

United States Court of Appeals for the Fifth Circuit

No. 18-60530
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

May 18, 2022

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

PHILIP JOSEPH SPEAR,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:17-CV-267

Before KING, COSTA, and HO, *Circuit Judges.*

PER CURIAM:*

Philip Joseph Spear appeals denial of his 28 U.S.C. § 2255 motion. The district court concluded that Spear's claims of ineffective assistance of counsel were barred by the appeal waiver in his plea agreement. We granted a COA on the issue whether the following claims of ineffective assistance of

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

counsel are barred by the appeal waiver: whether trial counsel failed to allow Spear to review discovery materials, inform him of upcoming court proceedings, seek a mental evaluation, interview Spear's family members to present evidence rebutting the negative character evidence, and object to the restitution amount.

It is not clear that Spear's briefed claims of ineffective assistance of counsel fall outside the scope of the COA. *See Lackey v. Johnson*, 116 F.3d 149, 151-52 (5th Cir. 1997). Because appeal waivers do not implicate this court's jurisdiction, we pretermit the issue here. *See United States v. Story*, 439 F.3d 226, 230-31 (5th Cir. 2006). Because Spear's appeal waiver contains an explicit reservation of his right to raise claims of ineffective assistance of counsel, the district court erred by concluding that the appeal waiver barred such claims. *See United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005). Thus, because the district court's judgment may be affirmed on any basis supported by the record, the appeal turns on whether Spear's claims of ineffective assistance of counsel were properly denied. *See United States v. Luyten*, 966 F.3d 329, 332 (5th Cir. 2020).

To establish a claim of ineffective assistance of counsel, Spear must show that his counsel's performance was deficient in that it fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A habeas petitioner has the burden of proving both prongs of the *Strickland* test. *Wong v. Belmontes*, 558 U.S. 15, 16 (2009). However, a defendant waives any challenge to nonjurisdictional defects in the pre-plea proceedings by entering a valid guilty plea, including ineffective assistance claims other than those related to the validity of the plea. *United States v. Palacios*, 928 F.3d 450, 455 (5th Cir. 2019).

The claim that counsel was ineffective in failing to allow Spear to review discovery was waived by his guilty plea. *See id.* His guilty plea also constitutes a waiver of his claim that counsel failed to prepare him for proceedings, to the extent that he complains about pre-plea proceedings. *See id.* To the extent that he complains about post-plea proceedings, he does not explain what counsel should have said or done to prepare him or how it would have changed the outcome of the proceeding. *See Strickland*, 466 U.S. at 687. Likewise, his guilty plea waived his claim that counsel was deficient for failing to request a mental evaluation. To the extent Spear challenges the voluntariness of his plea based on competency, he does not allege or show that he was incompetent at any relevant stage and does not explain why counsel should have explored his mental health prior to his entry of a guilty plea, and no other reason for such an investigation is apparent. *See Miniel v. Cockrell*, 339 F.3d 331, 345 (5th Cir. 2003). To the extent that he complains about this failure in regard to post-plea proceedings, he has not shown that counsel was put on notice of a mental or psychological condition. *See id.*

Although Spear argues that counsel was ineffective in failing to challenge the order of restitution, he does not provide a basis for challenging the restitution amount or any allegations of prejudice resulting from such a failure. *See Wong*, 558 U.S. at 16; *Strickland*, 466 U.S. at 687. As for the claim that trial counsel was ineffective in failing to call family members as character witnesses, Spear does not identify the witnesses or offer evidence of their proposed testimony and willingness to testify. *See Harrison v. Quarterman*, 496 F.3d 419, 428 (5th Cir. 2007). Spear has failed to establish that he received ineffective assistance of counsel.

The district court's judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

PHILIP JOSEPH SPEAR

v.

CRIMINAL NO. 1:17CR17-LG-RHW
CIVIL NO. 1:17CV267-LG

UNITED STATES OF AMERICA

MEMORANDUM OPINION AND ORDER DENYING
MOTION TO VACATE UNDER 28 U.S.C. § 2255

BEFORE THE COURT are the [26] Motion Under § 2255 to Vacate, Set Aside, or Correct Sentence by Person in Federal Custody and the [37] Motion to Amend 2255 Motion filed by Philip Joseph Spear. This Court conducted a hearing on June 13, 2018, at which Spear and his former counsel were present and testified. After consideration of Spear's Motions, the Government's response, the testimony and arguments at the hearing, the pleadings and record on file, and the relevant legal authority, the Court finds that the Motion to Amend should be granted. Spear's 2255 Motion, as amended, is denied.

BACKGROUND

Spear pled guilty to an information accusing him of two counts of production of any visual depictions of a minor engaged in sexually explicit conduct in violation of 18 U.S.C. § 2251(a), one count of production of any visual depictions of a minor engaged in sexually explicit conduct by a person having custody or control of a minor in violation of 18 U.S.C. § 2251(b), one count of transportation of any visual depictions of a minor engaging in sexually explicit conduct in violation of 18 U.S.C.

"Appendix B"

§ 2251(c), one count of distribution of any sexual depictions of a minor engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a), and one count of possession of any visual depictions of a minor engaging in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(4)(B).

This Court sentenced Spear to a total of 1920 months imprisonment and a life term of supervised release. This Court also ordered that Spear pay restitution in the amount of \$47,500, a special assessment of \$600, and an additional special assessment of \$30,000.

Spear filed a 2255 Motion alleging that (1) his attorneys provided ineffective assistance of counsel by failing to file a notice of appeal; (2) his attorneys provided ineffective assistance of counsel by waiving the preliminary hearing; (3) the information violated the Double Jeopardy Clause's multiplicity doctrine; (4) his attorneys provided ineffective assistance by failing to object to the life term of supervised release imposed by the Court; and (5) the restitution order imposed by the Court was unconstitutional. Spear has also filed a Motion to Amend his 2255 Motion to assert the following claims of ineffective assistance of counsel: (1) failure to provide discovery to Spear; (2) violation of Spear's right to a fair trial; (3) violation of Spear's Fifth Amendment right to due process; (4) failure to inform Spear of court proceedings; (5) failure to argue Spear's medical history, medical condition, age, and military service to support or request a sentence departure/variance; (6) failure to request a mental examination; (7) failure to object to Spear's sentence; (8) failure to allow Spear's family to speak on his behalf at the

sentencing hearing; (9) failure to file a motion to dismiss for failure to indict and violation of his speedy trial rights; (10) failure to file a motion to dismiss for violation of Spear's Miranda rights; (11) failure to allow Spear to read, view, or examine the presentence investigation report; (12) use of deceptive practices to coerce and threaten Spear to waive his rights and plead guilty; and (13) failure to ask for the Court to accept the Government's recommendation of sentencing Spear to the low end of the guidelines.

DISCUSSION

28 U.S.C. § 2255(a) provides four grounds for relief: (1) "that the sentence was imposed in violation of the Constitution or laws of the United States;" (2) "that the court was without jurisdiction to impose such sentence;" (3) "that the sentence was in excess of the maximum authorized by law;" and (4) that the sentence is otherwise "subject to collateral attack."

I. MOTION TO AMEND 2255 MOTION

The Court finds that Spear's Motion to Amend his 2255 Motion should be granted. Therefore, the Court will consider the arguments Spear asserted in his Motion to Amend as well as the arguments he made in his original Motion in this Memorandum Opinion and Order.

II. INEFFECTIVE ASSISTANCE FOR FAILURE TO FILE A NOTICE OF APPEAL

This Court conducted a hearing on the issue of whether Spear asked his attorney to file an appeal, because an attorney's failure to file a notice of appeal when requested — even when the right to appeal or collateral review has been

waived — is per se ineffective assistance of counsel. *See United States v. Tapp*, 491 F.3d 263, 265 (5th Cir. 2007).

In such circumstances, if the petitioner is able to demonstrate by a preponderance of the evidence that he requested an appeal, prejudice will be presumed and the petitioner will be entitled to file an out-of-time appeal, regardless of whether he is able to identify any arguably meritorious grounds for appeal that would not be precluded by the terms of his appeal waiver.

Id. at 266. After hearing testimony from Spear and his counsel, the Court finds that Spear did not request that his counsel file a notice of appeal. Therefore, Spear did not demonstrate that his attorneys provided ineffective assistance on this basis.

III. INEFFECTIVE ASSISTANCE OF COUNSEL BY COERCING AND DECEIVING SPEAR TO WAIVE HIS RIGHTS AND PLEAD GUILTY

Spear claims that his attorneys coerced him to plead guilty and waive his rights by threatening that Spear's wife would be prosecuted. Spear argues that there was no evidence to support his attorneys' belief that his wife could be prosecuted. Spear also alleges that, at his change of plea hearing, an FBI agent threatened him to plead guilty.

Spear's former attorney, Calvin Taylor, testified during the hearing held on June 13, 2018, that, at the time Spear decided to plead guilty, the Government's investigation and review of evidence was ongoing and the Government had already located some evidence that another adult assisted in the production of some of the images at issue. Mr. Taylor explained that Spear decided to plead guilty because Spear was anxious to stop the investigation, to prevent the removal of his children from their home, and to prevent the possible indictment of Spear's wife.

"To be voluntary, a plea must 'not be the product of actual or threatened physical harm, or . . . mental coercion overbearing the will of the defendant.'" *Austin v. Davis*, 876 F.3d 757, 783 (5th Cir. 2017) (quoting *Matthew v. Johnson*, 201 F.3d 353, 365 (5th Cir. 2000)). "A defendant pleading guilty must also be competent, have notice of the charges against him, understand the consequences of his plea, and have available the advice of competent counsel." *Id.*

During the change of plea hearing, Spear informed the Court that he had obtained a high school diploma as well as an avionics technology degree from a community college, and he had served over twenty years in the United States Armed Forces. He also testified that he had an opportunity to read the plea agreement and plea supplement and to go over those documents with his attorney before he signed them. He further testified that he fully understood all of the terms and conditions of the plea agreement. He agreed that, other than the written plea agreements, no one had made any other type of offer or promise in order to cause him to plead guilty. He also denied that any one had forced him to plead guilty or threatened him in order to cause him to plead guilty. He also testified that no one had threatened him or coerced him to cause him to waive his right to appeal and his right to file a 2255 Motion.

Generally, a defendant cannot refute his plea hearing testimony given under oath with statements made after conviction. *United States v. Fuller*, 769 F.2d 1095, 1099 (5th Cir. 1985). "Solemn declarations in open court carry a strong presumption of verity," forming a "formidable barrier in any subsequent collateral

proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977); *see also United States v. Lampaziane*, 251 F.3d 519, 524 (5th Cir. 2001). Therefore, the Fifth Circuit affords "great weight to the defendant's statements at the plea colloquy." *United States v. Cothran*, 302 F.3d 279, 283-84 (5th Cir. 2002).

Spear has not demonstrated that he was subjected to any threats of coercion. Instead, his plea was based on his own motivation to stop an ongoing criminal investigation...a reasoned and intentional strategy that obtained the results he sought. Furthermore, his sworn testimony at the change of plea hearing directly contradicts his current assertions. The record reflects that Spear is intelligent, and he was well-informed of the consequences of pleading guilty. Therefore, the Court finds that Spear's plea was knowing and voluntary.

IV. SPEAR'S REMANING CLAIMS

A defendant may, as part of a plea agreement, waive the right to seek post-conviction relief, including relief pursuant to § 2255. *See United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994). Where, as here, a defendant has pleaded guilty and waived his right to file a motion pursuant to § 2255, the only ineffective assistance of counsel claim to survive the waiver is one claiming the ineffective assistance "directly affected the validity of waiver or the plea itself." *United States v. White*, 307 F.3d 336, 343 (5th Cir. 2002). Thus, the Court asks "whether the plea or waiver itself was knowing and voluntary, and whether the issue challenged on appeal may properly be the subject of waiver. If the answer to both questions is 'yes,' then the

guilty plea sustains the conviction and sentence and the waiver can be enforced."

Id. at 343-44.

The record reflects that Spear's guilty plea and his waiver of rights were knowing and voluntary, and he has not shown that the alleged ineffective assistance of counsel affected the validity of his plea or his waiver. Therefore, all other claims contained in Spear's 2255 Motion are waived.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Motion [37] to Amend filed by Spear is **GRANTED**.

IT IS, FURTHER, ORDERED AND ADJUDGED that Philip Joseph Spear's Motion [26] Under § 2255 to Vacate, Set Aside, or Correct Sentence by Person in Federal Custody, as amended, is **DENIED**.

SO ORDERED AND ADJUDGED this the 19th day of June, 2018.

s/ Louis Guirola, Jr.
LOUIS GUIROLA, JR.
UNITED STATES DISTRICT JUDGE