UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-50598
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JEFFREY LEWIS WOLFSON,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

(W-94-CA-044 (W-90CR-089(2))

(May 19, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

Jeffrey Lewis Wolfson was convicted by a jury of conspiracy to manufacture 3,4 methylenedioxy amphetamine (MDA). He was sentenced to 51 months, followed by a five year term of supervised release,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and ordered to pay a $5000 fine. His conviction and sentence were affirmed by this court on direct appeal. United States v. Wolfson, No. 91-8093 (5th Cir. March 6, 1992, unpublished).

Wolfson then filed this motion to vacate his sentence under 28 U.S.C. § 2255. The district court denied his motion without holding an evidentiary hearing. Wolfson timely filed a notice of appeal.

The following is a summary of the facts surrounding Wolfson's conviction. Edwin Mathis, an undercover narcotics officers with the Dallas Police Department, was put into contact by an informant with Scott Osler who allegedly was interested in manufacturing "Ecstasy"[1] and needed to obtain the necessary chemicals. Mathis portrayed himself as a chemical supplier and contacted Osler in North Carolina. After numerous telephone conversations, Osler recommended that Mathis contact John Logan because Logan had more technical knowledge and was running the operation. Mathis and Logan had numerous conversation and eventually agreed to become partners; Mathis agreed to supply the chemicals, and Logan and Osler agreed to show Mathis how to make MDA. Wayne Fitch, a detective with the Fort Worth Police Department, posed as Mathis's assistant who "cooked" the drug.

Logan suggested that Mathis contact Wolfson, who was also involved and had more technical knowledge about how the drug was

[1] Two different drugs are known on the street as "ecstacy": 3,4 methylenedioxy amphetamine (MDA) and 3,4-methylenedioxy methamphetamine (MDMA). Both drugs have the same chemical composition, except that MDA contains the chemical "formamide" and MDMA contains the chemical "N-methylformamide."

manufactured. Mathis and Fitch had several telephone conversations with Wolfson which were tape recorded and transcribed. In these conversations, Wolfson discussed the chemicals that were needed, the process of making the drug MDA, and that the final product would be pills made with a press which could be obtained at any health food store. Wolfson also discussed the plan that Logan would go to Texas to manufacture the drug, and the possibility of Wolfson also going to Texas. Wolfson told Fitch that he and Logan had previously manufactured the drug starting at a different place in the formula.

Logan and Wolfson made an agreement with Mathis and Fitch that Logan would purchase some of the necessary chemicals and would travel to Texas to manufacture the drug at a laboratory set up by Mathis and Fitch. Logan testified that he and Wolfson discussed the possibility of each receiving $5000 for their participation in the manufacture of the drug. Logan was to contact Wolfson by telephone if he had questions or problems in manufacturing the drug. Logan contacted Wolfson by telephone twice from Texas during the manufacturing process for advice. Logan had problems manufacturing the drug, and the chemicals exploded. Both Logan and Wolfson were subsequently arrested for their involvement in the manufacture of the drug.

OPINION

Wolfson contends that his trial counsel was ineffective in that he: (1) failed to adequately prepare for trial; (2) failed to meet with or talk to Wolfson or any defense witnesses until two

days before trial; (3) failed to file any pretrial motions; (4) failed to review the tape recorded telephone conversations prior to trial and failed to have the recordings examined by an independent expert; (5) failed to subpoena any telephone records; (6) failed to interview or call a potential defense witness, Chris Sleuter, and a number of character witnesses; and (7) failed to identify or establish at trial that the indictment incorrectly charged Wolfson with making the MDA drug, instead of MDMA. Wolfson also made these allegations of error in the district court.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 689-94 (1984). To show Strickland prejudice, a defendant must demonstrate that counsel's errors were so serious as to "render[] the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 113 S. Ct. 838, 844 (1993). "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." Id. at 844. In evaluating such claims, the court indulges in "a strong presumption" that counsel's representation fell "within the wide range of reasonable professional competence, or that, under the circumstances, the challenged action `might be considered sound trial strategy.'"

Bridge v. Lynaugh, 838 F.2d 770, 773 (5th Cir. 1988) (citation omitted). A failure to establish either deficient performance or prejudice defeats the claim. Strickland, 466 U.S. at 697.

A. Allegations Regarding Trial Preparation and Pretiral Actions

Wolfson first contends that his counsel was ineffective in that he failed to adequately prepare for trial. He argues that his counsel did not even meet with him or any defense witnesses until two days before trial and that one of the meetings took place in a local bar. Wolfson maintains that if his counsel had been adequately prepared he would have been better able to present the entrapment defense and that Wolfson would have been acquitted.

At trial, Wolfson's counsel presented an entrapment defense. In cross-examining the undercover agents, Wolfson's counsel attempted to show that the agents aggressively pursued Wolfson and his co-defendants. He also presented Wolfson's testimony that he told the agents that he did not want to become involved, and that he was just giving advice on manufacturing the drug to agents because he owed a debt to Logan. Wolfson's counsel also presented the entrapment defense to the jury in his closing argument, stating that Wolfson never agreed to be a partner in the scheme to manufacture the drug and that he would not have become involved if he had not been approached by the undercover agents.

The district court determined that Wolfson failed to satisfy either prong of the Strickland standard, reasoning that Wolfson's counsel adequately presented the entrapment defense, but that "[t]he jury simply did not believe that [Wolfson] was not involved

in the conspiracy." As noted above, Wolfson's counsel presented the entrapment defense in the cross-examination of the undercover agents, in Wolfson's testimony, and in his closing argument to the jury. Wolfson has not pointed to any additional exculpatory evidence or defense that his counsel would have been able to present if he had been more prepared. Thus, Wolfson has failed to establish that he was prejudiced by his counsel's alleged error.

Wolfson also argued that his counsel should have filed pretrial motions to obtain all of the other tape recordings of telephone conversations between agents and his co-defendants. In particular, he states that the tapes would show that Logan was threatened by agents to become involved; that the agents were aware Wolfson and his co-defendants did not have a predisposition to make the drugs and called them "a bunch of amateurs." Wolfson also contends that his counsel should have obtained a copy of an agreement between Edward Cary and the Government, in which Cary agreed to provide information to assist the Government in arresting at least four people in exchange for the Government's agreement not to prosecute. He maintains that the agreement shows that Scott Osler was "set up" by Cary.

The district court rejected this allegation, reasoning that the other tapes did not contain any further direct evidence indicating Wolfson was entrapped. The district court determined that evidence that Logan was entrapped was not relevant to whether Wolfson committed the instant offense. The district court also determined that the agreement between Edward Cary and the

Government was not relevant to whether Wolfson committed the instant offense. Wolfson has not demonstrated that he was prejudiced by his counsel's failure to file pretrial motions to obtain all of the other taped telephone conversations as none of the other taped conversations contained any additional exculpatory evidence showing Wolfson was entrapped.

Wolfson also argued that his counsel was ineffective in that he failed to review the taped conversations further prior to trial. He maintains that his counsel should have been familiar with all of the tapes, in particular Wolfson's statement "I don't want anything to do with this, I'm in medical school." This statement is listed as "inaudible" on the Government's transcript. Wolfson also argued that his counsel should have had this portion of the tape examined by an independent expert. The district court did not address this argument.

Wolfson also failed to show he was prejudiced by his counsel's failure to review the taped conversations, or have the tape examined by an independent expert. The record indicates his counsel was aware of Wolfson's statement on the tape. Wolfson's counsel cross-examined Mathis concerning whether he heard Wolfson make this statement. After hearing a replay of the tape, Mathis admitted that he heard Wolfson say "I don't want anything to do with this," but said he could not hear the rest of the statement. On direct examination by his counsel, Wolfson testified that he made the above statement. Counsel argued this evidence to the jury as well. Counsel's performance in relation to this particular

taped comment was not deficient, and Wolfson has not pointed to any other potentially exculpatory evidence on the tapes of which counsel was unaware. He has also failed to show that an independent examiner could have added any specific evidence, or that such evidence would have affected the outcome of the trial. Cf. Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993) (petitioner alleging failure to investigate must specify what evidence would have been found). Further, Wolfson had the opportunity to have the tape examined by an independent examiner and to present such evidence in support of this Section 2255 motion, but he failed to do so. Thus, Wolfson has failed to show that he was prejudiced by his counsel's alleged error.

Wolfson also argues that his counsel was ineffective in that he was unaware that the indictment charged Wolfson with manufacturing the wrong drug prior to trial. He maintains that the indictment incorrectly charged him with making MDA, instead of MDMA.

The district court rejected this allegation, reasoning that Wolfson's counsel questioned the witnesses about the differences between the drugs MDA and MDMA, and that his counsel made numerous objections concerning this point. Wolfson's counsel questioned the Government's witness, Deborah Reagan, a chemist with the Texas Department of Public Safety, about the differences between the two drugs. He also moved for a judgment of acquittal based on the discrepancy between the indictment and the evidence. This issue

was decided adversely to Wolfson on appeal. Thus, Wolfson has not shown that his counsel's performance was deficient in this respect or that he was prejudiced in any way.

B. Failure to Interview or Call Potential Defense Witnesses

Wolfson next contends that his counsel was ineffective in that he failed to interview or call potential defense witnesses. He contends that his counsel should have called Chris Sleuter, who could have explained that Wolfson loaned his credit card to Logan to repay a debt. He also contends that his counsel should have called several professors from the University of North Carolina Medical School as character witnesses.

On federal habeas review, "complaints based upon uncalled witnesses [a]re not favored because the presentation of witness testimony is essentially strategy and thus within the trial counsel's domain, and . . . speculations as to what these witnesses would have testified is too uncertain." Alexander v. McCotter, 775 F.2d 595, 602 (5th Cir. 1985). Further, to demonstrate the requisite prejudice for a complaint of this kind, the defendant must show not only that the testimony would have been favorable, but also that the witness would have testified at trial. Id. A defendant must also establish a reasonable probability that the testimony of the uncalled witness would have affected the result of the trial. Id. at 602-03.

Wolfson has not shown that he was prejudiced by his counsel's failure to present the testimony of these potential defense witnesses. Although Wolfson attached Sleuter's affidavit to his

Section 2255 motion, he did not establish that Sleuter's testimony would have affected the outcome of the trial. The district court correctly determined that Sleuter's testimony would have added nothing to the evidence because other evidence indicated that Wolfson knew Logan used his credit card to travel to Texas to manufacture the drug, "ecstasy." Logan testified that Wolfson gave him the card for the trip because Wolfson owed Logan $700 for back rent. Wolfson identified one uncalled character witness, O'Dell W. Henson, Jr., a professor at the University of North Carolina Medical School, and attached his affidavit to his Section 2255 motion. Henson would have testified only to Wolfson's reputation "for truth and veracity under oath or not." Wolfson failed to demonstrate that Henson's testimony would have affected the outcome of his trial.

Wolfson contends that the district court erred in denying his Section 2255 motion without holding an evidentiary hearing. "Section 2255 provides that a hearing is required `unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" United States v. Plewniak, 947 F.2d 1284, 1290 (5th Cir. 1991), cert. denied, 502 U.S. 1120 (1992). This court reviews such determinations for abuse of discretion. United States v. Bartholomew, 974 F.2d 39, 41 (5th Cir. 1992). The district court did not abuse its discretion in holding that an evidentiary hearing was not necessary because Wolfson's claims could be resolved through review of the record.

AFFIRMED.