IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-6360
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WALLACE MARTIN ALANIZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(M91 132 & M89 347)

(November 19, 1992)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Wallace Alaniz appeals the denial of his 28 U.S.C. § 2255 motion to vacate sentence. Finding no error, we affirm.

I.

Alaniz pleaded guilty to conspiracy to possess with intent to distribute 699 kilograms of marihuana and was sentenced at the top

[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

of the guideline range to 121 months' imprisonment. He appealed, asserting error only in the calculation of his base offense level, and we affirmed. United States v. Alaniz, No. 90-2275 (5th Cir. 1990) (unpublished).

Alaniz moved to vacate his sentence pursuant to section 2255. Appearing pro se, he argued that the district court had failed to admonish him regarding the statutory maximum sentence. See Fed. R. Crim. P. 11(c). The transcript of the rearraignment reflects that, while the district court did ask Alaniz whether he understood that by pleading guilty he would be subject to the maximum sentence of imprisonment available under the statute, the court failed to admonish him that the statutory maximum was 40 years' imprisonment.

Alaniz also argued that he had received ineffective assistance of counsel in that his attorney had induced him to plead guilty by advising him that his sentencing range would be 63 to 78 months. Alaniz specifically alleged that he would not have pleaded guilty if he had known he was going to receive a larger prison sentence than 78 months and that the statutory maximum was 40 years. The government argued, in its answer, that the transcript was "replete with errors" and suggested that the tape recording of the rearraignment revealed that the district court indeed had admonished Alaniz that the statutory maximum was 40 years.[1]

The matter was referred to a magistrate judge, who recommended

[1] In its brief to the district court, the government suggested that the court reporter was "re-transcribing the tape." The record on appeal does not contain a re-transcription of the rearraignment; the supplemental record, however, is an "amended transcript," although it was so certified before Alaniz moved for § 2255 relief.

that the motion be denied because Alaniz's rule 11 claim did not raise a constitutional issue and could not be raised collaterally in a section 2255 motion. The magistrate judge further found that Alaniz had failed to meet his burden with respect to the ineffective assistance claim. In his objections to the findings of the magistrate judge, Alaniz argued for the first time that he had received ineffective assistance of counsel because his lawyer failed to raise the rule 11 issue in his direct appeal. The district court adopted the findings of the magistrate judge and made the additional finding that "a review of the tape of the Defendant's rearraignment does indicate he was warned of the maximum possible punishment of forty (40) years."

II.

Alaniz may not raise an issue for the first time on collateral review without showing both "cause" for his procedural default and "actual prejudice" resulting from the district court's error. United States v. Shaid, 937 F.2d 228, 232 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 978 (1992). While attorney error rising to the level of ineffective assistance can constitute cause, "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." Murray v. Carrier, 477 U.S. 478, 486 (1986). "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in

Strickland v. Washington, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." Murray, 477 U.S. at 488; see Strickland v. Washington, 466 U.S. 668 (1984); see also Coleman v. Thompson, 111 S. Ct. 2546, 2565-68 (1991).

A defendant claiming ineffective assistance must make two showings: (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced him. Strickland, 466 U.S. at 687. A criminal defendant is entitled only to "reasonably effective assistance." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-88.

Alaniz's ineffective assistance claim is based upon the failure of his attorney to raise the plea colloquy issue on appeal.[2] On direct appeal, a complete failure to address a core concern of rule 11 is ground for automatic reversal. United States v. Martirosian, 967 F.2d 1036, 1039 (5th Cir. 1992). If Alaniz can prove he would not have pleaded guilty if he had known the consequences of his plea, he can show he was prejudiced and that his plea was not knowingly and voluntarily entered. See United States v. Scott, 625 F.2d 623, 625 (5th Cir. 1980).

Prejudice is not enough under the Strickland test, however: Alaniz also must show cause, i.e., the constitutionally defective

[2] In this appeal, Alaniz has abandoned his argument that his guilty plea was induced by the false representations of his trial counsel.

performance of counsel. The Supreme Court has admonished that ineffective assistance claims must be viewed without "`the distorting effects of hindsight . . . . [Courts should] evaluate the conduct from counsel's perspective at the time.'" Smith v. Murray, 477 U.S. 527, 536 (1986) (quoting Strickland, 466 U.S. at 689). To establish that counsel's performance falls outside "the wide range of reasonable professional assistance," Alaniz must "show[] that counsel made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 689.

The Court has indicated that the Sixth Amendment "may be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." Murray v. Carrier, 477 U.S. at 496 (citations omitted). The error alleged here, however, does not reach this level. Counsel's failure to appeal at all may constitute ineffective assistance. Evitts v. Lucey, 469 U.S. 387, 394 n.6 (1985). But the contention here is that counsel should have included a particular argument in the appeal he filed.

The Sixth Amendment does not require counsel to raise all colorable or nonfrivolous claims on appeal, even in cases where the defendant has specifically requested that a particular objection be raised. Jones v. Barnes, 463 U.S. 745, 750-54 (1983); Sharp v. Puckett, 930 F.2d 450, 452 (5th Cir. 1991) (citing Hamilton v. McCotter, 772 F.2d 171 (5th Cir. 1985)). Counsel's possibly mistaken decision not to assert the colorable (but by no means clear-cut) rule 11 claim plainly does not warrant relief under

Strickland's deferential standard: "Second-guessing is not the test for ineffective assistance of counsel." King v. Lynaugh, 868 F.2d 1400, 1405 (5th Cir. 1989).

Accordingly, Alaniz is entitled to no relief, and the judgment of the district court is AFFIRMED.