might be considered sound trial strategy. Id.

The district court found "credible the testimony of petitioner's trial counsel to the effect that he undertook an extensive investigation into the prosecution's case against

petitioner" At the evidentiary hearing, Calvillo's trial counsel, Andrew Logan, testified that he was given "open access to the state's file," and that he "talked to different police officers," a firearms expert, and relatives of the deceased's family. He testified that as he "got deeper into [the] case," "it just seemed to get worse and worse."

Further, although Logan "was not successful in being able to speak with [Calvillo's son, Daniel]," he was aware of the substance of Daniel's statement. As the district court found, "the specified untrustworthy conditions[, which caused Daniel to recant his statement,] that would have allegedly been uncovered by a contemporaneous interview [with Daniel] were within the knowledge of defendant Jesus Calvillo himself." The record supports the district court's finding that Logan had undertaken an extensive investigation into Calvillo's case.

Finally, if the alleged error in an ineffective-assistance-of-counsel claim is a failure to investigate or discover potentially exculpatory evidence, the determination of prejudice will depend upon "the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." Hill, 474 U.S. at 59. Calvillo has failed to show that any further investigation by Logan would have led Logan to change his recommendation as to the plea. Accordingly, the district court's determinations that Logan conducted an extensive investigation and that Calvillo was not prejudiced by Logan's conduct are not clearly erroneous, as Calvillo failed to show that Logan's performance was outside the wide range of

professionally competent assistance or that a reasonable probability existed that, but for Logan's alleged errors, Calvillo would not have entered a plea of nolo contendere and would have insisted on proceeding to trial.

AFFIRMED.