

Appendix A

No. 17-3648

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUITFILED
Jun 25, 2018
DEBORAH S. HUNT, Clerk

BERNARDO OLIVARES-CEPEDA,

)

Petitioner-Appellant,

)

v.

)

UNITED STATES OF AMERICA,

)

Respondent-Appellee.

)

)

O R D E R

Bernardo Olivares-Cepeda, a federal prisoner proceeding pro se, appeals a district court order denying his motion to vacate, set aside, or correct sentence filed pursuant to 28 U.S.C. § 2255. The court construes his notice of appeal as a request for a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(2). Olivares-Cepeda requests leave to proceed in forma pauperis and has filed an unscheduled appellate brief.

With the benefit of a written plea agreement, Olivares-Cepeda pleaded guilty to conspiracy to possess with intent to distribute and to distribute 500 grams or more of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. He was sentenced to serve 200 months of imprisonment followed by ten years of supervised release. This court affirmed the district court's judgment. *United States v. Olivares-Cepeda*, No. 14-3701 (6th Cir. Apr. 10, 2015) (unpublished).

In his motion to vacate, Olivares-Cepeda asserted that he was denied effective assistance of trial counsel because counsel: (1) "accepted materially false information from the government as to [his] role in the conspiracy" and used that information "to convince and coerce [him] into accepting a plea agreement from the government"; (2) did not understand "the law related to conspiracy," causing him to plead guilty "to a crime that he did not commit"; (3) did not

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investigate “the video/audio recording that the government claimed had proof that [he] was part of the conspiracy,” and relied on the government’s factual assertions rather than translating the recording before the plea proceedings; and (4) did not “consult with [him] when the Court offered [him] the option to withdraw his plea agreement and go to trial.” On the recommendation of a magistrate judge and over Olivares-Cepeda’s objections, the district court denied Olivares-Cepeda’s motion to vacate and denied a certificate of appealability.

A certificate of appealability may issue only if a petitioner makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A certificate of appealability analysis is not the same as “a merits analysis.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, at the certificate of appealability stage, “[a] ‘court of appeals should limit its examination . . . to a threshold inquiry into the underlying merit of [the] claims,’ and ask ‘only if the District Court’s decision was debatable.’” *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 327, 348).

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the defendant to “show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. In the context of a guilty plea, the prejudice inquiry requires that the defendant “must show the outcome of the plea process would have been different with competent advice.” *Lafler v. Cooper*, 566 U.S. 156, 163 (2012).

The district court concluded that Olivares-Cepeda’s ineffective-assistance-of-trial-counsel claims did not warrant § 2255 relief. The district court pointed to this court’s order on direct appeal, which rejected Olivares-Cepeda’s claim that his guilty plea was invalid. The district court concluded that “[t]he substance of [Olivares-Cepeda’s] argument is that all of the things he said under oath” during the plea proceedings were not true. But the district court

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referred to the change-of-plea transcript and emphasized Olivares-Cepeda's sworn statements that his guilty plea was not coerced and that he was satisfied with counsel's advice and representation.

Reasonable jurists would not debate the district court's rejection of Olivares-Cepeda's ineffective-assistance-of-trial-counsel claims. *See Miller-El*, 537 U.S. at 327. The district court's findings and conclusions are supported by the record and Olivares-Cepeda has not presented any basis for debate. During the change-of-plea hearing, Olivares-Cepeda stated under oath that: the factual basis supporting the guilty plea as set forth in the statement of facts was true; his guilty plea was voluntary and not coerced; he understood the charged conspiracy offense and its elements and was guilty of each element; he had read the plea agreement and discussed it with counsel; and he was satisfied with counsel's advice and representation. "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

After the factual basis supporting the plea was read into the record, Olivares-Cepeda stated that he did not agree with everything said because he had not met all of the co-conspirators but that he "did have [an] idea what was going on" and knew "it was wrong." Counsel clarified, and Olivares-Cepeda agreed, that he could be guilty of conspiracy even if he had not met every member of the conspiracy. At no time did Olivares-Cepeda assert that he did not intend to participate in the drug conspiracy, as he later argued in his motion to vacate.

At sentencing, counsel discussed a "recorded video conversation" and explained that after the recording was translated, it was discovered that a drug-related statement that had been previously attributed to Olivares-Cepeda was not present on the recording. Counsel brought the matter to the district court's attention in the context of Olivares-Cepeda's objections to the presentence report "to strengthen his position on being a lesser-involved party," not to repudiate his guilty plea. The government argued that Olivares-Cepeda did make the drug-related statement attributed to him even though it is not on the recording. The government called Special Agent Candice Flaherty, who testified that a cooperating informant told her that the

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informant had a conversation with Olivares-Cepeda during which Olivares-Cepeda “said if the methamphetamine wasn’t good stuff, that if it was trash, they would send it back.” The government also argued that Olivares-Cepeda admitted that he made the drug-related statement during the plea proceedings and the district court highlighted that statement from the agreed-upon statement of facts.

Before sentence was imposed, counsel apologized “for even broaching the issue of what was on that tape” when objecting to the presentence report. Olivares-Cepeda argued that counsel’s apology demonstrates that counsel did not investigate the recording before the plea and, after it was translated, realized that it did not support his conspiracy conviction. But Olivares-Cepeda presented no evidence to support his theory and, in any event, the government presented evidence that Olivares-Cepeda made the drug-related statement even though it was not recorded.

In response to counsel’s apology, the district court explained that Olivares-Cepeda’s objections were inconsistent with the plea agreement and statement of facts wherein Olivares-Cepeda admitted to more than a minimal role in the conspiracy. The district court noted that either Olivares-Cepeda “lied when he signed the statement [of facts and accompanying plea agreement] or he’s lying now [at sentencing], either of which is obstruction to this Court, and either of which is not acceptance of responsibility.” The district court offered to allow Olivares-Cepeda to withdraw his plea and proceed to trial, but counsel quickly refused the offer, noting that Olivares-Cepeda did not want to do so and had “persisted in his guilt from the moment he was arrested.” Olivares-Cepeda did not interrupt counsel and, when given an opportunity to speak, did not request to withdraw his plea. Instead, Olivares-Cepeda simply apologized. On this record, Olivares-Cepeda has failed to show that but for counsel’s failure to consult with him regarding withdrawal of his plea, the outcome of the proceeding would have been different.

In his motion to proceed in forma pauperis and unscheduled brief, Olivares-Cepeda argues that the district court erroneously concluded that his notice of appeal was untimely. He argues that he did not receive notice that his motion to vacate had been dismissed, yet the district

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court refused to allow him to appeal. He requests this court to remand his case to the district court with instructions to reopen the proceedings and deny his motion to vacate, which would allow him to file a timely notice of appeal. Olivares-Cepeda's request is moot, however.

The district court entered its order denying Olivares-Cepeda's § 2255 motion on November 30, 2016. Because no separate judgment was entered, Olivares-Cepeda had 150 days after entry of the order plus 60 days because the United States is a party to this civil case, to file his notice of appeal. *See Fed. R. App. P. 4(a)(1)(B), (a)(7)(A)(ii).* Olivares-Cepeda's notice of appeal, with a June 9, 2017, certificate of service date, was entered on the district court's docket on June 19, 2017—201 days after entry of the order denying his § 2255 motion. *See Richard v. Ray*, 290 F.3d 810, 813 (6th Cir. 2002). Olivares-Cepeda's notice of appeal was, therefore, timely.

Accordingly, the application for a certificate of appealability is **DENIED**, and the motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Appendix B

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

UNITED STATES OF AMERICA,

Plaintiff, : Case No. 1:13-cr-108 (2)
Also 1:16-cv-354

District Judge Susan J. Dlott
Magistrate Judge Michael R. Merz

- vs -
BERNARDO OLIVARES-CEPEDA,

Defendant. :

ORDER ADOPTING REPORT AND RECOMMENDATIONS

This case is before the Court on Defendant's Objections (ECF No. 171) to the Magistrate Judge's Report and Recommendations recommending the Motion to Vacate be dismissed with prejudice ("Report," ECF No. 170). As required by Fed. R. Civ. P. 72(b)(3), the Court reviews the issues raised by the Objections de novo.

The Magistrate Judge decided the case without a reply from Defendant to the Government's Answer because Defendant had been reminded of the deadline for a reply and had not filed one (Report, ECF No. 170, PageID 910). Defendant's first objection is that he "never received [nor] am I aware of the existence of any government response to which I would reply." (Objections, ECF No. 171, PageID 910). He now seeks a copy of the Answer and "the opportunity to reply to it." *Id.*