UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 07-CV-11715-RGS

WILLIAM FELIZ

v.

UNITED STATES OF AMERICA

MEMORANDUM AND ORDER ON
RESPONDENT'S MOTION TO DISMISS

March 26, 2008

STEARNS, D.J.

William Feliz, a *pro se* litigant, brought this petition pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. Feliz claims ineffective assistance of counsel on five grounds: (1) that prior to trial, his counsel did not advise him of the law as it applied to the facts of his case; (2) that counsel did not fully explain the five safety-valve criteria, and particularly the necessity that Feliz make a full disclosure to the prosecution of his involvement in the underlying conspiracy; (3) that counsel slept through critical portions of the trial; (4) that counsel failed to fully investigate his history of alcohol abuse and bring it to the court's attention; and (5) that counsel should have been more diligent in demanding impeachment evidence from the government that might have undermined the credibility of one of its key witnesses.[1] The United States argues that Feliz's claims are meritless and that the conviction and sentence should be summarily affirmed.

BACKGROUND

[1]Feliz also argues that if no single ground is a sufficient basis for overturning his conviction, the five grounds, taken collectively, amount to a sufficient showing of constitutional error.

In October of 2004, Feliz was charged in a superseding indictment with one count of conspiring to possess and distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The government extended a plea offer to Feliz, which he declined, over the advice of his attorney.[2] On November 8, 2004, after a five-day trial, a jury returned a guilty verdict. The jury also determined by special verdict that Feliz was responsible for conspiring to distribute no less than 700 grams of heroin.

The court sentenced Feliz on February 2, 2005. The principal issue at the sentencing hearing was whether Feliz merited a two-level reduction in his Guidelines offense level under the so-called "safety-valve," 18 U.S.C. § 3553(f)(1)-(5). Without the reduction, the advisory Guidelines sentencing range was 97-121 months; with the reduction the range was 78-97 months. At the hearing, the government highlighted inconsistencies between Feliz's safety-valve proffer and facts that had come to light during the trial. For example, Feliz had failed to disclose the second of three heroin transactions in which he had been involved, and had substantially minimized his role in the conspiracy. The court agreed with the government that Feliz did not qualify for the safety-valve reduction, and sentenced him to a 97-month term of imprisonment.

Feliz's direct appeal was rejected by the First Circuit. See United States v. Feliz, 453 F.3d 33, 36-37 (1st Cir. 2006). Feliz argued on appeal that he had substantially complied with the prerequisites of the safety-valve and therefore should have received the

[2]Feliz admits that counsel informed him, prior to trial, of the probable sentencing range were he to be convicted and warned him that the probability of a conviction was very high.

benefit of a reduced sentence.[3] The Court of Appeals held that Feliz had failed to satisfy the fifth requisite of full disclosure and affirmed Feliz's sentence. Id. On September 4, 2007, Feliz filed this petition.

DISCUSSION

Section 2255 is not a surrogate for a direct appeal, but rather provides post-conviction relief in four limited instances: "[I]f the petitioner's sentence (1) was imposed in violation of the Constitution, or (2) was imposed by a court that lacked jurisdiction, or (3) exceeded the statutory maximum, or (4) was otherwise subject to collateral attack." David v. United States, 134 F.3d 470, 474 (1st Cir. 1998). "The catch-all fourth category includes only assignments of error that reveal 'fundamental defects' which, if uncorrected, will 'result in a complete miscarriage of justice,' or irregularities that are 'inconsistent with the rudimentary demands of fair procedure.'" Id., quoting Hill v. United States, 368 U.S. 424, 428 (1962). See also Moreno-Morales v. United States, 334 F.3d 140, 148 (1st Cir. 2003). A cognizable section 2255 claim, unless it is constitutional or jurisdictional in nature, must reveal "exceptional circumstances" compelling redress. David, 134 F.3d at 474.

A petitioner bears the burden of demonstrating an entitlement to relief. Mack v. United States, 635 F.2d 20, 26-27 (1st Cir. 1980). He has no per se right to an evidentiary hearing. See Dziurgot v. Luther, 897 F.2d 1222, 1225 (1st Cir. 1990). "Thus, a petition can be dismissed without a hearing if the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because

[3]Feliz also contended that the district court misunderstood the implications of the holding of United States v. Booker, 543 U.S. 220 (2005). The Court of Appeals found no error. Feliz does not pursue this argument further in his petition.

'they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" Id., quoting Myatt v. United States, 875 F.2d 8, 11 (1st Cir. 1989).

Sixth Amendment Ineffective Assistance of Counsel

The Sixth Amendment provides that: "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." The right to the assistance of counsel, includes the right that it be effective. See Strickland v. Washington, 466 U.S. 668, 686 (1984). To succeed on an ineffective assistance claim, a defendant must by a preponderance of the evidence meet two tests.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. A defendant bears a "heavy" burden of proof. See Argencourt v. United States, 78 F.3d 14, 16 (1st Cir. 1996) ("[A]rguments are evaluated against the heavy burden of proof the law imposes."). While a petitioner must prove both prongs of the test, "a reviewing court need not address both requirements if the evidence as to either is lacking." Sleeper v. Spencer, 510 F.3d 32, 39 (1st Cir. 2007). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland, 466 U.S. at 697.

In order to satisfy the first prong of the Strickland test, a petitioner must prove that counsel's performance was "so inferior as to be objectively unreasonable." United States v. McGill, 11 F.3d 223, 226 (1st Cir. 1993). Counsel's conduct is considered reasonable

if it falls "'within the range of competence demanded of attorneys in criminal cases.'" United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978), quoting McMann v. Richardson, 297 U.S. 759, 770-771 (1970). "In making this determination, 'judicial scrutiny of counsel's performance must be highly deferential.'" Bucuvalas v. United States, 98 F.3d 652, 658 (1st Cir. 1993), quoting Strickland, 466 U.S. at 689. As the Supreme Court has emphasized, the "Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 8 (2003).

To establish the prejudice necessary to satisfy the second prong of Strickland, the "defendant must show that, but for counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different." Sleeper, 510 F.3d at 39, citing Wiggins v. Smith, 539 U.S. 510, 537 (2003). "A reasonable probability is one sufficient to undermine confidence in the outcome." Dugas v. Coplan, 506 F.3d 1, 9 (1st Cir. 2007) (citations omitted). While a defendant need not prove that counsel's errors more likely than not affected the verdict, it is "not enough to show that the errors had 'some conceivable effect on the outcome.'" Gonzalez-Soberal v. United States, 244 F.3d 273, 278 (1st Cir. 2001), quoting Strickland, 466 U.S. at 693.

Plea Negotiations

Feliz alleges that counsel failed to adequately explain the elements of the offense, the facts as they related to the charge, and whether, in counsel's professional opinion,

Feliz's conduct was legally culpable.[4] Since being incarcerated, Feliz claims that inmates "versed in criminal law" have enlightened him as to the law of conspiracy. Feliz argues that because counsel failed to impress upon him the breadth of the crime and the wide latitude the government would be permitted in offering evidence at trial, he was unable to make an informed decision about the government's plea offer.[5]

To succeed on this claim, Feliz must show that but for this "error" the outcome would have been different; in other words, he must show that if better instructed in the law he would have pled guilty. See Colon-Torres, 382 F.3d at 86. Feliz's argument is flawed in several respects, the most significant of which was his rejection of his counsel's advice to accept the plea offer. As Feliz admits, counsel told him that there was a high probability that he would be convicted at trial. Feliz made a personal decision to take his chances with the jury. The gamble failed.

Failure to Describe the Five Safety-Valve Crieria

Feliz claims that because counsel did not fully explain the five factors triggering safety-valve eligibility, he did not understand the importance of making a full, complete,

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[4]As proof of his misunderstanding of the law, Feliz offers a letter from counsel. In the letter, counsel explains that the evidence was sufficient to "legally find that [Feliz was] involved in the distribution of drugs," even though he might not have fit the vernacular description of a "drug dealer." It is not clear why Feliz believes that this letter confirms his lack of understanding of the nature of the charge.

[5]While Feliz claims the government offered him a maximum sentence of 87 months, the draft of the unexecuted agreement suggests that this is inaccurate. The plea agreement offered an initial forecast of a Guidelines sentencing range of 70-87 months (or 57-71 months if the safety-valve applied). The government, however, reserved the right to argue for a higher drug weight, which would have resulted in a Guidelines sentence of 87-108 months (or 70-87 months with the safety-valve reduction).

and truthful proffer. "[T]he fifth factor requires that 'the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.'" Feliz, 453 F.3d at 35, quoting 18 U.S.C. § 3553(f)(5).

Feliz's claim is barred because he cannot show prejudice. On direct appeal, Feliz argued that he had truthfully responded to all questions put to him and that the omissions that resulted from the government's failure to ask him the right questions should not be held against him. See Feliz, 453 F.3d at 36. The argument ignores the fact that the safety-valve release places the burden on a defendant to make a full, complete, and truthful disclosure. It does not require the government to correctly guess what the defendant might know.[6]

Counsel's Conduct During Trial

Feliz claims that his counsel "fell asleep during the testimony of witnesses critical to the government's case-in-chief against [him]." Feliz states that he voiced his concern to his interpreter and that his wife also observed counsel nodding asleep.[7] Feliz's claim is belied by the court's memory of counsel's performance at trial and by a review of the trial transcript. The transcript confirms that counsel was active throughout the trial, requesting that witnesses speak up, objecting to questions posed by the government, and conducting

[6]Even when asked direct questions, Feliz minimized his role in the offense. He concedes that there were material variances between his proffer and the testimony that emerged at trial. See id. at 36-37.

[7]Feliz asserts that at one point during the trial he had to jostle counsel to wake him up.

lengthy and thorough cross-examination.[8] Even assuming that his counsel was asleep during portions of the trial, Feliz must show "how specific errors of counsel undermined the reliability of the finding of guilt." United States v. Cronic, 466 U.S. 648, 659 (1984). Feliz has failed to cite any error of counsel that might be attributed to inattention or Morphean bliss.[9]

Sentencing

Feliz claims that counsel's failure to inquire about his history of alcohol abuse amounted to ineffective assistance. Feliz argues that had counsel asked the right questions, he could have advocated for a judicial recommendation for an assignment to the Residential Drug Abuse Program (RDAP), making Feliz eligible for the sentence-reduction available to RDAP participants. See 18 U.S.C. § 3621(e)(2)(B). Feliz alleges that he had made counsel aware of his hospitalization for alcohol poisoning in February of 2004,[10] but that counsel made no further inquiry. Feliz's claim of alcohol dependency

[8]It is the court's practice to stop the proceeding and admonish counsel if it observes a lawyer sleeping. No such instance appears in the transcript.

[9]Feliz cites Javor v. United States, for the proposition that sleeping by counsel during a criminal trial is per se prejudicial. 724 F.2d 831, 833 (9th Cir. 1984). Other courts disagree. See Tippins v. Walker, 77 F.3d 682, 686 (2d Cir. 1996) ("We are reluctant to extend a rule of *per se* prejudice in any new direction. Ordinarily episodes of inattention or slumber are perfectly amenable to analysis under the Strickland prejudice test."). See also Prada-Cordero v. United States, 95 F. Supp. 2d 76, 81-82 (D.P.R. 2000). The Prada-Cordero court noted that it is not uncommon for attorneys to doze off during long trials, that the appearance of sleep may actually be a tactic to downplay the importance of damaging testimony, and that a per se rule would provide unscrupulous attorneys with too easy a means of annulling an unfavorable trial result. 95 F. Supp. 2d at 81-82.

[10]Feliz claims that this incident was the second time in three years that he had been hospitalized as a result of alcohol abuse.

is contradicted by what he told the Probation Office prior to sentencing. According to the Presentence Report (PSR), "[Feliz] reported that he occasionally drinks beer and disavowed any use of illegal narcotics." No evidence offered at trial even inferentially suggested that Feliz had a history of alcoholism.

Brady/Giglio Violation

Feliz asserts that his counsel failed to demand that the government produce essential exculpatory evidence. See Brady v. Maryland, 373 U.S. 83, 87 (U.S. 1963).[11] While in prison, Feliz claims that he learned that a co-conspirator who testified for the government, Jorge Ariel Abreu, made contradictory statements about another inmate's involvement in an unrelated crime. That unnamed inmate allegedly reached a favorable plea agreement with the government because of its wariness of Abreu's reliability. In Feliz's view, this newly discovered "exculpatory" information entitles him to an evidentiary hearing to determine whether Abreu might have made similar untrustworthy statements about his case.

Under section 2255 a defendant is not entitled to an evidentiary hearing as a matter of right. See David, 134 F.3d at 477. In determining whether to hold a hearing a court must take defendant's factual statements as true, "but the court need not give weight to conclusory allegations, self-interested characterizations, discredited inventions, or opprobrious epithets." McGill, 11 F.3d at 225; see David, 134 F.3d at 478 (petitioner must

[11]Brady holds "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id., 373 U.S. at 87.

proffer, at the very least, "[w]ho, what, when, where, and how details"), see also Machibroda v. United States, 368 U.S. 487, 495 (U.S. 1962) (hearing warranted when an "affidavit contain[s] charges which are detailed and specific"). Here, Feliz has not provided the critical details. He states only that an unnamed New York defense attorney ferreted out the contradictions in Abreu's testimony in another case. However, Feliz does not identify the nature of the alleged irregularities, when or where such statements were made, the case which they related to, or how the statements might relate to his case.

Cumulative Impact Claim

As discussed above, because Feliz has failed to establish even a single colorable section 2255 basis for relief, there is no viable claim of cumulative prejudice.

ORDER

For the foregoing reasons, Feliz's motion to vacate his sentence is DENIED. The petition is DISMISSED with prejudice. The Clerk may now close the case.

SO ORDERED

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE