

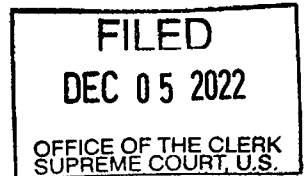
22-6460

No. _____

ORIGINAL

DAVONTE DEJEAN,
Appellant-Defendant,

v.



UNITED STATES OF AMERICA,
Appellee-Plaintiff

Writ of Certiorari to the United States Court of Appeals
for the Fifth Circuit

• • • • •
PETITION FOR WRIT OF CERTIORARI

Davante Dejean# 37538-034
F.C.I. El Reno
P.O. BOX 1500
El Reno, OK 73036-1500

QUESTIONS FOR REVIEW

Question 1: Was counsel ineffective for not enforcing the 6th Amendment right to a jury trial in the sentencing proceeding and is the court also responsible?

Question 2: Was counsel ineffective in the pretrial proceeding?

JUDGMENTS TO BE REVIEWED

In the United States Court of Appeals for the Fifth Circuit No.21-20755 the honorable judges King, Higginson, and Willett are the Circuit judges who's judgment is sought to be reviewed in accordance with judgment entered on September 8, 2022. In the United States District Court for the Eastern District of Louisiana the honorable judge Greg G. Guidry is the District Court judge who's judgment is sought to be reviewed in accordance with judgment entered on November 30, 2021.

No corporate disclosure statement is necessary in this particular case.

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OPINIONS OF LOWER COURTS

The citation to the opinion of the District Court is unpublished however can be found in case 2:18-cr-120 under UNITED STATES V. DAVONTE DEJEAN November 30, 2021.

The opinion of the Fifth Circuit Court can be found which is unpublished at No. 21-20755 and as is short discloses the following:

Davante Dejean pleaded guilty to possessing with intent to distribute cocaine base, possessing a firearm during and in relation to a drug- trafficki-
ng crime, and possessing a firearm and ammunition after a felony conviction.
he was sentenced to a total of 190 months in prison with three years of superv-
ised release and now appeals.

Dejean first challenges the district court's denial of his motion to with-
draw his guilty plea. To prevail on his motion, Dejean was required to show a
"fair and just reason" for seeking withdrawal. Fed. R. Crim.11(d)(2)(B). This
court reviews the denial of such motions for an abuse of discretion. United St-
ates v. Lord, 915 F.3d 1009, 1013-14(5th Cir. 2019). Dejean fails to show an
abuse of the district court's discretion in light of the record and the factors
set forth in United States v. Carr, 740 F.2d 339, 343-44 (5th Cir. 1984), and
we accordingly affirm the denial of his motion. See Lord, 915 F.3d at 1013-17;
United States v. Rivera, 898 F.2d 442, 447(5th Cir. 1990).

In his remaining claim, Dejean argues the district court erred by sentenc-
ing him based on a finding that an incident in which he denied involvement was
relevant conduct. The Government correctly responds that this claim is barred
by plain language of the knowing and voluntary appeal waiver in Dejeans plea
agreement. See United States v. Bond, 414 F.3d 542, 549(5th Cir. 2005). Theref-
ore, this portion of the appeal is dismissed. See United States v. Story, 437
F.3d 226. 230-31 & n.5(5th Cir. 2006).

AFFIRMED IN PART; DISMISSED IN PART.

STATEMENT OF JURISDICTION

Judgment was entered in the Fifth Circuit September 8, 2022 in case No. 21-30755. This Court has jurisdiction construed with 28 U.S.C. 1254(1) due to judgment entered in the Fifth Circuit.

PROVISIONS RELIED UPON

Amendment 4 U.S. Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person's or things to be seized.

Amendment 6 U.S. Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial Jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On May 22, 2017, deputies with the Jefferson Parish Sherriff's Office observed a 2004 Infinity FX, which had previously been entered into the National Crime Information Center by neighboring St. Bernard authorities. Deputies elected to conduct an investigatory stop. Appellant was the driver of the vehicle. He was detained, and the vehicle was subsequently searched pursuant to a warrant.

While executing the search warrant USPO deputies seized one 9mm Luger cartridge casing. No other evidence was discovered. However, while towing the vehicle for impound, a tow truck driver observed a firearm lodged inside the vehicle's center console. A second search recovered one .40 caliber Glock handgun with an extended magazine, 380 caliber ammunition, a 9mm Glock magazine, approximately fifteen rocks of crack cocaine, and a digital scale.

On November 14, 2019, Appellant was charged by Superseding Indictment, with four counts, to wit: Felon in Possession of Firearm and Ammunition, Possession with Intent to Distribute Cocaine Base, Possession of a Firearm During and in Relation to a Drug Trafficking Crime, and Felon in Possession of a Firearm and Ammunition.

On February, 11, 2020, Appellant entered a plea of guilty to counts 2 through 4 of the Superseding Indictment. Pursuant to the Plea Agreement, Appellee agree to dismiss Count 1 at Sentencing.

On April 27, 2020, Appellant filed a Motion to withdraw guilty plea. Appellant maintained that "the inclusion of the shooting which occurred on may 21, 2017 in the offense conduct portion resulting in the inflation of the guideline range. "Appellant maintained that this was not his understanding of the plea agreement; rendering it unknowingly and improvidently made. Appellee opposed. "Defendant's assertions that he did not understand the consequences of his plea

are belied by his sworn declaration at his re-arraignment hearing, which are afforded a strong presumption of veracity."

On November 30, 2021, the Court denied Appellant's Motion, concluding: Defendant indicated his understanding repeatedly as to the terms of the plea agreement, including the charges, maximum penalties, factual bases, proffered evidence, and the Court's discretion in sentencing. In short, this Court found Defendant's guilty plea to be knowledgeable, voluntary, and have a basis in fact, and the proffered reason for withdrawal is not valid basis to withdraw his guilty plea.

Thereafter, Appellant was sentenced and recieved a total sentence of 190 months in the B.O.P., three years supervised release, and \$300 special assessment.

The basis of counsels arguments were not discussed with the Appellant but were as followed in the Fifth Circuit of Appeals:

1. Whether the District Court abused its discretion in denying Appellant's Motion to withdraw his guilty plea.
2. Whether the District Court committed factual and legal errors at sentencing.

SUMMARY OF ARGUMENT

Question 1 discloses the facts supporting that which should have been provided to the jury by way of witnesses on behalf of Dejean. The unreasonable as well as deficient performance prejudiced Dejean considerably. However the Court who is to be mindful of its jurisdiction also exceeded its authority violating the Sixth Amendment rights of Dejean.

Question 2 provides facts supporting the performance of counsel who was to advocate Dejean's cause was unreasonable in various ways. Such deficient performance allowed Dejean to miss plenty of chances to have this case dismissed, acquitted, or won at trial.

This case should be vacated and remanded for resentencing in accordance with question 1 and vacated and set aside in accordance with question 2.

• • • • •

ARGUMENT

Question 1: Was counsel ineffective for not enforcing the 6th Amendment right to a jury trial in the sentencing proceeding and is the court also responsible.

This court has held it unconstitutional that any conduct not admitted by a defendant or proved beyond a reasonable doubt cannot be used to enhance a sentence outside the recommended guidelines without a jury finding such conduct to be proven beyond a reasonable doubt. See *United States v. Booker*, 543 U.S. 220 (2005) (Without 18 USCS 3553(b)(1), which made mandatory the Federal Sentencing Guidelines (18 USCS Appx)- to which the United States Supreme Court, in the two consolidated cases at hand, had held applicable the right to a jury trial under the Federal Constitution's Sixth Amendment-the Federal Sentencing Act (18 USCS 3551 et seq.) from which the court had severed and excised 3553(b)(1), fell outside the scope of the requirement, announced by the court in an earlier case, *Apprendi v. New Jersey* (2000) 530 US 466, 147 L Ed 2d 435, 120 S. Ct. 2348 (which had involved a state criminal statute), that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.).

This Court has also disclosed the means by how ineffective assistance of Counsel is the right to effective counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984) (The right to counsel is the right to effective counsel). To prove that counsel was in fact ineffective the convicted defendant must show: (1) that counsel's performance was deficient, which requires a showing that counsel was functioning as the counsel guaranteed the defendant by the Sixth Amendment; and (2) that the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. See *Strickland v. Washington*, 466 U.S. 668 (1984).

Dejean only pleaded guilty to Possession with Intent to Distribute Cocaine Base, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(c); and Felon in Possession of a Firearm and ammunition in violation of 18 U.S.C. 922(g)(1) and 924(a)(2); and Possession of a Firearm During and in Relation to Drug Trafficking Crime in violation of 18 U.S.C. 924(c)(1)(A). Thereby Dejean has not admitted to any conduct in relation to a shooting taking place May 21, 2017 resulting in such fact to be proved beyond a reasonable doubt. See United States v. Booker, 543 U.S. 220(2005)(The federal Constitution protects every criminal defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which defendant is charged.).

With such right to be found beyond a reasonable doubt to have engaged in the shooting that took place May 21, 2017 counsel's performance fell below an objective standard of reasonableness to not apply the Sixth Amendment right to a jury in the determination of the facts resulting to May 21, 2017. See Strickland v. Washington, 466 U.S. 668(1984)(The proper standard for attorney performance is that of reasonably effective assistance; when a convicted defendant complains of ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms.); See also United States v. Booker, 543 U.S. 220(2005)(The Federal Constitution gives a criminal defendant the right to demand that a jury find the defendant guilty of all the elements of the crime with which the defendant is charged.).

Counsel's performance prejudiced Dejean in that the Government was not held to the Sixth Amendment burden of proof standard which rendered such enhancement easy by his peers not being able to see the facts and evidence and make a finding based on such. See Strickland v. Washington, 466 U.S. 668(1984)(Any deficiencies in criminal defense counsel's performance must be prejudicial to the defense in

order to constitute ineffective assistance under the Constitution); See also *Blakely v. Washington*, 542 U.S. 296(2004)(For purposes of a holding by the United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 US 466, 147 L Ed 435, 120 S Ct 2348- that other than the fact of a prior conviction, any fact that increased the penalty for a crime beyond the prescribed "statutory maximum" had to be submitted to a jury, and proved beyond a reasonable doubt- the statutory maximum was (1) the maximum sentence a judge could impose solely on the basis of the facts (a) reflected in the jury verdict, or (b) admitted by the defendant, and (2) in other words, (a) not the maximum sentence the judge could impose after finding additional facts, but (b) the maximum a judge could impose without any additional findings. When a judge inflicted punishment that the jury's verdict alone did not allow, (1) the jury had not found all the facts that the law made essential to the punishment ; and (2) the judge exceeded the judge's proper authority.).

Dejean was to have a fair sentencing hearing in order to sentence him outside the guidelines associated with his plea of guilt. See *Strickland v. Washington*, 466 U.S. 668(1984)(A fair trial is one which evidence subject to adversarial testing is presented to a impartial tribunal for resolution of issue defined in advance of the proceeding.). Counsel being of expert knowledge of the law was to not only know that Dejean had a Sixth Amendment right to have facts and evidence presented to a jury in the sentencing proceeding. He was also to advocate Dejeans cause in accordance with such Sixth Amendment right which in this instance did not make a adversarial testing process. See *Strickland v. Washington*, 466 U.S. 668(1984)(In representing a criminal defendant, counsel owes the client a duty of loyalty, a duty to avoid conflicts of interests, a duty to advocate the defendants cause, a duty to consult with the defendant on important decisions, a duty to keep defendant informed on the developments in the course of the prosecution, and a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.).

However to further elaborate on the prejudice Dejean had multiple witnesses at his sentencing proceeding which: (1) Described that Dejean lended his car out to multiple people due to his kind nature to help those in need which in this instance back fired on him by lending his car to the wrong individual. See Case 2:18-cr-00120-GGG-JVM Doc. 128 P. 25 and 39; (2) Dejean's character showed he was gainfully employed and presently active in the community. See Fed. R. Evi. 405(b); See also 2:18-cr-00120-GGG-JVM Doc. 128 P. 30-35; and (3) The actual shooter was described by a witness as not only being involved in the shooting that took place on May 21, 2017. Yet also was involved in a fight with police that ended in his life being taken which is the only reason a witness would testify to such facts. See 2:18-cr-00120-GGG-JVM Doc. 128 P. 41-46. Had counsel presented this evidence and facts before a jury Dejean would not have recieved such enhancement construed with the shooting that took place May 21, 2017. See Strickland v. Washington, 466 U.S. 668(1984)(The test for prejudice resulting from the ineffectiveness of criminal defense counsel requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.).

However Dejean also argues that the court had a huge role to play in this as well because the court is only authorized to operate within the limits of the Constitution which the sentencing proceeding was to operate within in accordance with the Sixth Amendment. See Kokkenen v. Guardians Life Ins. Co. of America, 511 U.S. 375(1994)("Federal Courts are Courts of limited jurisdiction. They possess only power authorized by Constitution and Statute, which is not to be expanded by judicial degree. It is to be presumed that a cause lies outside the limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction); See Blakely v. Washington, 542 U.S. 296(2004)(Under the common law of criminal jurisprudence, the truth of every accusation against a defendant should

be confirmed by the unanimous suffrage of twelve of the defendant's equals and neighbors.).

The Court is of expert knowledge and it cannot disclose that Dejean waived his Sixth Amendment rights by not going to trial when the facts of the plea of guilty had nothing to do with the facts of the sentencing enhancement related to May 21, 2017. Thus not only is the court operating outside its authority but the judgment is void even now prior to reversal. See *Blakely v. Washington*, 542 U.S. 296 (2004)(Regardless of whether a judge's authority to impose an enhanced sentence depending on finding a specified fact, finding one of several specified facts, or finding any aggravating fact, the jury's verdict alone did not authorize the sentence, as (1) the judge had acquired that authority only upon finding some additional fact; (2) it did not matter that the judge, after finding aggravating facts, had to make a judgment that these facts presented a compelling ground for departure; (3) the judge could not make that judgment without finding some facts to support it beyond the bare elements of the offense; and (4) regardless of whether the judicially determined facts required a sentence enhancement or merely allowed it, the verdict alone did not authorize the sentence.); See also *Williams v. Berry*, 8 HOW. 945, 940 12 L. Ed. 1170, 1189(1850)(Courts are constituted by authority and they cannot go beyond that power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities; they are not voidable but simply void, and this even prior to reversal.).

Either way this Court would view this, whether it be ineffective assistance of counsel or a nullity by the judgment of the court, Dejean was extremely prejudiced. Such resulted in Dejean being sentenced more than ten years beyond that which he should've been sentenced. Also Dejean did not receive his 3 points for acceptance of responsibility which was denied him due to seeking to withdraw from the plea agreement construed with unconstitutional seeking of enhancement which

must now be restored to him due to fraud on both counsel and the court. See Rook v. Rook, 233 Va. 92, 95, 353 S.E. 2d 756, 758(1987)(Avoid judgment is one that has been procured by extrinsic or collateral fraud or entered by a court that did not have jurisdiction over the subject matter of the parties.).

Question 2: Was counsel ineffective in the pretrial proceeding?

As discussed in the previous argument Dejean must prove a 2 part prong in order to assert the claim of ineffective assistance of counsel. He must prove that counsel's performance was deficient, which requires a showing that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment; and that the deficient performance prejudiced the defense, which requires a showing counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. See Strickland v. Washington, 466 U.S. 668(1984).

As disclosed in the statement of the case the tow truck driver is the party who found the firearm and drugs in the vehicle. It must be kept in mind that the officers had searched the car at the scene of the alleged stop and at the particular destination the car was towed the first time before being towed a second time to the wreck yard and only one single shell casing was found. However upon the tow truck driver impounding the car he gained entry in the vehicle. The tow truck driver then "searched" the console by opening such lid which was closed and not the duty of the tow truck driver who's only job is to impound the vehicle. See Mincey v. Arizona, 437 U.S. 385(1981)(The Fourth Amendment prescribes all unreasonable searches, and seizures, searches conducted outside the judicial process, without prior approval by judge or magistrate, are per unreasonable under the 4th Amendment, subject only to a few specially established and well delineated exceptions.).

Thus, in this instance counsel's performance fell below a objective standard of reasonableness by not filing a motion to suppress the primary evidence which

is the one firearm and the narcotics in question due to such being the indirect product of unconstitutional conduct. See *Strickland v. Washington*, 466 U.S. 668 (1984)(The proper standard for attorney performance is that of reasonably effective assistance; when a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms.); See also *Kimmelman v. Morrison*, 477 U.S. 365(1986)(In order to prevail on a Fourth Amendment claim, the complainant need prove only that a search or seizure was illegal and that it violated his reasonable expectation of privacy in the item or place at issue.).

Counsel's performance prejudiced Dejean in that the exclusionary rule extends to bar the government from using both the indirect product and the direct product of unconstitutional conduct. See *Segura v. United States*, 468 U.S. 796(1984). The photographic evidence in the record (please excuse the citing to photograph not being disclosed) clearly shows that tools had to be used by the tow truck driver to enter the vehicle's shift console which cannot be associated with the plainview doctrine. Dejean being with a constitutional expectation of privacy right to the vehicle was thereby prejudiced such right which would've resulted in the fruit of a poisonous tree doctrine suppressing all the evidence from indirect unconstitutional conduct. See *Strickland v. Washington*, 466 U.S. 668(1984)(Any deficiencies in criminal defense counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.); See also *United States v. Calandra*, 414 U.S. 338(1974)(The prohibition of the exclusionary rule of the Fourth Amendment, under which evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure, applies also to the fruits of the illegally seized evidence.).

Counsel's performance further fell below an objective standard of reasonable

eness due to not seeking to advocate Dejeans claims of innocence when: (1) Dejean was not one of the people in the vehicle which is confirmed by a witness who knew the identity of the shooter on May 21, 2017. See 2:18-cr-00120-GGG-JVM Doc. 128 P. 41-46; (2) Dejeans DNA was not on any of the firearms in the vehicle which in fact had 5 sets of DNA on them. See 2:18-cr-00120-GGG-JVM Doc. P 54-55; (3) Witnesses disclose that Dejeans loaned his car out regularly which accounts for how another party had access to the vehicle. See 2:18-cr-00120-GGG-JVM Doc. 128 P. 30-35; and (5) with all the facts to be considered and taking into account the firearm and drugs were found in a place that needed tools to access them Dejean never knew such was in the vehicle. See *Strickland v. Washington*, 466 U.S. 668 (1984)(in representing a criminal defendant, counsel owes the client a duty of loyalty, a duty to avoid conflicts of interests, a duty to advocate the defendants cause, a duty to consult with the defendant on important developments in the course of the prosecutions, and a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.).

Counsel's deficient performance prejudiced Dejean in that: (1) Dejean never had a chance to have witnesses on his own behalf validate his innocence when in fact witnesses could account for all the pieces that would prove him innocent which counsel was to advocate; (2) With various DNA being on the firearms and Dejeans not being on them is prima facie evidence that such were neither shot by him or belonged to him; (3) The firearm in question which was involved in another shooting which if compared by cellular triangulation would account for Dejean not being involved in neither; (4) With police searching the car numerous times and not able to find the gun and drugs hidden Dejean being oblivious having loaned the car could not be in actual or constructive possession of anything in the vehicle; and (5) with the character put forth and the character put forth of the actual shooter it is evident Dejean would have been ruled innocent or acquitted by a competent group of his peers. See *Strickland v. Washington*, 466 U.S. 668(1984)(

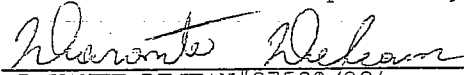
Any deficiencies in criminal defense counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.); See also *Cuyler v. Sullivan*, 466 U.S. 335(1980)(A criminal defendant's plea of guilty may be attacked on the ground that the defendant's counsel did not provide the defendant with reasonably competent advice.).

CONCLUSION

In accordance with question 1 such enhancement construed to involve the contents of the shooting on May 21, 2017 should be vacated and the 3 points of acceptance of responsibility restored to Dejean. In accordance with question 2 the judgment should be vacated and set aside due to the facts and law presented.

Date: 12-20-2022

Respectfully



Pro Se:

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AFFIDAVIT

I Davonte Dejean, being over 18 years of age do decree and declare that all facts and statements made in this brief for certiorari are true and correct not meaning to mislead any under the penalty of perjury.

Date: 12-20-2022

Davonte Dejean
DAVONTE DEJEAN