UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

TROY SLAY

Case Nos. 3:08-cv-764-J-20MCR
3:07-cr-0054-HES-MCR
3:04-cr-374-HES-MCR

v.

UNITED STATES OF AMERICA

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. §2255

The United States of America, by and through the undersigned Assistant United States Attorney, files this response in opposition to the defendant's Motion to Vacate, Set Aside or Correct Sentence. A review of the record, summarized below, supports the defendant's claim that he is entitled to a belated direct appeal.

I. PROCEDURAL HISTORY

On March 16, 2007, the defendant was named in a one-count Information charging him with possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). Doc. #1.[1] On April 3, 2007, the defendant entered a plea of guilty to the Information pursuant to the terms of a written plea agreement. Doc. #7. On August 1, 2007, the United States filed a motion for downward departure in recognition of substantial assistance rendered by the defendant,

[1] The docket numbers cited herein refer to the criminal docket in the underlying related criminal case United States of America v.Troy Slay, Case No. 3:07-cr-0054-HES-MCR, which is incorporated herein by reference as a part of the complete record of this case.

and on August 2, 2007, the defendant was sentenced to 78 months' imprisonment.[2] Doc. #18. On August 24, 2007, the defendant filed a "Consent Motion to Amend/Correct Judgment" seeking to credit his sentence for time already served in custody. Doc. #19. The Court denied this motion, stating that calculations concerning credit for time served are properly determined by the Bureau of Prisons. Doc. #23. The Court further stated that the initial judgment entered on August 2 was correct and would remain undisturbed. Id.

On September 8, 2007, the defendant, through counsel, filed a motion to extend time for filing a notice of appeal, and on September 10, 2007, counsel filed a late notice of appeal. Doc. ## 20, 21. That same day, however, the District Court denied the motion, refusing to find that counsel had established circumstances warranting extension of time to file the late appeal based on excusable neglect. Doc. #22. Specifically, the District Court recognized that "although it was dilatory behavior on behalf of counsel rather than the Defendant, which prevented a timely filing, the Supreme Court. . .made it clear that an attorney's acts or omissions are attributable to their client." Doc. #22 at 4-5. The Eleventh Circuit Court of Appeals subsequently dismissed the appeal for lack of jurisdiction. Doc. #28

On October 9, 2007, the defendant, through new counsel, filed a motion for leave to appeal in forma pauperis, which was denied. Doc. #30, 37. The defendant timely appealed this order, but on February 21, 2008, the appeal was dismissed as frivolous.

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[2]At the time the defendant was charged in the instant case, he was on supervised release from his prior conviction in Case No. 3:04-cr-374-HES-MCR. Consequently, the Court held revocation proceedings simultaneously with the sentencing hearing in this case.

See Attachment 1. The defendant moved for rehearing with the appellate court, but subsequently dismissed the appeal consistent with the findings of the Eleventh Circuit's findings. See Attachment 2.

On August 4, 2008, the defendant filed the pending motion pursuant to 28 U.S.C. § 2255, again through counsel, alleging that he was denied his Sixth Amendment right to effective assistance of counsel. Doc. #40.

II. RESPONSE TO FACTUAL ALLEGATIONS AND MEMORANDUM OF LAW

Title 28, United States Code, Section 2255, allows attack on a conviction and sentence on only four grounds: (1) it was imposed in violation of the Constitution or laws of the United States; (2) it was imposed without jurisdiction; (3) it was imposed in excess of the maximum authorized by law; or (4) it is otherwise subject to collateral attack. Only jurisdictional claims, constitutional claims, and claims of error so fundamental as to have resulted in a complete miscarriage of justice warrant relief on collateral attack. E.g., United States v. Addonizio, 442 U.S. 178, 184-86 (1979).

The defendant seeks review of his the advice and counsel of his former attorney, Curtis S. Fallgatter, Esq., for failing to file a timely notice of appeal, and for failing to adequately consult with his client regarding his right to appeal. He claims that this representation fell below the reasonable standard of effectiveness anticipated by the Sixth Amendment. Ineffective assistance of counsel claims are generally reviewable only on collateral attack, pursuant to 28 U.S.C. § 2255. Mills v. United States, 36 F.3d 1052, 1055 (11th Cir. 1994). Claims of ineffective assistance excuse failure to raise other claims if ineffective assistance of counsel is the cause for the failure to raise the claim. Greene v. United States, 880 F.2d 1299, 1305 (11th Cir. 1989).

A. Ineffective Assistance of Counsel - Generally

The Sixth Amendment right to counsel is the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). To prevail on a claim of ineffective assistance of counsel, a defendant must meet the "cause" and "prejudice" requirements established by Strickland v. Washington, 466 U.S. 668 (1984). That is, the defendant must show (1) that his counsel's representation was deficient, and (2) that this deficient representation prejudiced the defendant. Strickland v. Washington, 466 U.S. at 687; see also Baxter v. Thomas, 45 F.3d 1501, 1512 (11th Cir. 1995). A court need not address both components of the inquiry if the defendant makes an insufficient showing on one component. Id.; see also Weeks v. Jones, 26 F.3d at 1037.

In determining whether the first portion of the test has been met, the proper standard is "reasonably effective assistance[,]" or "whether counsel's representation fell below an objective standard of reasonableness." Weeks v. Jones, 26 F.3d 1030, 1036 (11th Cir. 1994). Application of this standard requires that judicial scrutiny of counsel's performance be highly deferential; a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id.

Even if the Court finds some deficiency in the performance of counsel, a defendant is not entitled to relief on ineffective assistance grounds unless the second prong of the Strickland test is met. United States v. Hilliard, 752 F.2d 578, 580 (11th Cir. 1985). Under the second prong, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

When a defendant fails to make a sufficient showing of prejudice, this Court need not even address the adequacy of counsel's performance. Strickland, 466 U.S. at 697; Tafero v. Wainright, 796 F.2d 1314, 1319 (11th Cir. 1986).

Finally, every effort must be made 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. Weeks v. Jones, 26 F.3d at 1036; Diaz v. United States, 930 F.2d 832 (11th Cir. 1991). A court must examine the "totality of the circumstances" in determining whether the counsel a defendant received was constitutionally sufficient and effective. McCoy v. Newsome, 953 F.2d 1252, 1263 (11th Cir. 1992).

B. Specific Claims of Ineffective Assistance

The defendant first claims that counsel failed to file a timely notice of appeal, despite the fact that the defendant's parents, acting on the defendant's behalf, repeatedly contacted his former attorney, Mr. Fallgatter, and requested the filing of the notice of appeal. He also claims that the Court's rejection of the motion for downward departure, which was filed by the United States in recognition of the defendant's substantial assistance, constituted a breach of the plea agreement by the Court. Because the defendant is entitled to an out-of-time appeal, this Court need not consider the defendant's second argument.

1. Application of Roe v. Flores-Ortega, 120 S. Ct. 1029 (2000).

Pursuant to Flores-Ortega, the Court's examination of the performance prong of the Strickland v. Washington, 466 U.S. 668 (1984), test for ineffective assistance of counsel should begin with resolution of the question whether counsel

consulted with the defendant about an appeal. 120 S. Ct. at 1035. If counsel did consult with the defendant, counsel performed in a professionally unreasonable manner only if counsel failed to follow the defendant's express instructions with respect to an appeal. Id.

If counsel did not consult with the defendant, the Court must resolve the question whether counsel had an obligation to consult with the defendant about an appeal. Id. Counsel has a "constitutionally-imposed duty" to consult with the defendant about an appeal when there is reason to think (1) that a rational defendant would want to appeal, or (2) that the particular defendant at issue reasonably demonstrated to counsel that he wanted to appeal. Id. at 1036. In making this determination, courts must take into account all the information counsel knew or should have known at the time. Id. at 1036. A highly relevant factor is whether the conviction resulted from a trial or a plea. Id.

Because the failure to file a notice of appeal results, not in the denial of a fair proceeding, but in the denial of a proceeding altogether, the prejudice prong of the Strickland test for ineffectiveness of counsel in this context requires the defendant to demonstrate that, but for his counsel's omission, there is a reasonable probability that he would have timely appealed. Flores-Ortega, 120 S. Ct. at 1038. If a defendant can make this showing, he is entitled to an out-of-time appeal without regard to the merits of his forfeited appeal.[3] Id. at 1039-40; see also Martin v. United States, 81 F.3d 1083,

[3]Should a defendant be granted an out-of-time appeal because of trial counsel's failure to file a notice of appeal and should appellate counsel determine that no meritorious issue existed to present, appellate counsel would be obligated to file a brief pursuant to Anders v. California, 386 U.S. 738 (1967).

1084 (11th Cir. 1996). (While demonstration of nonfrivolous grounds for appeal may be adequate to show a reasonable probability that a defendant would have timely appealed, failure to demonstrate nonfrivolous grounds for appeal does not foreclose the possibility that a defendant may establish prejudice. See 120 S. Ct. at 1039-40.)

In this case, the defendant has alleged that he directed his counsel to file a notice of appeal. Because of the protracted and somewhat convoluted procedural history surrounding the defendant's sentencing and his various attempts to appeal, there is a sufficient record against which to make a determination that, as found by the District Court, counsel's actions with regard to direct appeal were derelict. For this reason, the United States concedes that the defendant is entitled to an out-of-time appeal.

2. Allegation of Court Error.

The defendant also claims that the District Court erred in failing to properly credit the defendant's substantial assistance at sentencing, which constituted a de facto rejection of the plea agreement. This issue is one that is properly brought on direct appeal. Collateral review pursuant to 28 U.S.C. § 2255 is not a substitute for direct appeal. See Lynn v. United States, 365 F.3d 1225, 1232 (11th Cir. 2004); Burke v. United States, 152 F.3d 1329, 1331-32 (11th Cir. 1998) (citing Sunal v. Large, 332 U.S. 174, 178 (1947)). Nonconstitutional claims can be raised on collateral review only when the alleged error constitutes a " 'fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure.'" Reed v. Farley, 512 U.S. 339, 348 (1994) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

Because the defendant is entitled to a belated appeal, there is no fundamental defect or miscarriage of justice which requires this Court to consider this claim here. Therefore, this claim should be dismissed from the instant proceeding.

III CONCLUSION

Because the record in this case conclusively illustrates that the defendant intended for counsel to file a direct appeal and that counsel failed to do so in a timely manner, the defendant was denied that proceeding due to counsel's error. Therefore, the defendant is entitled to an out-of-time appeal. The defendant's allegation of Court error is properly raised on direct appeal, and this Court should decline to consider it at this time.

Respectfully submitted,

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U.S. v. Troy Slay **Case No. 3:08-cv-764-J-20MCR**

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

William M. Kent, Esq.

I hereby certify that on January 13, 2009, a true and correct copy of the foregoing document and the notice of electronic filing was sent by United States Mail to the following non-CM/ECF participant(s):

N/A

s/ Julie Hackenberry Savell
JULIE HACKENBERRY SAVELL
Assistant United States Attorney