

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO. 8:14-cr-486-T-23TBM
8:16-cv-1699-T-23CPT

DANI MUNOZ-GUZMAN
_____ /

ORDER

Dani Munoz-Guzman timely moves (Doc. 1) under 28 U.S.C. § 2255 to vacate his sentence. The United States responds (Doc. 5), and Munoz-Guzman replies (Doc. 6).

Background

In a written plea agreement, Munoz-Guzman admits that he and three conspirators purchased stolen credit card and debit card information, used counterfeit cards to purchase fuel, and re-sold the fuel at a discounted rate. (Crim. Doc. 97 at 17–18) Munoz-Guzman pleaded guilty to conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349, and conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h). Munoz-Guzman received a below-guidelines sentence of 78 months' imprisonment and was ordered to pay \$174,003.74 in restitution.

Discussion

Munoz-Guzman claims ineffective assistance, a difficult claim to sustain.

To demonstrate that counsel was constitutionally ineffective, a movant must show (1) that counsel's representation fell below an objective standard of reasonableness and (2) that counsel's deficient performance prejudiced the movant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[T]here is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697.

1. Ineffective assistance at sentencing

Citing an "intended loss" of more than \$400,000.00, the PSR applied a fourteen-level increase to the base offense level under United States Sentencing Guidelines, Section 2B1.1(b)(1). Munoz-Guzman claims that counsel rendered deficient performance both by failing to discuss with him "actual loss" and by failing to object to the fourteen-level increase.

Counsel reasonably declined to discuss the actual loss. Application Note 3A to Section 2B1.1 explains that "loss" means "the greater of actual loss or intended loss." In Munoz-Guzman's case, the intended loss of more than \$400,000.00 exceeds the actual loss of \$170,571.49. (Crim. Doc. 97 at 17–18) The intended loss controls.

Also, counsel reasonably declined to challenge the intended loss. *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001). Munoz-Guzman admits (Crim. Doc. 97 at 17) using information from 639 credit or debit cards. The PSR multiplied 639 by a

\$1,000 per-device loss amount, which was established during the sentencings of Munoz-Guzman's conspirators. (Doc. 131 at ¶ 40) Munoz-Guzman identifies no plausible basis on which counsel could have objected to the intended loss calculation.

Moreover, Munoz-Guzman's experienced defense counsel reasonably declined to raise an objection that could jeopardize a downward adjustment for acceptance of responsibility. Counsel instead advanced a number of other arguments in favor of a lower sentence and ultimately secured Munoz-Guzman a below-guidelines term of imprisonment.¹ See *Harrington v. Richter*, 562 U.S. 86, 109 (2011) ("There is a strong presumption that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect."); *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998) ("Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel.")

2. Ineffective assistance for failing to request a restitution hearing

Munoz-Guzman next claims that counsel failed to request a restitution hearing and failed to contest the restitution amount. Binding authority prohibits Munoz-Guzman challenging restitution through an ineffective-assistance claim. *Mamone v. United States*, 559 F.3d 1209, 1211 (11th Cir. 2009).

¹ Counsel objected to a two-level enhancement under Section 2B1.1(b)(10)(B), counsel requested a two-level minor-role reduction under Section 3B1.2, and counsel requested a downward variance based on the 18 U.S.C. § 3553(a) sentencing factors. (Doc. 131, Doc. 135, Doc. 152)

3. Ineffective assistance on appeal

After filing a notice of appeal, Munoz-Guzman's counsel moved to withdraw because Munoz-Guzman was dissatisfied with counsel's performance. The magistrate judge granted the motion and appointed new counsel. Munoz-Guzman claims ineffective assistance by appellate counsel because he "was pushed aside by his attorney on his direct appeal only with a letter, stating that his written plea agreement contains a sentence and appeal waiver." (Doc. 6 at 2)

Counsel's letter to Munoz-Guzman (Civ. Doc. 6-2) explains that the plea agreement's appeal waiver precludes a direct appeal and offers to withdraw the appeal or to file an *Anders* brief. Munoz-Guzman does not dispute that he directed counsel to voluntarily dismiss the appeal. (Cr. Doc. 154)

Munoz-Guzman instead argues that counsel failed to discover a Ninth Circuit decision, *United States v. Quintero-Leyva*, 823 F.3d 519, 521 (9th Cir. 2016), which remands for re-sentencing based on Amendment 794. Construed charitably, Munoz-Guzman appears to maintain that counsel should have advanced on appeal Munoz-Guzman's entitlement to a minor-role reduction under Amendment 794, which "clarified the factors to consider for a minor-role adjustment." *United States v. Cruickshank*, 837 F.3d 1182, 1194 (11th Cir. 2016) (citing *Quintero-Leyva*, 823 F.3d at 521).

Even if this claim (which Munoz-Guzman articulates for the first time in his reply) relates back to the initial motion to vacate, Munoz-Guzman demonstrates

neither deficient performance nor prejudice. Assuming that the plea agreement's appeal waiver (Crim. Doc. 97 at 14–15) was knowing and voluntary, counsel correctly advised that the appeal waiver precludes a sentencing challenge on direct appeal. *Williams v. United States*, 396 F.3d 1340, 1341 (11th Cir. 2005). Munoz-Guzman claims neither that the United States' appeal waiver is invalid nor that appellate counsel knew or should have known that the appeal waiver is invalid.²

To the extent Munoz-Guzman attempts to bring a non-constitutional challenge based on Amendment 794, that claim likewise fails. Because Amendment 794 is a clarifying amendment, *Cruickshank*, 837 F.3d at 1194, Munoz-Guzman's claim "can be raised on collateral review only when the alleged error constitutes a fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." *Burke v. United States*, 152 F.3d 1329, 1331 (11th Cir. 1998) (internal quotation marks and brackets omitted). For the reasons stated at the sentencing hearing (Crim. Doc. 152 at 11–16), Munoz-Guzman establishes no fundamental defect based on denial of the minor-role reduction.

² Munoz-Guzman mentions (Doc. 6 at 1) that trial counsel "knew that his plea agreement contained an appeal waiver, yet she did nothing about it." To the extent Munoz-Guzman denies knowing about the appeal waiver, the plea colloquy conclusively demonstrates Munoz-Guzman's knowledge. The magistrate judge reviewed the appeal waiver in detail, and Munoz-Guzman stated that he understood the appeal waiver. (Crim. Doc. 151 at 35–37)

Conclusion

The motion to vacate (Doc. 1) is **DENIED**. Because Munoz-Guzman's claims are patently frivolous, Munoz-Guzman's request for an evidentiary hearing is **DENIED**. 28 U.S.C. § 2255(b); *Griffith v. United States*, 871 F.3d 1321, 1329 (11th Cir. 2017).

Munoz-Guzman's motion for a copy of the docket sheet (Doc. 8) is **GRANTED**. The clerk must send to Munoz-Guzman a copy of the docket sheet.

The clerk is directed to enter a judgment against Munoz-Guzman and to **CLOSE** this case.

DENIAL OF BOTH CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL *IN FORMA PAUPERIS*

Because Munoz-Guzman fails to show that reasonable jurists would debate the merits of the procedural issues or the merits of the claims, a certificate of appealability is **DENIED**. 28 U.S.C. § 2253(c)(2); *Lambrix v. Sec'y, Fla. Dep't of Corrs.*, 851 F.3d 1158, 1169 (11th Cir. 2017). Leave to appeal *in forma pauperis* is **DENIED**. Munoz-Guzman must obtain permission from the circuit court to appeal *in forma pauperis*.

ORDERED in Tampa, Florida, on September 27, 2019.



STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE