

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)
)
 Plaintiff/Respondent,)
)
 v.) Criminal Action No. 97-92-SLR
) Civil Action No. 99-367-SLR
FELIX J. ALVARADO,)
)
 Defendant/Petitioner.)

Colm F. Connolly, United States Attorney and Shannon Thee Hanson,
Assistant United States Attorney, United States Attorney's
Office, Wilmington, Delaware. Counsel for Plaintiff/Respondent.

Robert D. Goldberg, Esquire of Biggs and Battaglia, Wilmington,
Delaware. Counsel for Defendant/Petitioner.

MEMORANDUM OPINION

Dated: April 16, 2002
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner Felix Jesus Alvarado is an inmate at the Federal Correctional Institution in Fort Dix, New Jersey. Currently before the court is petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 for ineffective assistance of counsel because his attorney failed to file a timely appeal of his sentence.¹ (D.I. 42) The court conducted an evidentiary hearing on petitioner's claim on March 22, 2001. (D.I. 61) The following are the court's findings of facts and conclusions of law pursuant to 28 U.S.C. § 2255.

II. FINDINGS OF FACT

1. On October 14, 1997, petitioner was indicted by a federal grand jury for conspiracy to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846. (D.I. 2)

2. Mr. Sidney Balick was appointed to represent petitioner in connection with those charges. (D.I. 61 at 6, 12, 43; GX 4) Because petitioner's native language is Spanish and he speaks little English, Mr. Balick used an interpreter each time he spoke to petitioner. (D.I. 61 at 45)

¹Petitioner's motion contained claims of ineffective assistance of counsel based on other reasons that were previously denied by the court. The court reserved decision on the claim at bar pending an evidentiary hearing. (D.I. 51)

3. As part of his representation of petitioner, Mr. Balick engaged in plea negotiations with the government. (Id. at 45-46) The negotiations resulted in a reduction in the weight of the cocaine with which petitioner was charged from more than 50 but less than 150 kilograms to more than 5 but less than 15 kilograms. (Id. at 46-47)

4. On February 17, 1998, petitioner entered into a Memorandum of Plea Agreement that provided, in pertinent part:

[Petitioner] agrees to plead guilty to Count I of the Indictment. Count I charges [petitioner] with Conspiracy to Distribute Cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A) and 846. The maximum penalties for this offense are life imprisonment, a mandatory minimum term of 10 years imprisonment, a \$4 million fine, at least five years supervised release, and a special assessment of not less than \$100.

. . .

The parties agree that the total weight of the cocaine in this case is at least 5 kilograms but less than 15 kilograms and it yields a base offense level of 32. SG 2D1.1(c)(4). The parties' agreement reflected in this paragraph does not bind the Court or the presentence officer.

(GX 1) The Memorandum of Plea Agreement is silent as to petitioner's appeal rights. (Id.)

5. The same day, petitioner entered his guilty plea in open court.² (D.I. 24) During the plea hearing, Senior Judge Joseph J. Longobardi informed petitioner that the mandatory minimum sentence he could receive was ten years, consistent with the terms of the Memorandum of Plea Agreement. (D.I. 24 at 9) Petitioner indicated that he understood and agreed to this. (Id. at 9-10) Judge Longobardi also confirmed that petitioner agreed that "the total weight of cocaine in this case is at least five kilograms, but less than 15 kilograms" and understood "the importance of the weight of cocaine . . . because it could affect the guidelines and the offense level for which [he] could be sentenced." (Id. at 11) Petitioner was also informed that he and the government had the right to appeal his sentence after it was imposed, and that he would not be eligible for parole. (Id. at 15)

6. In a letter dated March 4, 1998, Mr. Balick asked petitioner to review an enclosed letter from the Assistant United States Attorney to the probation officer containing information to be used in the presentence report. (GX 10)

²Prior to the plea hearing, petitioner expressed concern to Mr. Balick about the total weight of cocaine involved in his case. (D.I. 61 at 7, 83) Mr. Balick discussed each term of the Memorandum of Plea Agreement with petitioner prior to the hearing. (Id. at 12, 48, 52; D.I. 24 at 4)

7. On March 10, 1998, an office memorandum written by Mr. Balick's secretary indicates that Sandra Ovalles³ called Mr. Balick's office on behalf of petitioner and Mrs. Alvarado and stated:

[Petitioner's] research indicates that his case isn't that bad and that he could get 8 years; and, he would like you to "make an effort to get 8 years."

(GX 11)

8. In a letter dated March 24, 1998, Mr. Balick asked petitioner to forward any research that he thought would be helpful or to have anyone who was helping him contact Mr. Balick directly. Mr. Balick's letter did not mention the minimum ten years imprisonment that petitioner was obligated to serve. (GX 12)

9. On May 21, 1998, Mr. Balick met with petitioner at FCI-Fairton to discuss the details of the presentence investigation report, which stated that the sentencing guideline range for the crime to which petitioner was pleading guilty was 121 to 151 months. (D.I. 61 at 16; GX 3) Mr. Balick recounted the meeting in an internal memorandum dated May 26, 1998:

I spent four hours driving to Fairton, meeting with [petitioner], and driving back. I had the interpreter read the entire presentence report for [petitioner].

³Ms. Ovalles is a friend of Blanca Alvarado, petitioner's wife. She often served as an interpreter for petitioner and Mrs. Alvarado. (D.I. 61 at 29)

[Petitioner] thought that I had told him he might only get eight years, but I told him that was a misunderstanding. I had clearly told him that he was facing mandatory minimum 10 year sentence. I had explained that we had gotten the government to reduce the amount of the drug but we were unable to get them to agree to reduce it low enough for an 8 year sentence.

During our plea negotiations, the government had suggested that if he helped them get information about a certain woman it might help him. At that time, [petitioner] emphatically refused to give evidence against anyone else. However, now he is willing to give them information about this woman if it [can] help his sentence. I told him it was probably too late but that I would call the prosecutor and ask him.

(GX 14) Mr. Balick subsequently informed the probation officer that petitioner did not have any objections to the presentence report. (GX 15)

10. Mr. Balick notified the Assistant United States Attorney of petitioner's offer of information, and he arranged a meeting with petitioner for June 3, 1998. (GX 16) The meeting was unsuccessful, and the government did not give any consideration to petitioner in exchange for his offer. (GX 17)

11. Petitioner was sentenced on June 22, 1998. (D.I. 37) When Judge Longobardi asked petitioner if he found any factual inaccuracies in the presentence report, the following exchange occurred:

THE DEFENDANT: About the facts? Could you repeat that again?

THE COURT: We want to know if you found anything in the report that you want to challenge, that you think is inaccurate?

THE DEFENDANT: (No response.)

THE COURT: Do you agree with Mr. Balick there are no factual inaccuracies that he or you want to bring to the attention of the Court?

THE DEFENDANT: The only thing I wanted to say, when I signed the plea, it said they weren't going to give me more than 10 years. I'd like you to have some pity on me and to reduce it a little. I'm in your hands.

MR. BALICK: Can I explain that, your Honor?

THE COURT: Yes. I'm looking now for the -- I don't have the file or plea agreement in front of me but I want to confirm that that was said or not said.

MR. BALICK: What was said, your Honor, is that there is a mandatory minimum 10 year sentence; and I've explained that to Mr. Alvarado several times, that the Court must set this to a mandatory minimum 10 years. And, of course, I also explained the guidelines begin at 121 months, and explained that the Court follows the guidelines, the minimum would be 10 years and one month, 121 months.

THE COURT: And I remember specifically my colloquy in this case where we advised Mr. Alvarado that . . . the sentence could exceed the minimum term and if it did exceed the minimum term, even though you and the Government might recommend the minimum term, that that would be no basis to withdraw the guilty plea. Do you understand, Mr. Alvarado?

THE DEFENDANT: Yes. Yes.

THE COURT: Now, the way you said it alarmed me a little bit because it's not the same way Mr. Balick says it now, and I want to make sure you understand my understanding of the plea agreement. I know somebody had a copy of it around here.

MR. McDONOUGH: Your Honor, I'm handing forward a signed copy of the plea agreement.

THE COURT: Now, there is nothing in this plea agreement that says that you will only get 10 years. Do you understand that?

THE DEFENDANT: Yes, I understand that.

THE COURT: Do you understand there is a reference, like Mr. Balick says, to a mandatory minimum term of 10 years? Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now, are you satisfied with that?

THE DEFENDANT: Yes.

THE COURT: Now, apart from that, I gather there are no factual inaccuracies in the report?

THE DEFENDANT: No, everything is okay.

(D.I. 37 at 3-5) Judge Longobardi sentenced petitioner to 151 months, the highest sentence under the applicable guideline range. (GX 18) He also informed petitioner that he had a right to appeal his sentence and, if he was unable to pay the cost of an appeal, upon his request, the Clerk of Court would immediately file a notice of appeal on his behalf. (D.I. 37 at 10; D.I. 61

at 17, 105) Judge Longobardi did not advise petitioner as to the ten-day deadline for filing an appeal. (D.I. 37)

12. On June 22, 1998, in a memorandum to petitioner's file, Mr. Balick wrote:

I represented [petitioner] at sentencing. The interpreter arrived late and therefore I had very little opportunity to speak with him before the sentencing. He had family members there including his wife and an interpreter for her and some other people. Just prior to sentencing, I again tried to make it clear that the least he could get was 121 months (10 years and one month). I tried to explain to him that the Judge had a range within which he could sentence and the range started at 121 months. The range was 121 months to 151 months. Judge Longobardi gave him 151 months.

I did not speak with [petitioner] after the sentencing but I tried to explain to his family through their interpreter that he doesn't get any credit for the good time for the first 10 years of the sentence, but he does get credit for good time after the 10 years.

(GX 18) Mr. Balick did not speak to petitioner after the sentencing hearing, never discussed with him the possibility of filing an appeal, and never advised petitioner of the ten-day deadline for filing an appeal.⁴ (D.I. 61 at 63, 89)

⁴Petitioner testified that he met with Mr. Balick in the holding cell in the basement of the courthouse after the sentencing hearing (without an interpreter), and that Mr. Balick told him that he had no grounds for an appeal, but did not tell him how much time he had to file an appeal. (D.I. 61 at 9, 11) Petitioner stated that he asked Mr. Balick to file an appeal for him at that time. (Id. at 9) Mr. Balick had no recollection of such a meeting. (Id. at 90)

13. The Judgment and Commitment order was entered on June 30, 1998. (D.I. 27)

14. On July 10, 1998, Ms. Ovalles called Mr. Balick's office on behalf of Mrs. Alvarado to request a copy of petitioner's file. (GX 34) Mr. Balick responded that day by sending a letter to petitioner enclosing a release form which, when signed, would authorize Mr. Balick to release petitioner's file to his wife. (GX 19)

15. On July 14, 1998, Ms. Ovalles left two telephone messages on behalf of petitioner and Mrs. Alvarado. One message stated, "Felix Alvarado wants to appeal his case, and he wants you to go see him." (GX 35, 36)

16. On July 17, 1998, Mr. Balick's secretary wrote a memorandum to Mr. Balick, explaining that she contacted Robert Butts of the District Court Clerk's Office about obtaining funding for an interpreter so that Mr. Balick could visit petitioner in prison. Mr. Butts informed her that Mr. Balick's "duties are over after sentencing. It's up to the defendant to contact the Court and request counsel." (GX 20)

17. Mr. Balick wrote a letter to petitioner dated July 20, 1998, in which he stated:

I have received several phone calls lately from Ms. Sandy Ovalles in behalf of your wife. She has asked me to visit you about filing an appeal.

As you know, I was appointed by the Court to represent you in accordance with the

Criminal Justice Act. I contacted the Court last week to see whether I am authorized to hire an interpreter to meet with you again. I was advised that after sentencing my duties are over. It is up to you to contact the Court and request counsel for an appeal.

You should understand that you entered a plea of guilty, and if the Court sentenced you within the law, there is nothing to appeal. However, you are free to request other counsel, or to hire counsel.

Finally, I want you to know that I too was disappointed that the Court imposed more than the minimum mandatory sentence.

(GX 7)

18. Petitioner wrote the following in a letter to Mr. Balick, also dated July 20, 1998:

I would like to know if I can cooperate with the government in the future, and if I do that, I can be eligible for a downward departure of the sentence I already have. I want to know if you can contact the prosecutor in my case and ask him for this [possibility]. I think I can get some extra information for the government and I want to know if I can get any benefits from that.

(GX 6) There was no mention of an appeal in this letter.

19. A July 23, 1998 internal memorandum from Mr. Balick's secretary noted another telephone message from Ms. Ovalles, in which she stated that petitioner and Mrs. Alvarado are "[n]ot interested in appealing but want to cooperate with the FBI on the condition that [petitioner] is given a lower sentence." (GX 22)

20. On July 30, 1998, Mr. Balick wrote a letter to the Assistant United States Attorney enclosing petitioner's July 20, 1998 letter. (GX 21)

21. On August 17, 1998, petitioner filed a pro se notice of appeal. (D.I. 31)

22. In a letter dated September 16, 1998, responding to a notification from the Third Circuit that petitioner's appeal was to be submitted to a panel for possible dismissal due to a jurisdictional defect, Mr. Balick wrote:

I was appointed to represent [petitioner] in the District Court in accordance with the Criminal Justice Act. I represented him throughout the proceedings which resulted in a guilty plea, and through sentencing. The Judgment and Commitment Order were entered on June 30, 1998, at which time I understood my services were concluded. At no time was I asked to file an appeal for [petitioner]. Indeed, I was advised by [petitioner's] wife that he did not wish to appeal the sentence. I learned for the first time on August 27, 1998 that [petitioner] had filed a pro se notice of appeal on August 17, 1998, and I received a copy of the notice of appeal signed by [petitioner] on that date.

(GX 24)

23. On March 4, 1999, petitioner's appeal was dismissed as untimely by the Third Circuit. (D.I. 36)

24. On April 22, 1999, Mr. Balick wrote the following letter to petitioner in response to a letter from petitioner dated April 15, 1999:

You state that you have not received a copy of your Plea Agreement from me. As you know, in my last letter to you, dated April 8, 1999, I sent you a copy of my letter to you dated February 5, 1999 enclosing a copy of your Plea Agreement. However, I now enclose another copy.

Your April 15th letter also states that for the past several months you have made "numerous requests" for me to furnish you a copy of your Plea Agreement. You wrote to me on September 21, 1998 requesting a copy of your Plea Agreement. You wrote again on January 26, 1999. I responded by letter dated February 5, 1999.

In your April 15th letter, you state that you were hurriedly presented with a document for your signature. That is not correct. Actually, I met with you several times, always with an interpreter. I also wrote to you several times. I wrote to you on December 29, 1997. I met with you at Gander Hill for two hours on January 7, 1998. You told me that your wife had received a copy of my letter. We discussed a plea agreement which had been offered by the government. You stated that you were interested in a plea agreement, but you wanted a reduction in the amount of cocaine. You signed a Memorandum of Plea Agreement on February 4, 1998 when I visited you with an interpreter. Enclosed is a copy of a letter I wrote to you on February 18, 1998, in which I offered to answer any questions. Your wife received a copy. I wrote to you on March 24, 1998, April 23, 1998. I met with you at Fairton on May 21, 1998, with an interpreter. I sent you a copy of my letter to the probation officer, dated May 22, 1998. I wrote to you on May 28, 1998, and enclosed a copy of an Agreement you would be required to sign if you wanted to give government some additional information. I met with you at the United States Courthouse in Wilmington, on June 3, 1998. I represented you at sentencing, on June 22, 1998. I wrote to you on July 10, 1998, with a copy to your wife. I wrote to you on July 20, 1998, with a copy to your wife. I received a letter from you on July 21, 1998, and I wrote to the United States Attorney, with a copy to you on July 30, 1998. I wrote to the United States Court of Appeals, with a copy to you, on September 16, 1998, and again on September 18, 1998.

There was nothing hurried in my representation of you.

(GX 33)

III. CONCLUSIONS OF LAW

A. Applicable Legal Standards

1. The purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, but rather simply to ensure that criminal defendants receive a fair trial. See Roe v. Flores-Ortega, 528 U.S. 470, 481 (2000).

2. To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate that: (1) his counsel's performance fell below an objective standard of reasonableness, and (2) there exists a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668, 686 (1984).

3. **Reasonableness.** "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe, 528 U.S. at 481. "Courts must judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct, and judicial scrutiny of counsel's performance must be highly deferential." Id. at 477 (quotations omitted).

4. A lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is objectively unreasonable. See id.

5. However, as a constitutional matter, counsel's failure to consult with the defendant about an appeal is not per se unreasonable.⁵ See id. at 479. Counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think either: (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. See id. at 480.

6. "Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." Id. The court must also consider "whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Id.

⁵Nevertheless, "[b]ecause the decision to appeal rests with the defendant, . . . the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal." Roe, 528 U.S. at 479.

7. "For example, suppose that a defendant consults with counsel; counsel advises the defendant that a guilty plea probably will lead to a 2 year sentence; the defendant expresses satisfaction and pleads guilty; the court sentences the defendant to 2 years' imprisonment as expected and informs the defendant of his appeal rights; the defendant does not express any interest in appealing, and counsel concludes that there are no nonfrivolous grounds for appeal. Under these circumstances, it would be difficult to say that counsel is professionally unreasonable, as a constitutional matter, in not consulting with such a defendant regarding an appeal." Id. at 479.

8. **Prejudice.** To show prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed. See id. at 484. "If the defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything, and he is not entitled to relief." Id.

9. "[E]vidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal will often be highly relevant in making this determination." Id. at 485.

10. The denial of an entire judicial proceeding, which a defendant wanted at the time and to which he had a right, demands a presumption of prejudice. See id. at 483.

B. Application of Law to the Facts

11. Petitioner had ten days from the entry of judgment on the docket, or until July 10, 1998, in which to file a notice of appeal.⁶ See Fed. R. App. P. 4(b)(1)(A)(i), 4(b)(6). The court finds that petitioner did not request Mr. Balick to file an appeal on his behalf during this ten-day period.⁷

12. The court also concludes that Mr. Balick did not act unreasonably by not consulting with petitioner about the possibility of filing an appeal. Petitioner pled guilty and was sentenced within the applicable guideline range, creating no genuine issues for appeal. Petitioner's confusion about his sentence throughout the proceedings is undisputed, but this confusion does not rise to a nonfrivolous appealable issue that a

⁶When calculating the deadline for filing under Federal Rule of Appellate Procedure 4(b), "10 days" means "10 days." Intermediate weekend days and legal holidays are counted unless the filing period is 7 days or less. See Fed. R. App. P. 26(a)(2).

⁷Although petitioner claims that he asked Mr. Balick to file an appeal immediately after the sentencing hearing, the court finds that Mr. Balick's version of the facts is more credible and is supported by the record. Furthermore, although Ms. Ovalles specifically mentioned petitioner's desire to appeal in a July 14, 1998 telephone call, this communication occurred after the July 10, 1998 deadline and was contradicted by subsequent telephone messages.

rational defendant would choose to pursue. Similarly, the court finds no evidence in the record that petitioner reasonably demonstrated to Mr. Balick that he was interested in appealing. Petitioner expressed concerns about his sentence to Mr. Balick and Judge Longobardi, both of whom explained the law to petitioner and apparently satisfied his concerns. Mr. Balick could not reasonably infer from petitioner's conduct that he desired to appeal his sentence after he agreed to plead guilty to the charges and was sentenced within the applicable guideline range. Mr. Balick's representation of petitioner was not constitutionally unreasonable and, therefore, does not qualify as ineffective assistance of counsel.⁸

13. Because the court finds that Mr. Balick's conduct was not unreasonable, the court declines to address the issue of prejudice.

IV. CONCLUSION

For the reasons stated, petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 for ineffective assistance of counsel because his attorney failed to file a timely appeal of his sentence is denied.

⁸Although Mr. Balick's actions do not rise to a Sixth Amendment violation, the court notes that the more prudent practice is for counsel to routinely consult with their clients regarding the possibility of appeal. If a defendant requests an appeal, counsel should file a timely notice of appeal and, if there exist no nonfrivolous appealable issues, also file a motion to withdraw and accompanying Anders brief.

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FELIX J. ALVARADO,)
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 Defendant/Petitioner.)

O R D E R

At Wilmington, this 16th day of April, 2002, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 for ineffective assistance of counsel because his attorney failed to file a timely appeal of his sentence (D.I. 42) is denied.

2. For the reasons stated above, petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and a certificate of appealability is not warranted. See United States v. Eyer, 113 F.3d 470 (3d Cir. 1997); 3rd Cir. Local Appellate Rule 22.2 (1998).

Sue L. Robinson
United States District Judge