United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3035 **September Term, 2018**

FILED ON: SEPTEMBER 28, 2018

UNITED STATES OF AMERICA,
APPELLEE

v.

ANTOINE MILLER,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cr-00072)

Before: TATEL, *Circuit Judge*, and EDWARDS and GINSBURG, *Senior Circuit Judges*.

J U D G M E N T

The court considered this appeal on the record from the United States District Court for the District of Columbia and on the briefs and oral argument of the parties. The court has determined that the issues do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that Appellant's conviction be **AFFIRMED**. We review a district court's legal conclusion that no Fourth Amendment seizure occurred de novo. *See, e.g.*, *United States v. Jordan*, 951 F.2d 1278, 1281 (D.C. Cir. 1991). At the same time, however, we review factual findings only for clear error and will affirm a district court's denial of a motion to suppress "so long as any reasonable view of the record supports its denial." *United States v. Miller*, 799 F.3d 1097, 1101 (D.C. Cir. 2015) (quoting *United States v. Patrick*, 959 F.2d 991, 997 n.8 (D.C. Cir. 1992)).

In this case, the district court's determination that Miller was not seized when an officer exited the vehicle and questioned him is consistent with our precedents. In *United States v. Gross*, for example, we found no seizure when officers followed the defendant in a police car and asked him questions. 784 F.3d 784, 787-88 (D.C. Cir. 2015). We similarly found the encounter in *United States v. Goddard*, 491 F.3d 457 (D.C. Cir. 2007), did not constitute a seizure. There, four uniformed policemen drove their car into a gas station, parked near a group

of men, got out of the car, and approached the men. *Id.* at 462. Here, the record reveals that the officers neither made physical contact with Miller before arresting him nor used language or tones of voice indicating that he was required to comply. *See United States v. Castle*, 825 F.3d 625, 632-33 (D.C. Cir. 2016) (listing circumstances indicating a seizure, including touching the suspect and using language or a tone of voice compelling compliance). Although Miller may have felt compelled to answer the officer's questions, his subjective beliefs are not relevant to this issue. *See United States v. Carrasquillo*, 877 F.2d 73, 76 (D.C. Cir. 1989). Therefore, on the record at hand, there is no permissible ground for this court to disturb the district court's ruling that Miller was not seized. It is

FURTHER ORDERED that Appellant's sentence be **VACATED** and **REMANDED.** The district court denied Appellant's request for an acceptance of responsibility adjustment at least in part due to its mistaken belief that Miller could have pleaded guilty to the indictment and still gone on to appeal the court's suppression ruling. As Appellant correctly points out and as the Government concedes, however, an unconditional guilty plea would not have preserved his appeal rights. *See Class v. United States*, 138 S. Ct. 798, 806 (2018). The government has the burden to show harmless error in this circumstance and it has failed to do so. *United States v. Linares*, 367 F.3d 941, 952 (D.C. Cir. 2004). Remand is therefore required "so the district court may clarify the basis or bases for, and if necessary reconsider, its conclusion" that Miller "did not accept responsibility for his crimes." *United States v. Saani*, 650 F.3d 761, 770 (D.C. Cir. 2011). On remand, the district court should evaluate Miller's request for an acceptance of responsibility adjustment by considering the factors and exceptions listed in the Application Notes to § 3E1.1 of the Sentencing Guidelines. *See In re Sealed Case*, 350 F.3d 113, 117 (D.C. Cir. 2003). It is

FURTHER ORDERED and **ADJUDGED** that the Appellant's claim of ineffective assistance of counsel be **REMANDED** to the district court for consideration in the first instance. It is this court's "typical practice" to remand colorable ineffective assistance claims raised on direct appeal. *United States v. Knight*, 824 F.3d 1105, 1112 (D.C. Cir. 2016). To raise a colorable claim for ineffective assistance of counsel, a defendant must allege sufficient facts to "show two things: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense." *See In re Sealed Case*, No. 16-3005, 2018 WL 4000480, at *6 (D.C. Cir. Aug. 17, 2018) (quoting *United States v. Anderson*, 632 F.3d 1264, 1268 (D.C. Cir. 2011)).

Miller's first claim is that his trial counsel destroyed his chance of obtaining an acceptance of responsibility adjustment by failing to timely inform the district court that Miller was proceeding to trial solely to preserve his right to appeal and by needlessly presenting a closing argument at the trial. Appellant's Br. at 46-48. Because we are vacating Miller's sentence, this claim is likely now moot. Miller's second claim is that his trial counsel failed to properly inform him of the effect of going to trial and that he was thus prejudiced because there is a reasonable probability that he would have pleaded guilty if fully informed. *Id.* at 50. The Supreme Court has held that a defendant may show prejudice due to ineffective assistance if counsel's deficient performance led the defendant to reject a plea. *See Lafler v. Cooper*, 566 U.S. 156, 163-64

(2012). This claim is therefore colorable and we will remand it to the District Court for consideration.

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. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadiws
Deputy Clerk