

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50456
Summary Calendar

FIDENCIO MAGALLANES,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director, TDC,
ET AL.,

Respondents-Appellees.

Appeal from the United States District Court for the
Western District of Texas
(SA-93-CA-338)

(December 22, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Magallanes argues on appeal that the district court erred in determining that his nolo contendere plea was knowing and voluntary and that he received effective assistance of counsel.

I

Magallanes first contends that he did not knowingly and voluntarily enter his plea because of his alleged medication-induced mental impairments. He argues that he was incompetent at

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

the time he entered his plea because he was experiencing symptoms of "methadone postwithdrawal syndrome" such as difficulty concentrating and making decisions. After holding an evidentiary hearing, the magistrate judge found that Magallanes' own testimony and documentary evidence established that at the time he entered his nolo plea he had been on a regimen of methadone maintenance for over two months. She found that the same evidence also established that, "while some degree of mental or psychological impairment is common during the first week or two of a methadone maintenance program, after two months in such a program, no physical, mental, or psychological impairment is to be expected." Magallanes' own evidence showed that "when the dose is properly adjusted there is no physical, mental, or psychological impairment that can be detected or measured" from methadone maintenance. The evidence also showed only that a methadone maintenance patient may "experience impairment during the first 1-2 weeks of treatment when the dose might be started too high or raised too rapidly." Furthermore, Magallanes could not suffer the effects of methadone postwithdrawal syndrome until after the methadone was withdrawn, which did not occur until approximately two weeks after Magallanes' plea.

During the plea colloquy, Magallanes' attorney specifically informed the court that he was satisfied that Magallanes was competent to enter a plea. During the evidentiary hearing, Magallanes' attorney again testified that he had no trouble

communicating with his client in the time leading up to trial and that nothing in Magallanes' behavior caused him to question Magallanes' competence. The magistrate judge stated that "[i]nsofar as the testimony of the petitioner and his former state court defense counsel differs on these matters, the court finds petitioner's testimony to be incredible." See Collins, 918 F.2d at 1202 (holding that it is appropriate to credit the testimony of defense counsel over that of a habeas petitioner, especially when the court has had a first-hand opportunity to view the demeanor of both witnesses). Magallanes does not show that the magistrate judge's findings were clearly erroneous. In the light of the medical evidence, and the responses Magallanes' attorney gave during the plea colloquy and during the evidentiary hearing, Magallanes has not made a substantial showing that his ability to understand the significance and consequences of his plea was impaired.

Similarly, his contention that his plea was involuntary because it was effectively coerced is also without merit. Magallanes contends that because his attorney advised him that he had very little chance of prevailing should he go to trial and because his attorney failed to locate and interview particular defense witnesses, his attorney in essence coerced Magallanes into pleading nolo contendere. Magallanes made no showing to support this allegation. On the contrary, during the plea colloquy, Magallanes told the judge that he was satisfied with his attorney

and with the advice he had received. He stated to the court that he made the final decision to plead no contest. A defendant's solemn declarations in court carry a strong presumption of truth. Blackledge v. Allison, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

At the evidentiary hearing, his attorney testified that he initially believed that if Magallanes had any potential defense to the murder charge it would have to be based on a self-defense theory. He testified that as he continued trial preparation it became increasingly evident that the chances of successfully mounting a such a defense were extremely remote and that he so informed Magallanes.

Magallanes also argues that if his attorney had located particular witnesses, especially an alleged eyewitness who could corroborate a self-defense theory, he would not have pleaded guilty. Magallanes' attorney testified that he attempted repeatedly to locate and interview Magallanes' alleged "star witness," Jimmy Herrera. In Herrera's affidavit, attached as an exhibit to Magallanes' state habeas petition, Herrera corroborates Magallanes' attorney, admitting that he made himself unavailable at the time of Magallanes' trial.

In sum, the record does not support Magallanes' contention that his plea was effectively coerced by the action or inaction of his attorney.

II

Next, Magallanes also argues that he received ineffective assistance of counsel. He contends that his attorney was ineffective because he had failed adequately to investigate a self-defense theory, had not met with him on as many occasions as Magallanes believed were necessary, had not "introduced" information concerning the victim's propensity for violence and, as discussed above, had effectively coerced him into pleading no contest. A valid guilty plea, however, waives ineffective-assistance-of-counsel claims that do not go to the voluntariness of the plea. Smith v. Estelle, 711 F.2d 677, 682 (5th Cir. 1983), cert. denied, 466 U.S. 906 (1984). Therefore, with the exception of the coerced-plea claim, Magallanes' ineffectiveness claims are waived. As we have earlier discussed, this claim has no merit.

III

For the reasons stated herein, the judgment of the district court dismissing Magallanes' habeas petition is

A F F I R M E D.¹

¹Because Magallanes did not brief the issue of the district court's denying his motion for continuance, it is waived. Fed. R. App. P. 28(a)(4); see Atwood v. Union Carbide Corp., 847 F.2d 278, 280 (5th Cir. 1988), cert. denied, 489 U.S. 1079 (1989).