United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3046 **September Term, 2017**

FILED ON: JUNE 5, 2018

UNITED STATES OF AMERICA,
APPELLEE

v.

DUSTIN XAVIER WILKINS, ALSO KNOWN AS DXAVIER WILKINS, ALSO KNOWN AS XAVIER WILKINS, ALSO KNOWN AS CHOSEN WILKINS,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cr-00267-1)

Before: SRINIVASAN, MILLETT, and KATSAS, *Circuit Judges*.

J U D G M E N T

The court considered this appeal on the record from the district court and on the briefs and oral arguments of the parties. The court has given the issues full consideration and determined that they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the judgment of the district court be **AFFIRMED**.

In 2014, Dustin Wilkins pleaded guilty to one count of wire fraud pursuant to a plea agreement with the government. Wilkins admitted to committing debit card fraud at various hotels and other businesses in the Washington, D.C., area. The district court sentenced him to 33 months of imprisonment and ordered him to pay $106,668.29 in restitution.

Wilkins later filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255. He argued principally that his conviction and sentence should be vacated because he received ineffective assistance of counsel in connection with his plea agreement and sentencing proceeding. After holding a two-day evidentiary hearing, the district court rejected Wilkins's arguments and denied his § 2255 motion. *United States v. Wilkins*, No. 13-cr-267, 2017 WL 2458904 (D.D.C. June 6, 2017). We affirm.

I.

Wilkins's first two arguments center on whether he received ineffective assistance of counsel in violation of the Sixth Amendment. To prevail on a claim of ineffective assistance of counsel, Wilkins must demonstrate that his "counsel's performance was deficient" and that "the deficient performance prejudiced [his] defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In the guilty plea context, prejudice requires the defendant to show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In the sentencing context, the defendant must show that there is a reasonable probability that, but for his counsel's errors, he would have received a lower sentence. *See Glover v. United States*, 531 U.S. 198, 203-04 (2001).

A.

Wilkins contends that his initial attorney, Anthony Miles, was ineffective in advising him concerning his plea agreement in two respects. He argues, first, that Miles should have conducted further investigation of certain loss amounts contained in his plea agreement, including losses that were outside the statute of limitations, *see* 18 U.S.C. § 3282(a), such that the government might not have been able to prosecute Wilkins for those charges. He argues, second, that Miles should have sought an exception in the plea agreement from the general provision barring arguments for downward departures at sentencing, so that Wilkins later could have argued for a downward departure under § 5K2.23 of the sentencing guidelines. That provision allows a sentencing court to depart downward if the defendant recently finished serving a term of imprisonment for committing an offense relevant to the offense of conviction. U.S.S.G. § 5K2.23.

We conclude, like the district court, that Wilkins has not demonstrated that any deficiency in Miles's performance prejudiced Wilkins. To demonstrate prejudice based on his attorney's failure to adequately advise him about the plea agreement, Wilkins must show that he would have rejected the plea agreement if Miles had told him either that certain loss amounts listed in the plea agreement were outside the statute of limitations or that the agreement foreclosed his ability to argue for the downward departure at sentencing. Wilkins has not shown that such information would have changed his mind with respect to the plea.

Initially, we note that Wilkins has offered no specific evidence suggesting that he would not have accepted the agreement had he been better informed. Although Wilkins equivocated at various points before accepting the plea, he ultimately told Miles that he was eager to take responsibility and plead guilty. (To the extent Wilkins's testimony contradicted the notion that he wanted to plead guilty, the district court rejected that testimony as non-credible, and Wilkins does not challenge that credibility determination on appeal.)

In the absence of specific evidence of Wilkins's intentions, we are left to reconstruct the circumstances facing Wilkins when he decided to accept the plea agreement. On that score, we see no indication that different advice about the loss amounts or potential arguments at sentencing would have led Wilkins to reject the plea agreement.

For one thing, the evidence the government had gathered of Wilkins's offenses was substantial, including "business records documenting the charges that Wilkins incurred and witness statements identifying Wilkins as the perpetrator." J.A. 834. A trial thus presented little hope of an acquittal.

For another, if Wilkins had gone to trial, the government presumably would have sought convictions on the other counts in the indictment, including the conspiracy count. Had the government obtained a conviction on the conspiracy count, it would have been able to hold Wilkins responsible at sentencing for those financial losses in the plea agreement that may have fallen outside the statute of limitations, assuming those losses were incurred as part of the same conspiracy. *See Grunewald v. United States*, 353 U.S. 391, 396-97 (1957). And even if the government had not sought and obtained a conspiracy conviction at trial, the government would have been able to hold Wilkins accountable at sentencing for the losses outside the statute of limitations so long as they were part of the same "course of conduct or common scheme or plan" as the offense of conviction. *See United States v. Wishnefsky*, 7 F.3d 254, 256-57 (D.C. Cir. 1993).

Finally, had Wilkins gone to trial, the government indicated that it would have sought a higher sentence. The government specifically suggested that it would introduce evidence supporting a higher loss amount that would increase Wilkins's sentencing guidelines range. Miles was also concerned, reasonably, that if Wilkins had gone to trial, the government would have argued for a role enhancement for Wilkins's alleged major role in the conspiracy, declined to recommend a downward departure for acceptance of responsibility, and argued for a sentence at the high end of the guidelines range. Put together, the low probability of acquittal at trial and the sentencing risks of going to trial belie Wilkins's assertion that he would have rejected the plea agreement had he been more fully informed.

Wilkins perhaps could have argued in his § 2255 motion that Miles was constitutionally deficient in advising him more generally to accept the plea agreement, if it were the case that he could have received a better sentence at trial than the one he received under the plea agreement. It is conceivable, for example, that even with the various additional charges the government would have pursued at trial and enhancements the government would have sought at sentencing, Wilkins still could have been better off going to trial and maintaining the ability to argue for departures from the sentencing guidelines, like the § 5K2.23 downward departure. Insofar as that argument might have had merit, however, Wilkins bore the burden of developing it in the district court, and he did not do so.

B.

Next, Wilkins argues that his subsequent counsel, Mark Carroll, was ineffective at sentencing because he failed to argue for a variance based on § 5K2.23 of the sentencing guidelines. Section 5K2.23, as noted, allows a district court to depart downward from the otherwise applicable sentencing guidelines if the defendant has served a term of imprisonment for committing an "offense that is relevant conduct to the instant offense of conviction" under § 1B1.3. U.S.S.G. §§ 5K2.23, 5G1.3. "Relevant conduct" under § 1B1.3 refers to the defendant's conduct

considered in determining the appropriate sentencing guidelines range. As relevant here, an offense may be considered relevant conduct under § 1B1.3 if it is "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). The purpose of § 5K2.23 is to allow courts to depart downward from the sentencing guidelines when the defendant happens to have already served a term of imprisonment for a past offense, but if the defendant had not finished serving the time for that offense, the sentences for the past and present offenses would have run concurrently under a separate guidelines provision, § 5G1.3. *See United States v. Gonzalez-Murillo*, 852 F.3d 1329, 1338-39 (11th Cir. 2017).

Wilkins argues that Carroll should have argued for a variance from the guidelines range by reference to § 5K2.23. He contends that a fraud conviction he received in Virginia in 2010 was part of the same "scheme or plan" as the wire fraud conviction in this case, because it involved one of the same debit cards. Wilkins asserts that, because his sentence in this case would have run concurrently with his sentence for the 2010 Virginia offense if he had not finished serving his prison term for that offense, the § 5K2.23 departure would apply. Wilkins argues that, although the plea agreement foreclosed his ability to argue for a departure, Carroll could and should have invoked the departure provision in arguing for a variance.

We agree with the district court that Carroll was not deficient in failing to argue for a variance based on § 5K2.23. That departure provision applies only to offenses that have been considered as "relevant conduct" in determining a defendant's sentencing guidelines range. Under the plea agreement, the 2010 Virginia conviction was included in Wilkins's criminal history, not as relevant conduct for purposes of calculating his guidelines range. Section 5K2.23 therefore would not have applied.

It is true, as Wilkins points out, that Carroll might have argued for a below-guidelines sentence by analogy to § 5K2.23, even if the provision did not apply on its own terms. Had the court been receptive to the concerns underlying § 5K2.23, Wilkins might have received the benefit of a downward variance. We conclude that, although Carroll could have made such an argument, Carroll's failure to do so was not constitutionally deficient performance. The application of a variance based on the spirit of § 5K2.23 would have been discretionary several times over. The underlying downward departure is discretionary. U.S.S.G. § 5K2.23 ("A downward departure *may* be appropriate . . . .") (emphasis added). Variances generally are left to the considered discretion of the district court. *Gall v. United States*, 552 U.S. 38, 51 (2007). And this variance argument would have been particularly discretionary, because, as noted, the departure provision did not apply on its own terms.

Additionally, pursuing a § 5K2.23 variance argument was not without risks. It would have drawn attention to the fact that Wilkins had committed the offense in this case soon after being released from state custody for having committed a similar offense. Indeed, in its sentencing memorandum, the government highlighted Wilkins's recent conviction as an aggravating factor supporting its sentencing recommendation. For those reasons, under our "highly deferential" standard of review, *Strickland*, 466 U.S. at 689, we conclude that Carroll's failure to make the variance argument was not deficient performance.

At various points in his briefing, Wilkins briefly suggests that Carroll was ineffective because he did not seek to change Wilkins's criminal history score to remove the 2010 Virginia conviction. The removal of that conviction would have reduced his criminal history category, thereby lowering the applicable sentencing guidelines range. But that argument potentially would have been barred by Wilkins's plea agreement, which did not permit Wilkins to argue for a different guidelines range during sentencing proceedings. Even if the argument were not foreclosed, Wilkins offers no indication that the probation office or the court would have accepted a change to the criminal history score listed in the plea agreement. Carroll was therefore not constitutionally ineffective in failing to make that argument.

II.

Finally, Wilkins argues that we should remand the case to the district court to correct certain errors in the court's restitution order. We reject that claim because challenges to restitution orders are not cognizable under 28 U.S.C. § 2255. Section 2255 allows a "prisoner in custody" who claims "the right to be released" to move the court to "vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a). A claim disputing a restitution order in the circumstances here does not challenge any aspect of the government's custody over the defendant, and therefore may not be brought under § 2255. *See, e.g.*, *Mamone v. United States*, 559 F.3d 1209, 1211 (11th Cir. 2009); *Kaminski v. United States*, 339 F.3d 84, 87 (2d Cir. 2003); *United States v. Thiele*, 314 F.3d 399, 401 (9th Cir. 2002).

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Pursuant to D.C. CIR. R. 36(d), this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(b).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk