United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3070 **September Term, 2019**

FILED ON: April 7, 2020

IN RE: SEALED CASE

Appeal from the United States District Court
for the District of Columbia
(1:00-cr-00252-1)

Before: SRINIVASAN, *Chief Judge*, RAO, *Circuit Judge*, and SILBERMAN, *Senior Circuit Judge*.

JUDGMENT

This appeal was considered on the record and on the briefs and oral arguments of the parties. The Court has accorded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. Cir. R. 36(d). For the reasons stated below, it is

ORDERED and ADJUDGED that the judgment of the United States District Court for the District of Columbia be **AFFIRMED.**

In 2000, Appellant pleaded guilty to leading a criminal enterprise that distributed significant quantities of heroin. As part of the written plea agreement, Appellant agreed to cooperate with the government. In return, although Appellant faced a mandatory life sentence, the government promised to seek a downward sentencing departure. Pursuant to that agreement, the government eventually recommended a sentence of thirty years of imprisonment. The district court accepted that recommendation. We affirmed. *In re Sealed Case*, 449 F.3d 118, 120 (D.C. Cir. 2006).

Appellant later filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, alleging that he received ineffective assistance from both his trial and appellate counsel. The district court denied that motion. We granted a certificate of appealability on certain claims and remanded for an evidentiary hearing. After holding that hearing, a magistrate judge recommended that Appellant's motion be granted in part. The district court rejected that part of the recommendation and denied the motion in full. We now affirm.

I

To prevail on a claim of ineffective assistance of counsel, the movant must demonstrate both that his "counsel's performance was deficient" and that "the deficient performance prejudiced

[his] defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When the ineffectiveness claim concerns the movant's sentence, the movant establishes prejudice if he can show a "reasonable probability that, but for counsel's unprofessional errors, [his sentence] would have been different." *United States v. Murray*, 897 F.3d 298, 312 (D.C. Cir. 2018). In this appeal, Appellant renews his contention that he received ineffective assistance from both his trial and appellate counsel.

A

Appellant argues that his trial attorney was ineffective in several different ways. His first claim centers on a statement made by the prosecutor to Appellant's trial counsel during plea negotiations. The prosecutor told Appellant's counsel that "it was his policy that he wouldn't ask for a specific sentence" when dealing with cooperating defendants. App. 289. The prosecutor later acted inconsistently with that policy in Appellant's case: rather than refraining from recommending a sentence, he asked for a sentence of thirty years of imprisonment.

Appellant asserts that the prosecutor's statement to Appellant's trial counsel amounted to a promise not to recommend any specific sentence in Appellant's case. It follows, Appellant argues, that the government breached the prosecutor's ostensible promise by recommending a thirty-year sentence. Appellant claims that his trial counsel was ineffective in failing to raise or object to that breach.

The district court, however, found that the prosecutor's statement did not rise to the level of a promise. We review that factual finding for clear error, *United States v. Laureys*, 866 F.3d 432, 437 (D.C. Cir. 2017), and see no such error here.

Appellant's trial counsel, to whom the statement at issue was made, repeatedly testified that he did not consider it a binding promise or "negotiated point." App. 289. Instead, it was a casual comment made "in passing." *Id.* at 294. Appellant stated during his plea colloquy that no promises had been made to him other than those memorialized in the plea agreement. And the plea agreement's text twice disclaimed the existence of any alleged promise not to recommend a sentence: once in a general merger clause, and a second time in a clause specifically reserving the government's right to "recommend a specific period of incarceration." *Id.* at 44. In light of that evidence, the district court committed no clear error in finding that the prosecutor's statement did not amount to a promise.

It follows that trial counsel did not render ineffective assistance by failing to raise the prosecutor's statement to the district court. Trial counsel was aware that the prosecutor had departed from his general no-recommendation policy by requesting a specific sentence in Appellant's case. But Appellant cites no authority for the proposition that counsel was obligated to raise the mere fact of that departure to the district court. Appellant relies on a nonbinding magistrate judge's decision, but that decision, even assuming its correctness, is readily

distinguished: there, the prosecutor had made repeated assurances that he would request a lenient sentence for the specific defendant. *See United States v. Brunsman*, No. 1:11-cr-014, 2016 WL 2998110, at *7 (S.D. Ohio May 25, 2016), *adopted by United States v. Brunsman*, No. 1:11-cr-014, 2017 WL 427357 (S.D. Ohio Feb. 1, 2017). No such assurances were made here.

Next, Appellant argues that his trial counsel was deficient in not requesting a continuance after learning, shortly before sentencing, that the government would request a thirty-year sentence. Had counsel received a continuance, Appellant asserts, he could have more effectively rebutted the thirty-year recommendation. For example, he could have arranged character witnesses to testify at sentencing or filed a second memorandum pointing to examples of cooperators who had received comparatively short sentences.

Trial counsel's failure to move for a continuance (or his failure to take the other actions Appellant identifies) did not amount to constitutionally deficient performance. The Sixth Amendment recognizes a "wide range of reasonable professional assistance." *Payne v. Stansberry*, 760 F.3d 10, 13 (D.C. Cir. 2014). Here, trial counsel advocated against a long sentence both in his initial memorandum and during the sentencing hearing. As is virtually always the case, counsel in theory could have done more, but his performance did not fall "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

In arguing that his trial counsel should have sought a continuance, Appellant points to our decision in *United States v. Abney*, 812 F.3d 1079 (D.C. Cir. 2016). That case, however, involved markedly distinct circumstances in which defense counsel failed to move to delay Abney's sentencing until after the President signed a law that had already been approved by Congress, under which Abney's mandatory-minimum sentence would have been reduced by five years. The court thought it quite likely that a continuance would have resulted in a lower sentence, and distinguished cases in which that outcome was "entirely speculative" or "anything but guaranteed." *Id.* at 1092–93. Appellant's claim here—that a continuance would have given his counsel time to make a more persuasive argument and therefore might have resulted in a lower sentence—falls in the latter category.

Finally, Appellant argues that his trial counsel unreasonably failed to ask the judge to order that his sentence run concurrently with another sentence he was still serving, on parole, for an earlier offense. We cannot consider this claim. Appellant admits that he did not raise the issue at any point before this appeal and that the issue is outside the scope of the certificate of appealability. *See* 28 U.S.C. § 2253(c). He accordingly asks us to expand the certificate of appealability. But our precedents hold that we may not do so "when the district court [did not] ha[ve] the opportunity below to consider the claim." *Waters v. Lockett*, 896 F.3d 559, 571 (D.C. Cir. 2018); *see also United States v. Bertram*, 762 F. App'x 1, 5 (D.C. Cir. 2019) (same).

B

Appellant argues that his counsel on direct appeal—who was married to and was joint law partners with Appellant's trial counsel—provided ineffective assistance. Before the district court, Appellant's claim concerning his appellate counsel was that she failed to argue that (or investigate whether) the government broke its promise not to recommend a specific sentence. The district court, however, foreclosed that argument by finding that appellate counsel was never made aware of the prosecutor's statement. Appellant now presses a different claim of appellate counsel's ineffective assistance, asserting that she labored under a conflict of interest due to her spousal and professional relationship with trial counsel.

We cannot consider this claim because it is not encompassed within the certificate of appealability. Appellant claims that the district court granted an "unlimited certificate of appealability." Appellant's Br. 42. While it is true that the district court did not "indicate which specific issue or issues satisfy the showing required" for appellate review, 28 U.S.C. § 2253(c)(3), that does not mean the court's certificate was of infinite scope. Because Appellant did not raise the conflict-of-interest issue before the district court, the court could not have certified that issue for appeal. Appellant asks us to expand the certificate of appealability, but as noted previously, our precedent prevents us from addressing an issue presented for the first time on appeal. *See Waters*, 896 F.3d at 571.

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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/
Daniel J. Reidy
Deputy Clerk