

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-1824

Mario Murillo-Mora

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(6:18-cv-02066-LRR)

JUDGMENT

Before KELLY, WOLLMAN, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

Appellant's motion for appointment of counsel is denied as moot.

July 02, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION**

MARIO MURILLO-MORA,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. C18-2066-LRR
No. CR15-2015-LRR

ORDER

I. INTRODUCTION

Mario Murillo-Mora (“the movant”) has moved to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (“motion”) (civil docket no. 1). In a prior order (civil docket no. 8), the court found that an evidentiary hearing was required for the movant’s claim that trial counsel was ineffective because he failed to file a notice of appeal from the amended judgment after being instructed to do so. The court denied the movant’s remaining claims. The court also appointed counsel to represent the movant. The evidentiary hearing was held on March 18, 2021 (civil docket no. 21). Both the movant and his trial counsel, Jonathan B. Hammond, testified. In addition, the court received into evidence without objection numerous exhibits, which consisted of correspondence between the movant and trial counsel (*see* civil docket no. 20 (Exhibit A); civil docket no. 20-1 (Exhibit B); civil docket no. 20-2 (Exhibit C); civil docket no.

20-3 (Exhibit D); civil docket no. 20-4 (Exhibit E)).¹ Trial counsel previously had filed an affidavit with the court (civil docket no. 3).²

II. RELEVANT FACTS

The relevant facts concerning the movant's conviction, sentencing and 28 U.S.C. § 2255 motion are set forth in the court's prior order (civil docket no. 8) and need not be repeated here. In the motion, the movant asserts that he asked trial counsel to appeal the amended judgment entered on October 16, 2017 and that trial counsel failed to do so (civil docket no. 1 at 25-26). In response, trial counsel states in his affidavit (civil docket no. 3 at 7):

I mailed [the movant] a copy of the Amended Judgment in a Criminal Case. I pointed out the sentence imposed was well within the Court's discretion. I stated that I would not appeal the sentence unless he specifically directed me to do so. He did not do so. He did, however, write me later and inquire[d] about the status of the appeal. I have no written records or recollection of my response. I deny that he directed me to file a notice of appeal within the time allowed for such filings, or, having been directed to do so, I refused to file one.

During the evidentiary hearing, the movant introduced correspondence between the movant and trial counsel. In a letter dated October 18, 2017 (civil docket no. 20-2 (Exhibit C)), which was two days after the movant was resentenced, trial counsel wrote to the movant and enclosed the amended judgment. The letter advised the movant:

You have a right to appeal from this sentence. We have previously appealed from the Court's failure to their motion [sic]. Both of those matters were resolved unfavorably to us. Under the circumstances, *I will not be filing a notice of appeal unless you specifically direct me to.*

¹ The government withdrew its Exhibit 1 (civil docket no. 11) because it was the same document as the movant's Exhibit C (civil docket no. 20-2).

² The movant previously had filed a declaration with the motion (civil docket no. 1 at 30-31). The declaration does not include any information about his request that trial counsel file a notice of appeal from the amended judgment (*id.*).

(*Id.*) (emphasis added). Trial counsel testified that his last billing entry was for the drafting of this letter. On November 7, 2017, after the fourteen-day appeal deadline had expired, the movant sent an email to trial counsel that reads: “hi msr hammonds i hope you recived my masege i will like to se if you sand me a latter to se if you put my appeal please let me know [sic]” (civil docket no. 20-4 (Exhibit E)). Trial counsel testified that he had no recollection of, and no record of any correspondence responding to this email. He testified that he had no correspondence from the movant before the movant’s November 7, 2017 email regarding the movant’s desire to file an appeal. Trial counsel further stated that he had no reason to believe that the movant contacted him before November 7, 2017 regarding appealing his resentencing. He explained that if he had received a voicemail or other communication that was sent within the fourteen-day appeal timeframe directing him to file an appeal, he would have filed a notice of appeal. On January 2, 2018, trial counsel received a letter from the movant dated December 28, 2017 (civil docket no. 20-3 (Exhibit D)) which trial counsel understood to be a request about the progress of an appeal and a request for assistance with an appeal.

The movant testified that, after he was resentenced, trial counsel did not discuss the fourteen-day timeframe to file a notice of appeal, and he did not recall trial counsel calling him to consult about whether to file an appeal. The movant stated that, if trial counsel would have called, he would have directed him to file an appeal. On cross-examination, the movant confirmed that between October 16, 2017 (the date of resentencing) and November 7, 2017, he did not communicate with trial counsel about his desire to appeal. Specifically, he testified that the first time that he communicated with trial counsel about his desire to appeal from the amended judgment was on November 7, 2017, and that after resentencing and before sending the email on November 7, 2017, he did not call or write to trial counsel about his desire to appeal.

III. DISCUSSION

A prisoner in custody under sentence of a federal court may move the sentencing court to vacate, set aside or correct a sentence. *See* 28 U.S.C. § 2255(a). To obtain relief pursuant to 28 U.S.C. § 2255, a federal prisoner must establish:

[T]hat the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or [that the judgment or sentence] is otherwise subject to collateral attack.

Id.; *see also* Rule 1 of the Rules Governing § 2255 Proceedings (specifying scope of 28 U.S.C. § 2255). If any of the four grounds are established, the court is required “to vacate and set aside the judgment and [to] discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” 28 U.S.C. § 2255(b).

The movant argues that trial counsel provided ineffective assistance of counsel by failing to file an appeal from the amended judgment despite being requested to do so. The failure to file a requested appeal constitutes ineffective assistance of counsel sufficient to vacate, set aside or correct a sentence under 28 U.S.C. § 2255:

An attorney’s failure to file a notice of appeal upon the client’s request constitutes ineffective assistance of counsel, and no specific showing of prejudice is required. *Watson v. United States*, 493 F.3d 960, 963-64 (8th Cir. 2007) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000)). Even if the client waived his right to appeal as part of a plea agreement, prejudice is presumed if the client asked his attorney to file a notice of appeal and the attorney did not do so. *Id.* at 964.

United States v. Sellner, 773 F.3d 927, 930 (8th Cir. 2014).

Here, the court finds that the movant did not request trial counsel to file an appeal within fourteen days after resentencing. In making this finding, of course, the court must make a credibility determination to resolve any conflicting testimony. With regard to the movant, the court’s prior order (civil docket no. 8) explains that, although the movant executed a cooperation plea agreement and initially worked with the government in order

to obtain a sentence reduction for substantial assistance, he had denied and minimized the involvement of many people in this conspiracy and was not always truthful throughout the proffer sessions with the government. Trial counsel also testified that he was with the movant during the proffer sessions and that the movant did not always tell the truth.

As for trial counsel, he has been practicing law for 37 years, has been a CJA panel attorney for 33 years and has represented more than 100 defendants in federal court. The movant offered no evidence contradicting trial counsel's testimony that he always files an appeal when asked to do so, or otherwise casting doubt on trial counsel's credibility. With all else being equal, believing trial counsel over the movant with respect to any contradicting testimony is not a particularly hard call.

Of course, the general credibility standing of two witnesses does not automatically control in every situation. However, other factors also weigh against the movant. The record indicates that the movant was aware of his appeal rights and the fourteen-day deadline for filing a notice of appeal. Indeed, the movant had timely appealed his original sentence, which demonstrates that the movant knew about the fourteen-day appeal timeframe. In addition, the court expressly informed the movant of this fourteen-day appeals limitation at the resentencing hearing:

Obviously, Mr. Murillo-Mora, if you think that you still have the right to appeal the sentence, you certainly can try to do so, and here's how you appeal. You have to file a written notice of appeal with the Clerk of Court here in the United States District Court for the Northern District of Iowa at Cedar Rapids, Iowa. If you do not file a written notice of appeal within the next 14 days, you forever give up your right to challenge this judgment and sentence.

Finally, trial counsel sent a letter to the movant two days after sentencing advising the movant of his right to appeal and that he would not file a notice of appeal unless the movant directed him to do so. The movant confirmed that he had received the letter. Both the movant's testimony and trial counsel's testimony establishes that the movant did not contact trial counsel within fourteen days after he was resentenced to inform him of

his desire to appeal. The record further demonstrates that the movant had the ability to contact trial counsel, as indicated by his emails and letters to trial counsel. That the movant contacted trial counsel after the fourteen-day deadline had expired to inquire whether he had filed an appeal and the progress of an appeal does not establish that the movant specifically directed trial counsel to file an appeal or that he did so within the fourteen-day appeal timeframe.


IV. CONCLUSION

The movant has failed to meet his burden of proving that he requested an appeal within fourteen days of his resentencing, but that trial counsel failed to file that appeal. Based on this finding, the movant's claim of ineffective assistance of counsel for failing to file an appeal must be denied. As the court has already denied the movant's other grounds for relief (civil docket no. 8), the movant's 28 U.S.C. § 2255 motion will be denied in its entirety.

IT IS THEREFORE ORDERED:

- 1) The movant's claim of ineffective assistance of counsel related to a request to appeal is **DENIED**.
- 2) Because this order resolves all remaining claims presented by the movant's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255, this action is hereby **DISMISSED WITH PREJUDICE**.
- 3) No certificate of appealability will issue for those claims. If the movant desires further review of his 28 U.S.C. § 2255 motion, he may request the issuance of a certificate of appealability by a judge of the Eighth Circuit Court of Appeals in accordance with *Tiedeman v. Benson*, 122 F. 3d 518, 520-22 (8th Cir. 1997).

DATED this 26th day of March, 2021.

A handwritten signature in black ink, appearing to read "Linda R. Reade", written over a horizontal line.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 21-1824

Mario Murillo-Mora

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Eastern
(6:18-cv-02066-LRR)

ORDER

The petition for rehearing by the panel is denied.

September 22, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI

“In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.”

28 U.S.C. § 2253

Appeal

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from— ...

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).