FILED
United States Court of Appeals
Tenth Circuit

September 18, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

IBANGA ETUK, a/k/a Mark,

Defendant - Appellant.

No. 23-5011
(D.C. Nos. 4:21-CV-00512-CVE-CDL &
4:20-CR-00100-CVE-1)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **TYMKOVICH**, **EID**, and **CARSON**, Circuit Judges.

Ibanga Etuk, a federal inmate proceeding pro se, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion. We deny the motion.

I. BACKGROUND & PROCEDURAL HISTORY

In the spring of 2020, Congress created the Paycheck Protection Program (PPP) to provide loans to businesses affected by the economic impacts of the COVID-19 pandemic. Etuk and two associates used falsified business records to

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

apply for numerous PPP loans. Some of those loans, amounting to almost $1 million, were approved.

A federal grand jury in the Northern District of Oklahoma eventually indicted Etuk and his associates on seventeen charges related to this scheme, including bank fraud and identity theft. At first, the district court allowed Etuk to remain free on bond while the case was pending. Later, his probation officer petitioned the court to revoke bond and detain Etuk based on violations of his pretrial release conditions. The district court held a hearing, received evidence, granted the petition, and ordered that Etuk be detained.

Etuk agreed to plead guilty to two of the pending charges in exchange for dismissal of the rest. The district court accepted the plea agreement and sentenced him to forty-eight months' imprisonment. Etuk attempted to appeal, but this court dismissed that proceeding based on the appeal waiver in his plea agreement.

Soon after dismissal of his appeal, Etuk filed a pro se § 2255 motion. Based on that motion and other papers Etuk filed, the district court concluded Etuk was raising six claims for relief, all based on ineffective assistance of counsel.[1] The claims can be categorized as follows:

- two claims attacking his attorney's representation at the bond-revocation hearing;

[1] In this proceeding, Etuk does not claim the district court misunderstood the number or content of his claims.

- three claims attacking his attorney's representation during the change-of-plea process; and
- one claim that his sentencing attorney (a different attorney than the one who represented him up through the change-of-plea hearing) allegedly prevented him from bringing his first attorney's inadequacies to the district court's attention.

The district court concluded that none of Etuk's accusations amounted to ineffective assistance of counsel. It therefore denied his § 2255 motion, and denied a COA.

II. LEGAL STANDARD

To merit a COA, Etuk must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This means he "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). We may deny a COA on any basis evident in the record. *Davis v. Roberts*, 425 F.3d 830, 834 (10th Cir. 2005).

III. ANALYSIS

Ineffective assistance of counsel means: (1) constitutionally deficient performance by the attorney that (2) prejudices the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). With this in mind, we analyze, in turn, Etuk's three categories of § 2255 claims.

A. The Bond-Revocation Hearing

Etuk claims his bond would not have been revoked but for his attorney's ineffective assistance at the bond-revocation hearing. For example, his attorney chose not to call a certain witness, and never verified allegedly important employment information. The district court denied relief because it concluded the attorney made reasonable strategic decisions and Etuk suffered no prejudice.

The district court should not have reached the merits. Section 2255 allows district courts "to vacate, set aside or correct the *sentence*." 28 U.S.C. § 2255(a) (emphasis added). It does not reach pretrial detention. Because § 2255 does not authorize any relief that would remedy Etuk's allegedly wrongful pretrial detention, the district court did not have jurisdiction over claims based on ineffective assistance at the bond-revocation hearing. *See Murphy v. Hunt*, 455 U.S. 478, 481–82 (1982) (holding that challenges to pretrial detention generally become moot after conviction). We deny a COA on this basis. *See Davis*, 425 F.3d at 834 (denying a COA on the alternative basis that the district court lacked jurisdiction over the habeas claim).

B. The Change-of-Plea Process

Etuk claims his counsel was ineffective because: (1) he did not inform Etuk of the date of the change-of-plea hearing (Etuk apparently means to imply he was initially confused why he was brought to court that day); (2) he first showed Etuk the sentencing guidelines in a hasty meeting less than five minutes before the change-of-plea hearing; (3) he did not come to court with a copy of the plea agreement, and had

to rely on a copy made available by the prosecutor; and (4) he coached Etuk to say "yes" to the district court's questions during the plea colloquy. The district court denied relief because it found Etuk had not demonstrated prejudice from these alleged failings.

Jurists of reason would not find the district court's resolution debatable or wrong. When a defendant claims his attorney provided ineffective assistance in connection with the decision to accept a plea bargain, the second *Strickland* element (prejudice) has a special meaning: "[T]he defendant must 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). As the district court noted, Etuk never asserted he would have rejected the plea deal and insisted on going to trial.

Etuk now argues in his COA motion that he wanted to go to trial rather than take the plea deal. This argument faces two problems. First, he did not make it to the district court, and we generally do not consider issues for the first time on appeal. *See United States v. Viera*, 674 F.3d 1214, 1220 (10th Cir. 2012) (applying this principle in the COA context). Second, "a petitioner's mere allegation that he would have insisted on trial but for his counsel's errors, although necessary, is ultimately insufficient to entitle him to relief." *Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001) (internal quotation marks omitted). A defendant must "persuade[] us that going to trial would have been rational in light of the objective circumstances of his case." *Heard v. Addison*, 728 F.3d 1170, 1184 (10th Cir. 2013). This may involve

factors such as unmade but available legal and evidentiary arguments, the weight of the evidence against the defendant, the risk of an unsympathetic jury, and sentencing exposure. *See id.* at 1183, 1186. At a minimum, however, the defendant must provide *some* explanation why he or she would have rationally taken the risk of going to trial. Etuk provides no such explanation. Thus, he cannot show prejudice.

For all these reasons, we deny a COA as to Etuk's claim that he received ineffective assistance of counsel at the change-of-plea phase.

C. The Sentencing Attorney's Alleged Interference

Finally, Etuk claims the attorney who represented him during the sentencing process "prohibit[ed] [him] from filling [sic] [a] motion with the various constitutional violations of [the attorney who represented him at the change-of-plea phase]." R. vol. II at 287. In district court, the sentencing attorney submitted an affidavit responding to this accusation. He admitted he spoke with Etuk about his prior attorney's representation, but he denied interfering with Etuk's desire to file something about it with the district court. The attorney stated that, in his judgment, Etuk's grievances "were not of the kind that warranted me bringing [them] to the Court's attention." *Id.* at 329, ¶ 7. Nonetheless, he "advised Mr. Etuk that he could write a letter to the Court if he so desired." *Id.* The district court ruled that the attorney's decision not to file a motion about the prior attorney's representation was an exercise of reasonable judgment. As for Etuk's claim that the attorney prohibited Etuk from bringing the issue to the court through his own efforts, the district court accepted the attorney's denial of that accusation.

We will not discuss whether the attorney exercised reasonable judgment in declining to raise the alleged constitutional violations of prior counsel because that was not part of Etuk's claim. He did not claim his sentencing attorney should have filed a motion regarding the previous attorney, but that his sentencing attorney prohibited him from raising the issue himself. And as to *that* accusation, we are skeptical the district court could conclude, on the papers alone, that it believed the attorney's story and not Etuk's. But we need not reach that question because, even if we accept Etuk's version of events, his failure to qualify for a COA is evident on other grounds.

We begin by clarifying our understanding of what Etuk means when he says he wanted to file a "motion with the various constitutional violations of [his previous attorney]." R. vol. II at 287. We presume Etuk did not mean to file something purely for informational purposes, without a request for relief. In context, and construing his pleadings liberally given his pro se status, *see, e.g.*, *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008), we understand him to mean he wanted to file a motion to withdraw his guilty plea based on the ineffective assistance he allegedly received from his previous attorney.

Etuk does *not* argue that he has a right to move to withdraw from a plea agreement, such that an attorney's failure to file or interference with filing such a motion is ineffective assistance per se. *Cf. Rodriquez v. United States*, 395 U.S. 327, 329–30 (1969) (holding that, because a defendant may appeal from a federal criminal conviction as a matter of right, a defendant whose attorney prevents him from

appealing does not need to show prejudice—a likelihood of success on appeal—before being granted relief). Thus, if there is no right to move to withdraw a guilty plea, then Etuk must show that his attorney's alleged interference with filing such a motion caused him prejudice. In this context, therefore, he must demonstrate some likelihood that the district court would have granted the motion. *See, e.g.*, *United States v. Young*, 862 F.2d 815, 820 (10th Cir. 1988) (in the context of a motion to suppress the defendant believed his attorney should have filed, concluding that the applicable case law "strongly suggests that any motion to suppress on this theory would not have been granted and defendant was not prejudiced by failing to raise such a motion").

Etuk gives us no reason to believe the district court would have granted a motion to withdraw his guilty plea, and these § 2255 proceedings strongly suggest the opposite. The district court's order denying § 2255 relief recounts the change-of-plea proceedings in detail, *see* R. vol. II at 378–80, and relies on those details to conclude, among other things, that Etuk "understood the terms of the plea agreement he discussed with his attorney, and that it was more advantageous to him than going to trial," *id.* at 391. Etuk fails to explain to us how a hypothetical motion to withdraw his guilty plea had a chance of succeeding despite findings such as these.

For these reasons, Etuk has failed to make an "adequate" showing that this claim "deserve[s] encouragement to proceed further." *Slack*, 529 U.S. at 484

(internal quotation marks omitted). Etuk therefore does not merit a COA on this issue.[2]

IV. CONCLUSION

We deny a COA and dismiss this appeal. Because this appeal may not proceed, we deny all of Etuk's other pending motions as moot.

Entered for the Court

Allison H. Eid
Circuit Judge

[2] Etuk's COA motion claims the district court violated his rights because it failed to police the conduct of other actors in the judicial system (the prosecutor, the defense attorneys, the probation officer, etc.), and because it allegedly displayed bias and prejudice at his sentencing hearing. We cannot find where Etuk raised these claims to the district court, so we do not consider them.