United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-3041 **September Term, 2018**

FILED ON: JANUARY 18, 2019

UNITED STATES OF AMERICA,
APPELLEE

v.

KEVIN BERTRAM,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:15-cr-00012-1)

Before: MILLETT and KATSAS, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

J U D G M E N T

This case was considered on the record from the United States District Court for the District of Columbia, and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the judgment of the United States District Court for the District of Columbia be affirmed.

From 2004 to 2010, Kevin Bertram operated Distributive Networks, a mobile media firm that he founded. In January 2015, the government charged Bertram with one count of willfully failing to remit to the Internal Revenue Service more than $927,000 in payroll taxes that had been withheld from employees' paychecks between January 31, 2008 and July 31, 2009, in violation of 26 U.S.C. § 7202.

The next month, Bertram pled guilty to willfully failing to pay those taxes over to the IRS. In his plea agreement and in the accompanying Statement of Offense, Bertram admitted that (i) he was legally responsible for the payment of payroll taxes to the IRS, (ii) he had directed the company's payroll service to withhold the federal taxes, and yet (iii) he never remitted those withholdings to the IRS. Bertram admitted that he "was aware of his legal duty to account for and pay over payroll taxes[]" and "knowingly and voluntarily violated this legal duty," Suppl. App'x 5 ¶ 1, by "willfully fail[ing] to pay over $927,921.78 in payroll taxes," S.A. 4 ¶ 10. Bertram

separately affirmed that he was "pleading guilty because [he was] in fact guilty of the offense[] identified" in the plea agreement. App'x 16. At his plea hearing, Bertram again admitted to the facts of his criminal activity as outlined in the Statement of Offense, and assured the court that he had had sufficient time to discuss the plea agreement with his counsel and was "completely satisfied with the services of [his] lawyer in this case[.]" App'x 22. The district court accepted Bertram's guilty plea and sentenced him to 30 months of imprisonment, to be followed by 36 months of supervised release.

Although the plea agreement contained a waiver that generally barred collateral challenges to the conviction, Bertram later moved under 28 U.S.C. § 2255 to vacate his conviction, alleging that (i) he was selectively prosecuted on the basis of his political affiliation, (ii) he was actually innocent because he did not act "willfully," and (iii) his non-appearing counsel, Cono Namorato, was ineffective because he had an actual conflict of interest at the time of the representation and had failed to investigate exculpatory witnesses. The district court denied the motion, as well as Bertram's subsequent motion for reconsideration.

We affirm.

First, with respect to selective prosecution, Bertram argues that the government chose to prosecute him because of his work for Republican candidates and conservative organizations. Bertram alleges that prosecutions under 26 U.S.C. § 7202 are extremely rare, and that several well-known Democrats failed to pay taxes but were never criminally charged. He also claims that two IRS agents approached him in 2012 about the unpaid payroll taxes and inquired why he was "working for the President's enemies." App'x 92, 164 ¶11.

The district court rejected this claim as barred by the plea agreement's waiver of collateral review. *See* Dist. Ct. Op. 5–10. Bertram, supported by the Federal Public Defender as *amicus curiae*, argues that the collateral-review waiver is unconstitutional. We need not decide that constitutional question to resolve this appeal. "[I]t is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case[.]" *United States v. Resendiz-Ponce*, 549 U.S. 102, 104 (2007) (internal quotation marks omitted) (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)); *see Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 80 (2009); *Meredith Corp. v. FCC*, 809 F.2d 863, 870 (D.C. Cir. 1987).

Resolution of Bertram's constitutional challenge is not remotely necessary in this case. That is because Bertram's selective prosecution claim is independently foreclosed by Federal Rule of Criminal Procedure 12(b)(3)(A)(iv). That Rule requires a defendant to raise a selective prosecution claim prior to trial "if the basis for the motion is then reasonably available[.]" FED. R. CRIM. P. 12(b)(3). Failure to do so bars the claim, at least if the defendant demonstrates neither good cause nor plain error. *See United States v. Burroughs*, 810 F.3d 833, 837 (D.C. Cir. 2016) (discussing but not deciding whether plain error review is available).

Bertram has failed to demonstrate either good cause or plain error. There is no good cause for Bertram's tardiness because all of the material facts on which he relies to assert his selective prosecution claim were personally known by Bertram before trial (such as his version of the encounter with IRS agents) or fully available to him before trial (such as the publicly available press articles and data from 2011 through mid-2013). The district court also did not commit plain error in failing to *sua sponte* dismiss Bertram's case before his plea. At that time, absolutely nothing in the record even hinted at selective prosecution.

Second, even assuming an actual innocence claim is a cognizable challenge to a knowing and voluntary plea, Bertram's argument that he is innocent because he did not act willfully fails. The standard for "actual innocence" is demanding. When used as a "gateway" to reach procedurally defaulted claims, the defendant must prove that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see also Bousley v. United States*, 523 U.S. 614, 623 (1998). The standard for proving freestanding claims of actual innocence is even more daunting. *See House v. Bell*, 547 U.S. 518, 554–555 (2006) ("[T]he threshold showing for such an assumed right would necessarily be extraordinarily high * * *[.]") (internal quotation marks omitted) (quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993)).

Bertram's claim would fail under any standard because the record forecloses his claim of innocence. Willfulness in criminal tax cases means the "voluntary, intentional violation of a known legal duty." *Cheek v. United States*, 498 U.S. 192, 201 (1991); *United States v. Udo*, 795 F.3d 24, 29 (D.C. Cir. 2015). Bertram swore under oath, both orally and in writing, that the Statement of Offense accurately explained that he "was aware of his legal duty to account for and pay over payroll taxes[]" and "knowingly and voluntarily violated this legal duty[.]" Suppl. App'x 5; App'x 30–31; *see also* App'x 8, 16. The factual record overwhelmingly supports those statements. The IRS and others warned Bertram "over and over again that the [payroll] tax returns were not being filed and that the taxes were not being paid over to the government." App'x 49. Distributive Network's president "begged" Bertram to "get right with the IRS." App'x 50. But Bertram chose instead to "wire[] more than $278,000" of a loan ostensibly taken to pay the IRS "to his personal bank account" and to send another "$20,000 to Tusk Mobile[.]" App'x 51. Not "one single penny" went to the IRS. App'x 51.

Against this damning record, Bertram tries to shift blame to other organizations and his advisors. It does not work. An actual innocence claim must include some "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented" to the trial court. *House*, 547 U.S. at 537 (internal quotation marks omitted). None of Bertram's fingerpointing is new. The argument simply repackages arguments that Bertram first trotted out at sentencing.

Finally, Bertram's argument that one of his attorneys—Cono Namorato—had a conflict of interest gets him nowhere. Bertram alleges that Namorato developed a conflict of interest when he was considered for a position as Assistant Attorney General of the Department of Justice's Tax Division—the very Department that was prosecuting Bertram—and failed to alert Bertram to the

conflict. Because Namorato served as outside counsel rather than counsel of record, Bertram has to show that Namorato had an "actual conflict" that "adversely affected" Bertram's decision to plead guilty. *See United States v. Wright*, 745 F.3d 1231, 1233 (D.C. Cir. 2014) (finding no evidence to support defendant's allegation that conflicted counsel had coerced him into pleading guilty).

Bertram has not plausibly alleged that his decision to enter the guilty plea was adversely affected by Namorato's alleged conflict. As Bertram has admitted, Namorato did not advise him about the plea he ultimately accepted. Attorneys from Jenner & Block, including his counsel of record Jessie Liu, alone counseled him about that plea agreement. And Bertram said on the record that he was satisfied with Liu's performance. App'x 22.

Bertram argues instead that Namorato failed to investigate several "exculpatory" witnesses. But the "exculpatory" witnesses to whom Bertram points are the same lawyers and IRS agent whose anticipated testimony he invoked in support of his actual innocence claim. Bertram was aware of those witnesses at the time of his plea, and the district court specifically advised Bertram that he had a right to present witnesses in his defense if he went to trial. He chose not to do so. And then his sentencing memorandum, (presumably) written by counsel of record, admitted that Bertram's actions taken pursuant to those same witnesses' advice did not negate the willfulness of his actions, but merely provided "[c]ontext." S.A. 10.[1]

Bertram also argues that Namorato failed to investigate a selective prosecution claim or to explain to him the *mens rea* element of the offense under 26 U.S.C. § 7202. Because those arguments were made for the first time on appeal even though the relevant facts were fully known to Bertram when he was before the district court, we will not entertain them. *See Chichakli v. Tillerson*, 882 F.3d 229, 234 (D.C. Cir. 2018); *United States v. Rice*, 727 F. App'x 697, 702 (D.C. Cir. 2018). Bertram's separate argument that his plea was involuntary because of asserted shortfalls in his Rule 11 colloquy will not be addressed either because it is raised for the first time on appeal and is outside the scope of the certificate of appealability. *See* 28 U.S.C. § 2253(c)(1); *Waters v. Lockett*, 896 F.3d 559, 571–572 (D.C. Cir. 2018).

* * * * *

[1] The district court's holding that non-appearing counsel cannot be constitutionally ineffective was disputable. Other courts of appeals have recognized that, in rare instances, the actions, omissions, or conflicts of a non-appearing or secondary member of a defendant's team can so "taint" the defendant's representation as to constitute ineffective assistance. *See Rubin v. Gee*, 292 F.3d 396, 405 (4th Cir. 2002) (representation of two conflicted attorneys "ultimately tainted and adversely affected" defendant's representation by three trial lawyers); *Stoia v. United States*, 22 F.3d 766, 769 (7th Cir. 1994) (counsel need not have appeared in court to give rise to ineffective assistance of counsel claim); *United States v. Tatum*, 943 F.2d 370, 379 (4th Cir. 1991) (representation "tainted" by conflict of one of defendant's counsel who was relied upon heavily). But that issue is of no moment because Bertram has made no showing of taint, and the ineffective assistance claim fails on the merits.

For the foregoing reasons, the judgment of the district court denying Bertram's motion to vacate his conviction is affirmed.[2]

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein 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(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

[2] We appointed the Federal Public Defender for the District of Columbia as *amicus curiae* in support of Bertram. He has ably discharged his duties, and the court greatly appreciates his service.