

United States Court of Appeals
For the Eighth Circuit

No. 18-2029

Barbara Kathleen Carnnahan

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: April 17, 2019

Filed: June 20, 2019

[Unpublished]

Before SHEPHERD, MELLOY, and GRASZ, Circuit Judges.

PER CURIAM.

Barbara Carnnahan pled guilty to conspiring to distribute 50 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846. She was sentenced to 120 months' imprisonment. Carnnahan later petitioned pro se for relief under 28 U.S.C. § 2255 to vacate, set aside, or modify her sentence. She argued, among other things, that she was denied effective assistance of counsel when

her attorney refused her request to file an appeal. The district court denied Carnnahan's petition without holding an evidentiary hearing, finding that her allegations were inherently incredible. Carnnahan appeals, arguing the district court erred in deciding not to hold an evidentiary hearing. We reverse and remand.

I. Background

On September 10, 2015, Carnnahan was charged with nine methamphetamine-related felonies. On July 20, 2016, she entered a binding plea agreement in which she agreed to plead guilty to conspiring to distribute methamphetamine and to accept a 120-month sentence. In exchange, the Government agreed to dismiss the remaining eight charges. As part of the agreement, Carnnahan also waived her right of appeal on all grounds except: (1) ineffective assistance of counsel; (2) prosecutorial misconduct; and (3) an illegal sentence. On November 28, 2016, Carnnahan appeared before the district court for sentencing. After sentencing her to the agreed-upon 120 months, the district court noted that,

while this is a sentence that I take it would not be appealed because it does follow the agreement, nevertheless, I will give the procedural advice that is standard, which is that a defendant who has just been sentenced and who wishes to appeal and has reserved the right to appeal can only do so by filing a notice of appeal within 14 days of this date.

Carnnahan indicated during the hearing that she was "ready to serve [her] sentence" but made no comment regarding whether she intended to appeal.

On July 5, 2017, Carnnahan filed her § 2255 petition, alleging that her attorney had been ineffective because, among other things, he "failed to file an appeal [for her] after sentencing when [she] requested one." In response, the government provided an affidavit from Carnnahan's attorney which stated, "As my client was elated that she took a plea that only required her to serve 120 months . . . she clearly indicated

to me at [her sentencing hearing] that she did not wish to appeal the sentence she was given.” Carnnahan noted in her reply that, after her sentencing hearing, her attorney told her, “[D]o your ten yrs. [sic] You got a good deal[. G]ood bye. Be happy.”

The district court denied Carnnahan’s petition without holding an evidentiary hearing. The court acknowledged that normally such a “he said, she said” situation would require an evidentiary hearing. But, it declined to hold one because it found that Carnnahan’s credibility had been “impeached repeatedly by the record.” The court reasoned that “when there is more than bare ‘conflicting statements,’ and a trial judge sees fatal contradictions in the record and inherently incredible claims, it would be wasteful and fruitless to hold a hearing when the result is not fairly in doubt.”

II. Standard of Review

“We review a district court’s decision to deny an evidentiary hearing for abuse of discretion.” Thomas v. United States, 737 F.3d 1202, 1206 (8th Cir. 2013).

III. Discussion

As a preliminary matter, “an attorney’s failure to file a notice of appeal after being instructed to do so by his client constitutes ineffective assistance entitling petitioner to section 2255 relief, no inquiry into prejudice or likely success on appeal being necessary.” Barger v. United States, 204 F.3d 1180, 1182 (8th Cir. 2000). This remains true “[e]ven if the client waived [her] right to appeal as part of a plea agreement.” United States v. Sellner, 773 F.3d 927, 930 (8th Cir. 2014); see also Garza v. Idaho, 139 S. Ct. 738, 744–45 (2019).

In general, “[w]here [a] petitioner’s allegations, if true, amount to ineffective assistance of counsel, a hearing must be held unless the record ‘affirmatively refutes the factual assertions upon which [the claim] is based.’” Watson v. United States,

493 F.3d 960, 964 (8th Cir. 2007) (third alteration in original) (citation omitted). Indeed, “[i]f neither [party’s] statement is facially incredible and both contain similar specificity regarding when the alleged appeal-request conversations took place (or did not take place), counsel’s contrary statement simply is insufficient to support a finding that the [petitioner’s] allegations cannot be accepted as true.” Witthar v. United States, 793 F.3d 920, 923 (8th Cir. 2015) (alteration in original) (citations and internal quotation marks omitted).

Here, Carnnahan said that she asked her attorney to file an appeal after her sentencing hearing. Her attorney, on the other hand, said that, after her sentencing hearing, Carnnahan told him she did not want to file an appeal. Neither statement is “facially incredible” and both contain “similar specificity regarding when the alleged appeal-request conversations took place (or did not take place).” Id. In addition, the record does not “affirmatively refute[]” Carnnahan’s allegations. Watson, 493 F.3d at 964 (citation omitted). While the district court suggested Carnnahan’s petition contains a number of “fatal contradictions” that “impeached” her credibility, none of those purported contradictions relate to her request for an appeal. Accordingly, the district court was required to hold a hearing before making factual determinations about Carnnahan’s credibility.

IV. Conclusion

For the foregoing reasons, we reverse and remand for an evidentiary hearing on the issue of whether Carnnahan asked her attorney to file an appeal.
