FILED
United States Court of Appeals
Tenth Circuit

August 10, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ISRAEL PAUL GARCIA,

Defendant - Appellant.

No. 20-1381
(D.C. No. 1:17-CR-00132-PAB-1)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BACHARACH**, **MURPHY**, and **CARSON**, Circuit Judges.

Petitioner Israel Paul Garcia—a felon—unlawfully possessed a firearm in violation of 18 U.S.C. § 922(g)(1). After the Supreme Court's decision in Rehaif v. United States, 139 S. Ct. 2191 (2019), Petitioner timely moved to vacate his conviction and sentence under 28 U.S.C. § 2255. The district court denied the motion on procedural grounds and declined to issue a certificate of appealability ("COA"). Petitioner appealed and now seeks a COA from this Court.

We will grant a COA only if Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make the showing, Petitioner must

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

demonstrate that "reasonable jurists could debate whether, or for that matter, agree that, the petition should have been resolved 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) (internal citation and quotation marks omitted). Because the district court denied the petition on procedural grounds, we will grant a COA if Petitioner shows that reasonable jurists could debate both "whether the petition states a valid claim of the denial of a constitutional right" and "whether the district court was correct in its procedural ruling." Id. Our jurisdiction arises under 28 U.S.C. § 1291 and § 2253(c). We decline to issue a COA and dismiss the appeal.

I.

Petitioner called law enforcement to report an armed man running through the neighborhood. When police officers arrived at Petitioner's home, they found him armed with a rifle. Officers arrested Petitioner, searched his home, and found assorted rifles, a handgun, and a homemade silencer. Petitioner has prior felony convictions, so the government obtained an indictment charging Petitioner with two counts of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1), and one count of possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d). Petitioner agreed to plead guilty to one of the § 922(g) counts, and, in return, the government agreed to dismiss the remaining counts. At the change of plea hearing, the district court informed Petitioner of the elements of the offense, and Petitioner acknowledged his understanding of them:

> *First*: the Petitioner knowingly possessed firearms as charged in the indictment.

> *Second*: the Petitioner was convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year, before he possessed the firearm; and
>
> *Third*: before the Petitioner possessed the firearm, the firearm had moved at some time from one state to another.

Petitioner never objected to his plea agreement nor did he file a direct appeal.

At the time of Petitioner's plea, we required knowledge of conduct only (that he knowingly possessed a firearm), and not of status (that he knew he was a felon). See United States v. Silva, 889 F.3d 704, 711 (10th Cir. 2018). After Petitioner's conviction, however, the Supreme Court decided Rehaif. In that case, the Court held that "knowingly," the first element of § 922(g), applied to "both the defendant's conduct and to the defendant's status." Rehaif, 139 S. Ct. at 2195. So Petitioner moved to vacate his conviction under 28 U.S.C. § 2255, because the district court omitted the knowledge of status element from his plea colloquy, thereby rendering his plea "constitutionally invalid."

Generally, a Petitioner cannot collaterally attack a voluntary and intelligent guilty plea. Bousley v. United States, 523 U.S. 614, 621 (1998). But before the district court, the government conceded and the district court acknowledged that (1) Rehaif applies retroactively to Petitioner's case and (2) his guilty plea cannot be voluntary and intelligent if the Petitioner is unaware of an element of his crime. So Petitioner's plea was neither voluntary nor intelligent and is, therefore, subject to collateral attack. Even so, Petitioner cannot collaterally attack the intelligence of his guilty plea unless he first raised that argument on direct review. Id. Failure to do so constitutes a procedural

default and ordinarily precludes relief. See Reed v. Farley, 512 U.S. 339, 354 (1994). Petitioner did not challenge his guilty plea on direct review, so he procedurally defaulted his claim. To proceed, as we discuss below, he must overcome the default by showing cause and prejudice.

II.

The district court determined that Petitioner could not meet the burden required to overcome his procedural default. To obtain a COA, Petitioner must establish that reasonable jurists could debate the district court's ruling that he did not overcome his procedural default. See Slack, 529 U.S. at 484. To overcome the procedural default, Petitioner must "demonstrate either cause and actual prejudice, or that he is actually innocent."[1] Bousley, 523 U.S. at 622 (citations and internal quotation marks omitted). Petitioner can establish cause where a claim is "so novel that its legal basis is not reasonably available to counsel." Id. (quoting Reed v. Ross, 468 U.S. 1, 16 (1984)). Petitioner argued before the district court that Rehaif overturned near-unanimous lower court authority. As a result, Petitioner contends, his claim was so novel that it was unavailable to him at the time of his plea. The district court agreed and held that Petitioner established cause. We, too, agree that Petitioner established cause. See Reed, 468 U.S. at 17.

But a finding of "cause" does not end the inquiry—Petitioner must still show prejudice. To establish prejudice, Petitioner must show the district court's error is one

[1] Petitioner does not argue actual innocence, so we do not address it.

"'of constitutional dimensions' that 'worked to his actual and substantial disadvantage.'" United States v. Snyder, 871 F.3d 1122, 1128 (10th Cir. 2017) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). The Petitioner must "shoulder the burden of showing" more than a mere "possibility of prejudice." Frady, 456 U.S. at 170. Because the context here is a defective guilty plea, Petitioner must show "there is a reasonable probability that, but for [the error], he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985). We conclude that reasonable jurists could not debate whether the district court correctly found a lack of prejudice.

Although Petitioner established cause, the district court held that Petitioner failed to establish prejudice. The district court gave two reasons. First, Petitioner failed to fulfill his burden to establish prejudice. Rather than establishing a reasonable probability that he would have gone to trial, Petitioner simply argued the government would be "hard pressed" to show his knowledge of prohibited status. The district court held that this statement was immaterial because it was "not the government's burden to establish a lack of prejudice," but Petitioner's burden to show its presence. Second, the district court reasoned that the charge for possession of an unregistered firearm, which does not depend on any status, did not require the government to prove Petitioner knew of his felon status. Therefore, the government could have likely presented Petitioner with enough evidence

on that charge to induce Petitioner to plead guilty (perhaps in exchange for dismissing the § 922(g) charges) and dissuade him from pursuing a trial.[2]

Petitioner has not shown a reasonable probability he would have demanded a trial had the district court informed him of the proper elements of § 922(g). In his petition, and in his brief here, Petitioner mischaracterizes his burden. Petitioner merely describes the nature of his prior convictions and argues the potential difficulty of proving his knowledge of his felon status. Petitioner points out that the convictions are twenty-five years old and that he served less than ninety days in jail. But showing the difficulty of establishing an element does not alone show a reasonable probability he would have gone to trial—the necessary showing for prejudice.

For one thing, Petitioner bears the burden to show prejudice, not the government. Frady, 456 U.S. at 170. Petitioner must, therefore, show actual evidence that, or otherwise convince us that, he would have gone to trial but for the district court's error. Hill, 474 U.S. at 59. He has not met that burden. The timeline and the age of Petitioner's previous convictions are insufficient without some connection to Petitioner's reasoning for going or not going to trial. Petitioner infers, based on a string of assumptions, that because his sentences are old and he served no prison time, the government would struggle to prove he knew his felon status, and therefore he would not have pleaded guilty. Although interesting, Petitioner's arguments do not sufficiently show a

[2] Petitioner vigorously challenges the district court's second reasoning, but regardless of the district court's second reason or Petitioner's alternative arguments, we decline to consider them or endorse either side.

reasonable probability that he would have gone to trial. He has offered no evidence that he did not know of his prohibited status, nor has he given sufficient evidence-based or record-based reasoning that makes his choice of a trial probable.

Petitioner points to United States v. Trujillo, 960 F.3d 1196, 1207 (10th Cir. 2020), where we said, "if the evidence of a [petitioner's] knowledge of his felony status is weak, we can presume his substantial rights were affected because he might have proceeded to trial if he had known the government would be required to prove he knew he was a felon." But this cherry-picked language does not help him. We stated this presumption in the context of the third prong of plain-error review—whether a Petitioner's substantial rights are being affected. Id. at 1206-07. Because Trujillo discussed a different context than the more burdensome cause-and-prejudice standard, Petitioner's reliance on the case is misplaced.

Our decision in United States v. Harms, 371 F.3d 1208 (10th Cir. 2004) is more on-point. The defendant in Harms, like Petitioner, failed to demonstrate actual prejudice to overcome his procedurally barred claim. Id. at 1212. The defendant was unaware and uninformed of the distinction between "virtual" and "actual" child pornography, so he pleaded guilty and abandoned trial. Id. After the Supreme Court held the prohibition of virtual child pornography unconstitutional, see Ashcroft v. Free Speech Coalition, 535 U.S. 234, 258 (2002), the defendant moved to vacate his sentence, Harms, 371 F.3d at 1209. On appeal, we held the defendant could not establish prejudice to overcome his procedural default below because, like Petitioner, the defendant put forth no evidence that he would have gone to trial. Id. at 1212. Like Petitioner's failure to show evidence that

he did not know of his status, the defendant failed to show evidence that the pornography he possessed was actually virtual and legal. Id. Like Petitioner, who only states that the government would be "hard-pressed" to show his knowledge, the defendant in Harms only claimed no evidence in the record could support "that he would *not* have gone to trial." Id. Neither argument will suffice.

Petitioner did not satisfy his burden of showing prejudice. He has not convinced us that reasonable jurists could debate whether the district court's decision was correct. For these reasons, we decline to issue a COA and dismiss the appeal.

DISMISSED.

Entered for the Court

Joel M. Carson III
Circuit Judge