

07-3130-pr
Forbes v. United States of America

1 UNITED STATES COURT OF APPEALS
2
3 FOR THE SECOND CIRCUIT
4

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6 _____
7 August Term, 2008
8

9 (Argued: June 25, 2009 Decided: July 30, 2009)

10 Docket No. 07-3130-pr
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12 _____
13

14 DENNIS FORBES,
15

16 *Petitioner-Appellant,*
17

18 -v.-
19

20 UNITED STATES OF AMERICA,
21

22 *Respondent-Appellee.**
23
24 _____
25

26 Before:

27 PARKER and WESLEY, *Circuit Judges*, TSOUCALAS, *Judge.***
28

29 Appeal from an order of the United States District
30 Court for the Western District of New York (Siragusa, J.),
31 entered on May 23, 2007, dismissing petitioner-appellant's

* We direct the Clerk of Court to amend the caption as noted.

** The Honorable Nicholas Tsoucalas, Senior Judge of the United States Court of International Trade, sitting by designation.

1 application to vacate, set aside, or correct his sentence
2 pursuant to 28 U.S.C. § 2255.

3
4 AFFIRMED.

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8 ELEANOR JACKSON PIEL, New York, NY, *for Petitioner-*
9 *Appellant.*

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11 FRANK H. SHERMAN, Assistant United States Attorney
12 (Kathleen M. Mehlretter, Acting United States
13 Attorney, *of counsel*), Office of the United
14 States Attorney for the Western District of
15 New York, Rochester, NY, *for Respondent-*
16 *Appellee.*

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20 PER CURIAM:

21 Petitioner-appellant Dennis Forbes ("Forbes") appeals
22 from an order of the United States District Court for the
23 Western District of New York (Siragusa, J.), dismissing his
24 petition to vacate, set aside, or correct his sentence under
25 28 U.S.C. § 2255 on the basis of ineffective assistance of
26 appellate counsel on direct appeal. For the reasons stated
27 below, the district court's order of dismissal is hereby
28 AFFIRMED.

29 **Background**

30 Forbes was indicted on September 9, 1999 on one count
31 of being a convicted felon in possession of a firearm in

1 violation of 18 U.S.C. § 922(g)(1). *United States v.*
2 *Forbes*, No. 99-CR-6084(CJS) (W.D.N.Y.). Forbes was also
3 indicted in a separate instrument for possession of a
4 firearm in furtherance of a crime of drug trafficking in
5 violation of 18 U.S.C. § 924(c), as well as two other drug-
6 related counts, based on the same set of events that led to
7 the § 922(g)(1) charge. *United States v. Forbes*, No. 99-CR-
8 6089(CJS) (W.D.N.Y.).

9 After a jury trial, Forbes was convicted on all counts
10 in the second indictment but the § 924(c) count, on which
11 the jury could not reach a verdict. The initial § 922(g)(1)
12 count, however, was not tried with the offenses alleged in
13 the second indictment. On January 24, 2001, Forbes pleaded
14 guilty to the § 922(g)(1) count, and in exchange the
15 government agreed not to pursue the 8 U.S.C. § 924(c) count
16 left open by the jury. On accepting Forbes's guilty plea,
17 the district court tolled the requirements of the Speedy
18 Trial Act, 18 U.S.C. § 3161, in relation to the § 924(c)
19 count because Forbes specifically indicated that the reason
20 for his plea on the § 922(g)(1) count was the government's
21 promise to dismiss the § 924(c) "trafficking" charge.

1 Later in 2001, but prior to sentencing, Forbes wrote a
2 letter to the district court indicating that he wanted to
3 withdraw his guilty plea because it "was illegal due to the
4 fact that [he] was not fingerprinted, photographed, booked,
5 charged, or arraigned in 72 hours of [his] arrest which
6 [was] a violation of [his] due process rights." Forbes's
7 retained attorney, Michael P. Schiano, stated on the record
8 that he had advised Forbes that in attempting to withdraw
9 his guilty plea he would likely lose the two-point reduction
10 in his sentencing offense level on the basis of acceptance
11 of responsibility, as well as risk a two-point enhancement
12 for perjury and obstruction of justice. Forbes insisted on
13 pursuing the plea withdrawal and indicated to the court that
14 he would discharge Schiano as his attorney. Schiano
15 informed the district court that, for his part, he intended
16 to withdraw as Forbes's counsel should Forbes pursue the
17 plea withdrawal, because "one of [Forbes's] basis [sic] in
18 wanting to withdraw his plea [was] his position that
19 [Schiano] intimidated and forced him . . . into taking the
20 plea."

21 After extensive attempts on the record by defense

1 counsel, the government, and the district court to explain
2 to Forbes the status of the charges against him and the
3 potential consequences of attempting to withdraw his plea at
4 this stage of the proceeding, the district court stated:

5 Mr. Forbes, here's what I'm going to do. If
6 you tell me this is what you want to do, I'm going
7 to ask Mr. Schiano to make a formal motion to
8 withdraw. I'll make it returnable for a day.

9 I'll examine you now. If I find you're
10 entitled to assigned counsel, I'll have another
11 counsel here, and I'll give you a chance to
12 consult with that counsel to determine what you
13 want to do; but I'm not going to keep assigning
14 you lawyers.
15

16 Forbes indicated that he understood the district court's
17 statement and insisted that he still wanted to withdraw his
18 guilty plea. The district court then found Forbes eligible
19 for assigned counsel.

20 On June 25, 2001, Jeffrey Wicks agreed to serve as
21 Forbes's assigned counsel, provided he should conclude upon
22 review of the record that Forbes had a nonfrivolous argument
23 to withdraw his guilty plea. The district court informed
24 Forbes that Wicks's review of the record would result in one
25 of three possibilities: (1) Wicks might agree that
26 attempting to withdraw the plea was Forbes's best legal

1 option; (2) Wicks might inform Forbes that going forward
2 with the attempt would be against Forbes's best interest but
3 that a legal argument could be made in support of it; or (3)
4 Wicks might determine any such attempt would be frivolous
5 and that he would be unable to make the application to
6 withdraw the plea. The district court then told Forbes:

7 If Mr. Wicks comes back to you after independently
8 reviewing everything and says Mr. Forbes, you're
9 crazy for trying to withdraw your plea, and
10 secondly, there's no basis upon which I can in
11 good faith ask the Court to withdraw the plea,
12 that's the end of it. I'm not saying that's going
13 to happen, but that would be the end of it. I'm
14 not going to assign you another lawyer. It would
15 be exceptionally foolish, but you can always
16 represent yourself if you want; but I'm not going
17 to assign you a string of lawyers until you
18 somehow hit on one that is going to give you the
19 advice you want.
20

21 Wicks ultimately decided that there was no good-faith basis
22 for Forbes's motion to withdraw his plea, after which the
23 district court concluded that Wicks was ethically obligated
24 not to bring the motion on Forbes's behalf and allowed Wicks
25 to withdraw as counsel. The district court informed Forbes
26 that he would have to move for the plea withdrawal on his
27 own and described the proper procedure and potential
28 consequences. The district court explained that it would

1 assign Forbes another attorney upon resolution of his motion
2 to withdraw his plea, but again emphasized that it would not
3 "put another lawyer in a situation where they're called upon
4 by you [Forbes] as the client, despite what they tell you,
5 to do something that they feel is unethical and really
6 against your best interest."

7 In September 2001, Forbes filed the motion to vacate
8 his guilty plea, arguing that his plea was not knowing,
9 intelligent, and voluntary as required by Federal Rule of
10 Criminal Procedure 11 because Schiano had "advised him that
11 he would be pleading guilty to count two of indictment No.
12 99-CR-6089 [the § 924(c) count] and not to indictment No.
13 99-CR-6084 [the § 922(g) count]." In his papers, Forbes
14 alleged that his counsel was ineffective for advising him to
15 plead guilty to the § 922(g) count in spite of what he
16 termed "jurisdictional defects," namely that the count
17 should have been dismissed because the police did not have
18 probable cause to search or arrest him and because he was
19 not arraigned until more than 60 days after his arrest.

20 The district court denied the motion to vacate. The
21 district court rejected Forbes's claim of ineffectiveness of

1 counsel with respect to the plea, explaining to Forbes that
2 pleading guilty to the § 922(g) charge did not result in any
3 additional jail time and that the guilty plea eliminated
4 the possibility of the government re-trying him on the
5 remaining § 924(c) count. This, in turn, as the district
6 court explained, eliminated the possibility of an additional
7 five years of jail time being added to Forbes's sentence, as
8 would have been required with a § 924(c) conviction. The
9 district court further found that Forbes's factual
10 allegations were clearly contradicted by the record and
11 "inherently incredible."

12 At sentencing Forbes was represented by M. Kirk Okay of
13 The Okay Law Firm. The district court calculated a total
14 offense level of 26 with respect to the § 922(g) count,
15 starting from a base level of 20 and adding two points
16 because the pistol was stolen, U.S.S.G. § 2K2.1(b)(4), and
17 four points for possession of the firearm while distributing
18 cocaine, U.S.S.G. § 2K2.1(b)(5). The district court did not
19 enhance Forbes's sentence for obstruction of justice with
20 respect to his motion to vacate the guilty plea. Forbes was
21 sentenced to life in prison on each of the two drug count

1 jury convictions and a concurrent 120 months' imprisonment
2 on the § 922(g) firearm possession conviction.

3 On appeal, Forbes was again represented by Okay, who
4 argued that the district court erred in not allowing Forbes
5 to withdraw his plea and that the record did not contain
6 sufficient facts to support his plea. This Court rejected
7 these arguments, concluding that, "[a]lthough Forbes now
8 suggests that his plea was not knowing and voluntary because
9 he was confused as to the charge he was pleading to during
10 the allocution, our review of the transcript of the
11 allocution discloses no such confusion[, n]or . . . that the
12 district court accepted Forbes' plea without determining
13 that there was an adequate factual basis for the plea."
14 *United States v. Forbes*, No. 02-1120-cr, 78 Fed. App'x 164,
15 165 (2d Cir. 2003). Although we expressed "some doubt about
16 the propriety of the district court relieving counsel of his
17 representation of the defendant . . . and then proceeding to
18 deny the defendant's motion to withdraw his guilty plea
19 while he was unrepresented," we declined to address this
20 issue because it was not raised on appeal or pursued during
21 questioning at oral argument. *Id.* Forbes, still

1 represented by Okay, filed a petition for a writ of
2 certiorari to the United States Supreme Court in which he
3 raised this new Sixth Amendment right-to-counsel issue. The
4 Supreme Court denied the petition. *Forbes v. United States*,
5 540 U.S. 1210 (2004).

6 On October 13, 2004, Forbes filed a pro se petition to
7 vacate, set aside, or correct his sentence under 28 U.S.C. §
8 2255, contending that Schiano's pre-trial representation was
9 ineffective and that Schiano had coerced him into pleading
10 guilty to the § 922(g) charge. Forbes also argued that Okay
11 was ineffective at sentencing for not challenging the
12 sentencing enhancements imposed and on appeal because he did
13 not raise the argument that Forbes was unconstitutionally
14 deprived of counsel with respect to his motion to withdraw
15 the guilty plea. The district court dismissed the petition
16 without a hearing.

17 With respect to the allegations regarding Schiano, the
18 district court indicated that it had already considered and
19 rejected Forbes's arguments in the motion to vacate the
20 plea, and that decision had been affirmed. The district
21 court concluded that these issues were therefore

1 procedurally barred. See, e.g., *United States v. Sanin*, 252
2 F.3d 79, 83 (2d Cir. 2001).

3 The district court also found that Forbes's allegations
4 regarding Okay at sentencing were unsupported by the record.
5 With respect to Okay's effectiveness on appeal, the district
6 court noted that appellate counsel was not obligated to
7 raise every possible argument and that Forbes had not
8 indicated that the arguments Okay raised were "significantly
9 weaker," *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994),
10 than Forbes's right-to-counsel claim. The district court
11 also noted that Forbes did not argue that he suffered
12 prejudice due to Okay's failure to raise the right-to-
13 counsel issue on appeal.

14 Forbes subsequently moved for a certificate of
15 appealability on the basis of ineffectiveness of appellate
16 counsel. This court granted the certificate and ordered
17 that counsel be appointed.

18 **Discussion**

19 Forbes now argues that his motion to withdraw his
20 guilty plea constituted a "critical stage" of the criminal
21 proceeding, such that he was entitled to counsel unless he

1 waived the right, which he did not do. See *Hines v. Miller*,
2 318 F.3d 157, 164 (2d Cir. 2003) (Winter, J., dissenting).
3 As the majority noted in *Hines*, federal courts have taken a
4 variety of approaches with respect to habeas claims of
5 denial of the right to counsel based on ineffective
6 representation, or complete lack of representation, on
7 motions to withdraw guilty pleas. *Id.* at 163. While the
8 *Hines* court left open the question of the proper standard to
9 apply in such situations, Forbes's claim does not bring this
10 issue before us. Rather, Forbes's claim is once removed –
11 he contends his appellate counsel was ineffective for not
12 raising the issue on direct appeal.

13 Under *Strickland v. Washington*, 466 U.S. 668 (1984), to
14 establish ineffective assistance of appellate counsel,
15 Forbes must show that "counsel's representation fell below
16 an objective standard of reasonableness," *id.* at 688, and
17 that "there is a reasonable probability that, but for
18 counsel's unprofessional errors, the result of the
19 proceeding would have been different," *id.* at 694. Although
20 there may be merit to Forbes's unraised right-to-counsel
21 argument in the abstract, as indicated by the panel of this

1 Court that heard his direct appeal, this does not make
2 counsel's failure to raise the argument on appeal
3 objectively unreasonable on the record before us.

4 A motion to withdraw a guilty plea is a critical stage
5 of a criminal proceeding, *United States v. Davis*, 239 F.3d
6 283, 285-86 (2d Cir. 2001), meaning no showing of prejudice
7 is necessary to establish a Sixth Amendment violation where
8 a defendant is deprived of counsel in bringing it, see
9 *United States v. Cronin*, 466 U.S. 648, 659 (1984). However,
10 "the Sixth Amendment does not require that counsel do what
11 is impossible or unethical." *Id.* at 656 n.19. It is well
12 established that "[t]he failure to include a meritless
13 argument does not fall outside the wide range of
14 professionally competent assistance to which [a defendant
15 is] entitled." *Aparicio v. Artuz*, 269 F.3d 78, 99 (2d Cir.
16 2001) (internal quotation marks omitted). Two attorneys
17 withdrew as counsel to Forbes because he insisted on
18 pursuing what both attorneys considered to be a frivolous
19 motion to withdraw his plea. A previous panel of this Court
20 conducted a thorough review of the record on direct appeal
21 and found no merit in any of the grounds Forbes raised as

1 possible bases for allowing him to withdraw his plea. An
2 independent review of the record reconfirms this conclusion.
3 Moreover, Forbes would likely have ended up in a worse
4 position than he now finds himself had he been allowed to
5 withdraw his plea, because the government promised to pursue
6 both the § 922(g) and § 924(c) charges if he succeeded. A
7 conviction on the § 924(c) count would have required the
8 court to add a minimum of five years to Forbes's sentence,
9 to be served consecutively to the sentences for the two
10 other drug-related counts.

11 Forbes's right to counsel at the critical plea-
12 withdrawal stage is not the issue before us, but rather
13 appellate counsel's failure to raise that right-to-counsel
14 claim on direct appeal. We cannot, on this record, conclude
15 that counsel's failure to raise it was objectively
16 unreasonable or caused Forbes any prejudice.

17 **Conclusion**

18 The district court's order of May 23, 2007 dismissing
19 petitioner-appellant's motion to vacate, set aside, or
20 correct his sentence under 28 U.S.C. § 2255 is hereby
21 AFFIRMED.