FILED
United States Court of Appeals
Tenth Circuit

October 10, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARIO SAUCEDO-AVALOS,

Defendant - Appellant.

No. 18-3119
(D.C. Nos. 2:17-CV-02260-JAR and 2:14-CR-20071-JAR-2)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **PHILLIPS**, **MCKAY**, and **O'BRIEN**, Circuit Judges.

Mario Saucedo-Avalos pled guilty to conspiracy to possess with intent to distribute more than 50 grams of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(viii), 846. The plea agreement did not specify a particular sentence or call for a recommendation as to sentencing but did contain a waiver of the right to file a direct appeal and to challenge the sentence via a 28 U.S.C. § 2255 motion, with the exception of ineffective assistance of counsel claims.

The presentence investigative report (PSR) calculated the total offense level to be

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

42, which included both a three-level downward adjustment for acceptance of responsibility, *see* USSG § 3E1.1, and a three-level upward adjustment because Saucedo-Avalos acted as "a manager or supervisor" in the offense which "involved five or more participants or was otherwise extensive." *See* USSG § 3B1.1(b). With a Criminal History Category of I, the advisory guideline range was 360 months to life imprisonment. The district judge sentenced Saucedo-Avalos to 360 months.

Saucedo-Avalos filed a direct appeal. In response, the government moved to enforce the plea agreement's appellate waiver. We granted the motion and dismissed the appeal. *See United States v. Saucedo-Avalos*, 645 F. App'x 639, 644 (10th Cir. 2016) (unpublished). In so doing, we expressly rejected Saucedo-Avalos' claims that (1) he did not know the nature of the charge to which he pled guilty and (2) due to the lack of a Spanish interpreter during his meetings with counsel, he developed the belief that he was pleading guilty in exchange for a 10-year maximum sentence. *Id*. at 642-44. Both claims were belied by the record of the change of plea hearing, where the judge, assisted by a Spanish interpreter, explained the charge, the statutory range of imprisonment (10 years to life), and her authority to sentence him within that range unconstrained by any recommendations from the parties. *Id*. "Saucedo-Avalos never indicated his understanding of the proceedings was compromised by language difficulties." *Id*. at 643. Even though "counsel may have estimated, and [Saucedo-Avalos] may have expected, a sentence substantially less than the thirty years imposed," such musings did not invalidate his guilty plea or render it involuntary. *Id*. at 644 (quotation marks omitted).

Saucedo-Avalos filed a pro se 28 U.S.C. § 2255 motion.[1] Relevant here, he alleged trial counsel was ineffective in coercing him to enter an involuntary and unknowing guilty plea. Specifically, he claimed counsel (1) failed to provide an interpreter during their meetings in which they discussed the plea agreement and potential sentence, (2) led him to believe he was pleading guilty in exchange for a maximum sentence of 10 years; and (3) did not explain to him the charge to which he was pleading.[2]

The government's response included the affidavit of defense counsel. Counsel

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[1] We have liberally construed Saucedo-Avalos' pro se pleadings, stopping short, however, of serving as his advocate. *See United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

[2] As stated previously, although Saucedo-Avalos waived the right to challenge his sentence via a § 2255 motion, the waiver excluded ineffective assistance of counsel claims from its scope. In that respect, it is broader than *United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001) ("[A] plea agreement waiver of postconviction rights does not waive the right to bring a § 2255 petition based on ineffective assistance of counsel claims challenging the validity of the plea or the waiver"; "[c]ollateral attacks based on ineffective assistance of counsel claims that are characterized as falling outside that category are waivable.").

In addition to claiming counsel coerced him into entering an involuntary and unknowing plea, he alleged counsel was ineffective for failing to (1) notify the Mexican Consulate of his arrest and detention as required by the Vienna Convention or ensure that the government had provided the requisite notification; (2) pursue as evidence a letter from co-defendant Jesus Octavio Valdez-Aguirre which purported to retract statements he made about Saucedo-Avalos' involvement in the conspiracy; and (3) object to the three-level manager/supervisor upward adjustment at sentencing. The judge rejected each claim: (1) Saucedo-Avalos had not established he was prejudiced by the lack of Consulate notice; (2) counsel's tactical choice not to pursue Valdez-Aguirre's letter, which was neither dated nor under oath, was reasonable in light of Valdez-Aguirre's signed and sworn plea agreement which implicated Saucedo-Avalos as a co-conspirator, and (3) counsel did object to the manager/supervisor adjustment and sought instead a two-level downward adjustment for playing a minor role in the offense. Because Saucedo-Avalos does not challenge the resolution of these claims in this putative appeal, we do not consider them.

claimed that although an interpreter was present during their initial attorney-client meetings, Saucedo-Avalos eventually told him an interpreter was unnecessary because he fully understood and comprehended the English language and counsel's advice. Based upon their discussions, wherein Saucedo-Avalos asked intelligent questions in English and appropriately answered counsel's questions in English, it was "crystal clear" to counsel that Saucedo-Avalos fully understood counsel's advice. (R. Vol. 4 at 89.) Moreover, "[a]t no time during any of the discussions that occurred without an interpreter . . . did Saucedo-Avalos indicate any inability whatsoever to understand counsel or what was being discussed." (*Id*.) Counsel admitted he discussed the possibility of a 10-year or less sentence with Saucedo-Avalos. However, he told Saucedo-Avalos such sentence would be conditioned on him cooperating with the government and testifying against his co-defendants; Saucedo-Avalos stated he understood and wished to cooperate. Counsel pursued a plea agreement based on cooperation but Saucedo-Avalos ultimately decided not to cooperate because his family had been threatened. According to counsel, it was the decision not to cooperate which led to the ultimate sentence; had Saucedo-Avalos cooperated and testified against his co-defendants, counsel believes he would have received a substantially lower sentence.

The district judge decided there was a factual dispute regarding the use of an interpreter during attorney-client meetings: while both parties agreed an interpreter was not present at certain meetings, they each blamed the other for the interpreter's absence. Nevertheless, Saucedo-Avalos' claim that he did not understand the charge or the potential sentence due to the absence of an interpreter was, as we concluded on direct

appeal, not supported by the record of the change of plea hearing where Saucedo-Avalos, with the aid of an interpreter, acknowledged that he understood the charge and that he faced a minimum sentence of 10 years and a maximum sentence of life imprisonment.[3]

Moreover, even if counsel erred, Saucedo-Avalos had failed to demonstrate prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to succeed on an ineffective assistance of counsel claim, a defendant must show both deficient performance and prejudice resulting therefrom). To establish prejudice in the guilty plea context, Saucedo-Avalos had to show "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985). His mere allegation of having insisted on going to trial is not enough; he had to show that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). This he could not do, the judge reasoned, because (1) he did not dispute that a jury likely would have convicted him on the conspiracy count had he gone to trial, (2) the record did not reveal any viable defense to the charge; and (3) the factual basis for his plea, which spanned four single-spaced pages of the plea agreement, was supported by police surveillance and his co-conspirators' statements; it also illustrated the scope of the conspiracy as well as the "great degree of control" he exercised over the drug-trafficking

[3] As the judge also noted, counsel's version of the events surrounding the potential 10-year sentence was consistent with the record. Saucedo-Avalos was scheduled to plead guilty on July 13, 2015, but asked for a continuance because he was no longer willing to cooperate. Approximately two weeks later, he pled guilty pursuant to a plea agreement without a cooperation provision.

organization. (R. Vol. 4 at 128.) Although the benefits of the plea agreement were certainly less than what cooperation would have yielded, he did receive a three-level downward adjustment for acceptance of responsibility, which reduced the bottom of the guideline range from life imprisonment to 360 months. The judge correctly observed: "In light of the evidence and benefits received under the plea agreement, Saucedo-Avalos has not shown how a decision to reject the plea agreement would have been rational under the circumstances." (R. Vol. 4 at 128.)

Saucedo-Avalos seeks a certificate of appealability (COA) from this Court because the trial judge denied his request for one. A COA is a jurisdictional prerequisite to our review of a petition for a writ of habeas corpus. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). We will issue one "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make this showing, he must establish that "reasonable jurists could debate whether . . . the petition should have been resolved [by the district court] 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) (quotation marks omitted). He has not met his burden.

Saucedo-Avalos argues an evidentiary hearing was necessary because the judge found a factual dispute existed regarding the use of an interpreter during attorney-client meetings.[4] But an evidentiary hearing on a § 2255 motion is necessary only if "the

[4] He also claims that had the interpreter headphones been functioning properly

motion and the files and records of the case [do not] conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). We have thoroughly reviewed the record and the judge's cogent decision. No hearing was necessary. Although the judge addressed a factual dispute as to which party was responsible for the absence of an interpreter during attorney-client meetings, she ultimately concluded such a dispute was immaterial—even if counsel was to blame, the record did not support Saucedo-Avalos' misunderstanding claim or prejudice. Saucedo-Avalos does not explain how this conclusion is reasonably debatable. Because it is not reasonably debatable, we **DENY** a COA and **DISMISS** this matter. Saucedo-Avalos' request to proceed on appeal without prepayment of fees (*in forma pauperis* or *ifp*) is **DENIED AS MOOT** because we have reached the merits of his COA application.

Entered by the Court:

Terrence L. O'Brien
United States Circuit Judge

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during the sentencing proceedings, he "may well have placed facts on the record indicating that he previously misunderstood the plea agreement due to [counsel's] out-of-court legal advice. Because [he] was denied this opportunity, the . . . sentencing hearing cannot be characterized as full and fair, nor can the plea colloquy where [he] followed counsel's advice to answer yes or no." (COA Application at 3.) But the sentencing transcript shows the "issue" with the headphones was corrected at the onset of the sentencing hearing. (R. Vol. 3 at 33.) Moreover, we will not consider the issue because he did not raise a claim concerning the headphones in the district court. *See Parker v. Scott*, 394 F.3d 1302, 1307 (10th Cir. 2005) (declining to consider additional claims that habeas petitioner did not present to the district court)*; see also United States v. Fishman*, 608 F. App'x 711, 712 (10th Cir. 2015) (unpublished) ("[A] district court cannot be debatably wrong on issues that are not fairly presented to or decided by it."). Not only that, any such claim would be barred by the plea agreement waiver. *See supra* n.2.