FILED
United States Court of Appeals
Tenth Circuit

October 13, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NAGY SHEHATA,

Defendant - Appellant.

No. 21-3107
(D.C. Nos. 2:20-CV-02503-JWL &
2:15-CR-20052-JWL-1)
(D. Kansas)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **KELLY**, and **McHUGH**, Circuit Judges.

Applicant Nagy Shehata pleaded guilty to conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349. The district court sentenced him to thirty-two months' imprisonment and restitution in the amount of $8,362,200. In August 2020, the district court granted Mr. Shehata's motion for compassionate release and placed him on home detention for a period of two years, while his total supervised release period was extended to three years.

In October 2020, Mr. Shehata, a citizen of Egypt and a legal permanent resident of the United States, filed a motion to vacate, set aside, or correct his sentence under

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

28 U.S.C. § 2255. Mr. Shehata's motion asserted that he received ineffective assistance of counsel in violation of the Sixth Amendment because his attorney provided erroneous or misleading advice regarding the immigration consequences of his guilty plea. The district court held an evidentiary hearing to resolve factual issues raised by Mr. Shehata's motion. Three witnesses testified—Mr. Shehata, his spouse Valerie Shehata, and Tom Bartee, the Federal Public Defender who represented Mr. Shehata throughout his criminal proceedings.

Ultimately, the district court denied Mr. Shehata's motion. He now requests a certificate of appealability ("COA") from this court. *See* 28 U.S.C. § 2253(c)(1)(B) (requiring COA to appeal denial of relief under § 2255). We deny his request and dismiss this matter.

I. BACKGROUND

In July 2015, Mr. Shehata was arrested and charged with conspiracy to commit wire fraud. Mr. Bartee, a Federal Public Defender, was appointed to represent him and did so throughout the criminal proceedings.

Mr. Shehata first discussed his immigration status with Mr. Bartee in April 2017 as part of a larger conversation regarding a possible plea agreement. It is undisputed that prior to this discussion, Mr. Bartee was unaware that Mr. Shehata was a green card holder. While Mr. Shehata testified he did not discuss the immigration consequences of a potential plea with Mr. Bartee at the April 2017 meeting, the district court found Mr. Bartee did indeed advise Mr. Shehata about the possible immigration consequences of a plea agreement at the meeting. Mr. Bartee testified he told Mr. Shehata "that this

conviction results in at least presumptive removal, that because he was a non-citizen, that this conviction is an aggravated felony, and you end up being removed for this unless something happens," and also recalled that Mr. Shehata was "unhappy" and "concerned" when he learned about the immigration consequences of a guilty plea. *Id*. at 162.

On April 20, 2017, Mr. Bartee contacted an immigration lawyer, Mr. Sharma-Crawford, to assist with Mr. Shehata's case. The Federal Public Defender subsequently retained Mr. Sharma-Crawford to represent Mr. Bartee on the immigration issues. In early May 2017, Mr. Sharma-Crawford confirmed to Mr. Bartee that Mr. Shehata's conviction would lead to mandatory deportation. They also discussed the possibility of Mr. Shehata obtaining a temporary S visa, a nonimmigrant visa that allows a person to remain in the United States to assist with a criminal prosecution. *See* 8 U.S.C. § 1101(a)(15)(S) (defining the "S" nonimmigrant classification). Mr. Sharma-Crawford did not speak directly with Mr. Shehata at any time prior to his guilty plea.

Mr. Bartee then contacted the prosecutor about a potential plea agreement that would not result in Mr. Shehata's mandatory deportation. The prosecutor declined Mr. Bartee's offer. With this avenue closed, Mr. Bartee believed that an S visa was Mr. Shehata's best option to avoid deportation. Mr. Shehata's plea agreement thus contained his agreement to cooperate in not only his Kansas case, but also in prosecutions in New Jersey and Colorado, two cases with longer "life spans" that Mr. Bartee viewed as more likely to result in an S visa.

Mr. Bartee and Mr. Shehata then had another meeting to discuss the plea agreement. Mr. Bartee advised Mr. Shehata that a guilty plea would result in removal but

that there was a possibility if Mr. Shehata continued to cooperate, he might be able to obtain an S visa after the entry of the plea. Mr. Bartee testified that he told Mr. Shehata that deportation was a "virtual certainty" unless "the S Visa were to be used." *Id.* at 173. It is undisputed that Mr. Bartee never promised Mr. Shehata he could obtain an S visa, and never guaranteed a sponsor for the visa. Indeed, Mr. Shehata testified that Mr. Bartee told him "if you cooperate, you may be able to get the S visa." *Id*. at 91. Notwithstanding this equivocal advice, Mr. Shehata testified that he believed he would be able to remain in the country if he pleaded guilty and continued to cooperate.

II. DISCUSSION

"[T]here can be no appeal from a final order in a § 2255 proceeding unless a circuit justice or judge issues a certificate of appealability." *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016). We may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires "a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). To put it simply, Mr. Shehata must show that the district court's resolution of his ineffective assistance of counsel claim was either "debatable or wrong." *Id.*

Following "denial of a § 2255 motion, ordinarily we review the district court's findings of fact for clear error and its conclusions of law de novo." *United States v.*

Barrett, 797 F.3d 1207, 1213 (10th Cir. 2015) (internal quotation marks omitted). We analyze ineffective assistance of counsel claims using the approach set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland*, "a defendant must show both that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense." *Holloway*, 939 F.3d at 1102 (internal quotation marks omitted). Because Mr. Shehata claims his acceptance of the plea offer was the product of ineffective assistance of counsel, he must show that "but for the deficient performance, he would have gone to trial." *Williams v. Jones*, 571 F.3d 1086, 1093 (10th Cir. 2009). There is a "strong presumption that counsel provided effective assistance." *Holloway*, 939 F.3d at 1103 (quotations omitted).

Mr. Shehata alleges he received ineffective assistance of counsel, in violation of the Sixth Amendment because Mr. Bartee provided erroneous or misleading advice regarding the immigration consequences of his plea. We disagree.

Mr. Bartee was required to advise Mr. Shehata that a guilty plea would subject him to mandatory removal. *See Padilla v. Kentucky*, 559 U.S. 356, 360 (2010) (holding that counsel was deficient in failing to advise client of the removal consequences of his plea when those consequences could be easily determined). But the district court found Mr. Bartee did advise Mr. Shehata of the consequences of his guilty plea, and we cannot say this finding was the result of "clear error." Mr. Bartee testified he told Mr. Shehata, "this conviction is a crime that results in deportation absent some extraordinary circumstances." App. at 184. This testimony is supported by Mr. Bartee's recollection that Mr. Shehata became concerned about the possible immigration consequences of a

plea following this discussion, and by Mr. Shehata's own testimony that Mr. Bartee told him "if you cooperate, you *may* be able to get the S visa." *Id.* at 91 (emphasis added). Although Mr. Bartee did advise Mr. Shehata that an S visa could possibly stave off mandatory deportation, Mr. Bartee made no promises or assurances that an S visa could be obtained, and he further advised Mr. Shehata to consult an immigration attorney.

Mr. Shehata's alleged belief that the S visa was a sure thing did not arise through any fault in Mr. Bartee's advice. Mr. Bartee was clear that removal was a mandatory consequence of a guilty plea, and that obtaining an S visa was only a possibility over which he had no control. Therefore, nothing about Mr. Bartee's advice overcomes the "strong presumption that counsel provided effective assistance." *Holloway*, 939 F.3d at 1103 (quotations omitted).

Mr. Shehata's own testimony belies his position that he believed an S visa was assured and, regardless, that understanding is contrary to Mr. Bartee's express advice. Because Mr. Bartee's advice met an "objective standard of reasonableness," Mr. Shehata's ineffective assistance of counsel claim fails. The district court's decision is therefore clearly not "debatable or wrong."

III. CONCLUSION

For the foregoing reasons, we DENY Mr. Shehata's request for a COA and DISMISS this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge