FILED
United States Court of Appeals
Tenth circuit

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ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOE L. BLANTON,

Defendant-Appellant.

Nos. 89-5122
&
89-5195
(D.C. No. 87-CR-118-02
&
D.C. No. 88-CR-061-04)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before LOGAN, SEYMOUR, and TACHA, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cases are therefore ordered submitted without oral argument.

Defendant appeals from two orders of the district court denying his motions for relief filed pursuant to 28 U.S.C. $ 2255.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

In 1987, defendant was indicted in the Northern District of Oklahoma on seven counts of conspiracy to defraud the United States, failing to file currency transaction reports (CTRs), and making false statements in CTRs in violation of 18 U.S.C. §§ 371, 1001, 1002 and 31 U.S.C. §§ 5313, 5322. D.C. No. 87-CR-118-02. (Tulsa case.) In 1988, defendant was indicted in Texas on charges of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and making false statements in violation of 18 U.S.C. §§ 3, 1001, 1002 and 31 U.S.C. §§ 5313, 5322. That case was transferred to Oklahoma pursuant to Fed. R. Crim. P. 20. D.C. No. 88-CR-061-04. (Dallas case.)

In the Tulsa case, defendant pled guilty to one count of conspiracy and one count of making a false statement in a CTR. He was sentenced to five years' imprisonment on count one and three years on count two, to be served consecutively. He was also ordered to make restitution to the Internal Revenue Service in the amount of $7,280.00, to pay one half the cost of prosecution in the amount of $3,264.66, and to pay a special assessment of $50.00 on each count.

In the Dallas case, defendant pled guilty to one count of conspiracy to defraud the United States and was sentenced under the Sentencing Reform Act of 1984, 28 U.S.C. § 994(a)(Sentencing Guidelines) to sixty months' imprisonment and three years' supervised release to be served concurrently with count two in the Tulsa case. He was also ordered to pay a fine of $12,500.00 and a special assessment of $50.00. Defendant took no appeal from either conviction.

In his first § 2255 motion, defendant raised eleven issues:

1. The court erred in imposing a three-year term of supervised release in the Dallas case because the Supreme Court in Bifulco v. United States, 447 U.S. 381 (1980) held that a special parole term cannot be imposed for conspiracy to commit drug offenses under 29 U.S.C. § 846. Defendant acknowledged that he was convicted under 18 U.S.C. § 371, but argued that the two sections are worded "basically the same."

2. The court violated the ex post facto clause by applying the Sentencing Guidelines to his sentence in the Dallas case because he was not personally involved in the Texas conspiracy after March 11, 1986.

3. The court erred in finding him guilty of aiding and abetting in count two of the Tulsa case because the indictment did not allege the elements necessary for that charge.

4. The indictment in the Tulsa case was inadequate to inform him of the charges to which he pled thereby subjecting him to double jeopardy.

5. The court did not strictly comply with the mandates of Fed. R. Crim. P. 11 because it failed to establish that he fully understood the charges.

6. The court did not strictly comply with the mandates of Fed. R. Crim. P. 11 because the court did not determine either that he understood what the alleged conspiracy was or that he had knowledge of or furthered the conspiracy.

7. Defendant could not be convicted of conspiracy because he only conspired with a government informant who cannot be a true coconspirator.

8. Defendant was denied due process and equal protection because the Presentence Investigation Report (PSI) contained inaccuracies.

9. Defendant was denied "reasonably effective assistance of counsel" because counsel did not correct court records to show that his name is Joe not Joseph, did not listen to ninety-six tape recordings of conversations between him and his codefendants and "failed to make a fact-finding determination on a 3½ hour video of a meeting held in Dallas, Texas, between defendant and a coconspirator," had been drinking when he advised defendant to enter guilty pleas, failed to conduct a proper investigation which would have established his innocence, and failed to present his objections to the PSI.

10. The Sentencing Guidelines are unconstitutional.

11. Defendant was entrapped.

The district court denied defendant's motion holding that grounds three through eleven were precluded because defendant had failed to raise them on direct appeal:

> Section 2255 may not be used as a substitute for a direct appeal. It is only where the judgment was rendered without jurisdiction, the sentence imposed was not authorized by law, or there was such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, that a motion to vacate will lie under § 2255.

District Court's order of July 22, 1989, at 3, quoting Peoples v. United States, 365 F.2d 284, 285 (10th Cir. 1966).

As to defendant's first two grounds, the court held that the Sentencing Guidelines were properly applied because the conspiracy continued beyond their enactment date. Therefore, sentencing under the Sentencing Guidelines did not violate the ex post facto clause. The court also held that under the Sentencing Guidelines the imposition of supervised release was mandatory.

On appeal, defendant argues:

1. He was entrapped.

2. He could not be convicted for conspiracy because he only conspired with a government informant who is not a "true conspirator."

3. The trial court erred in finding him guilty of aiding and abetting in count two of the Tulsa case.

4. The indictment was inadequate to inform him of the charges to which he pled and to provide him with safeguards against double jeopardy.

5. He was denied due process and equal protection because the PSI contained false allegations.

6. He was denied effective assistance of counsel because (in addition to the issues raised to the district court) he instructed counsel to file a timely notice of appeal which counsel agreed to do but never did.

7. Pursuant to Fed. R. Crim. P. 32(d), he has the right to withdraw his guilty plea.[1]

Generally, we will not consider claims raised for the first time on appeal. See Baker v. Penn Mut. Life Ins. Co., 788 F.2d 650, 663 (10th Cir. 1986). However, here, defendant has raised on appeal a potential claim of serious constitutional magnitude. Defendant argues that he instructed counsel to file a timely notice of appeal which counsel agreed to do but never did.

Even though defendant pled guilty, he is still entitled to a direct appeal with regards to the few issues he could have raised on direct appeal. See Abels v. Kaiser, 913 F.2d 821 (10th Cir. 1990). When "counsel's failure . . . essentially waived respondent's opportunity to make a case on the merits; . . . it is difficult to distinguish respondent's situation from that of someone who had no counsel at all." Evitts v. Lucey, 469 U.S. 387, 395 n.6 (1985). In such cases, prejudice is presumed. See generally Strickland v. Washington, 466 U.S. 668 (1984). See also Estes v. United States, 883 F.2d 645, 648 (8th Cir. 1989)("A criminal defendant is entitled to effective assistance of counsel on a first appeal as of right. . . . [C]ounsel's failure to file a notice of appeal when so instructed by the client constitutes ineffective assistance of counsel for purposes of section 2255."); Gray v. United States, 834 F.2d 967, 967 (11th Cir. 1987)("[I]f an

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[1] We note that issues defendant raised to the district court but did not brief on appeal are considered waived. See United States v. Jenkins, 904 F.2d 549, 554 n.3 (10th Cir. 1990)(citing United Transp. Union v. Dole, 797 F.2d 823, 827 (10th Cir. 1986)); Abercrombie v. City of Catoosa, 896 F.2d 1228, 1231 (10th Cir. 1990).

attorney fails to file an appeal after the defendant requests him to do so, the defendant was denied effective assistance and is entitled to an out-of-time appeal, without any showing of likelihood of prevailing on the appeal."); Ferguson v. United States, 699 F.2d 1071, 1072 (11th Cir. 1983)("[A]n attorney's total failure to file an appeal after being instructed to do so will always entitle the defendant to an out-of-time appeal, regardless of the defendant's chances of success.").

Therefore, we must remand this case to the district court for consideration of this claim. We have previously noted that the

> question of whether [defendant's] counsel was constitutionally ineffective in failing to file a timely notice of appeal depends upon his interaction with [defendant]. If defense counsel explained the pros and cons of an appeal to [defendant] and [he] made a knowing and intelligent choice not to appeal, counsel's failure to timely file could not have violated [defendant's] due process rights. If counsel did not adequately advise his client or if he ignored his client's wishes, the failure to file an appeal may well have denied [defendant] due process of law.

Hannon v. Maschner, 845 F.2d 1553, 1556 (10th Cir. 1988)(citation omitted).

Should defendant prevail on this issue, he shall be granted an out-of-time appeal. See Bell v. Lockhart, 795 F.2d 655, 658 (8th Cir. 1986)(state court's review of defendant's post-conviction petition was not a "constitutionally adequate substitute for a direct appeal."); cf. United States v. Frady, 456 U.S. 152, 164-65 (1982)(The same standard of review does not apply to section 2255 motions as applies on direct appeal.).

Should defendant not prevail, the district court should then consider whether defendant deliberately bypassed a direct appeal.

The district court correctly held that a section 2255 motion is not a substitute for a direct appeal. "[A] final judgment commands respect. For this reason, we have long and consistently affirmed that a collateral challenge may not do service for an appeal." Frady, 456 U.S. at 165.

However, "failure to take a direct appeal from conviction does not deprive a federal post-conviction court of power to adjudicate the merits of constitutional claims; the question rather is whether the case is one in which refusal to exercise that power would be appropriate." Kaufman v. United States, 394 U.S. 217, 220 n.3, 227 n.8 (1969).

The district court must make this determination in the first instance. The Supreme Court has held that constitutional claims should not be denied solely because they should have been raised on direct appeal. Kaufman, 394 U.S. at 223-24. However, the Court implied that constitutional claims should not be decided when direct appeal procedures were deliberately bypassed. Id. at 220 n.3. See generally United States v. Spawr Optical Research, Inc., 864 F.2d 1467 (9th Cir. 1988), cert. denied, 110 S. Ct. 51 (1989); Cheek v. United States, 858 F.2d 1330, 1335 (8th Cir. 1988)(deliberate bypass operates as a waiver of defendant's right to challenge conviction through section 2255 proceeding).

No. 89-5195

In this section 2255 motion, defendant alleged that his PSI contained mistakes. The district court entered a minute order denying the motion for the same reasons stated in its order denying defendant's first section 2255 motion.

On appeal, defendant argues that there was an unfair disparity in the sentencing between him and his codefendant in the Tulsa case because his codefendant was only sentenced to ninety days in jail plus five years' probation. Defendant also argues that the "district court failed to consider other sentences imposed on other criminals for commission of the same crime in other jurisdictions" in violation of his eighth amendment rights.

We will not consider defendant's appellate issues because he did not raise them initially to the district court. See Baker, 788 F.2d at 663. We also note that the issue raised to the district court was raised in No. 89-5122 and is, therefore, a successive petition. "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." 28 U.S.C. § 2255.

The judgment of the United States District Court for the Northern District of Oklahoma in No. 89-5122 is VACATED, and the case is REMANDED for further proceedings in accordance with this order and judgment. The judgment of the district court in No. 89-5195 is AFFIRMED.

ENTERED FOR THE COURT
PER CURIAM