

No. 22-6460

ORIGINAL

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

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

BRIEF IN SUPPORT FOR REHEARING

Davonte Dejean # 37538-034

F.C.I El Reno

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QUESTIONS FOR REVIEW

Question 1: Did the district court lack jurisdiction in sentencing Dejean under USSC 2A2.1(a)(2) without a jury finding proof beyond a reasonable doubt?

Question 2: Was defense Counsel ineffective in the district court?

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The citation to the opinion of the District Court is unpublished.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The opinion of the Fifth Circuit Court can be found which is unpublished at No. 21-20755 and as is short discloses the following:

Davonte Dejean pleaded guilty to possessing with intent to distribute cocaine base, possessing a firearm during and in relation to a drug-trafficking 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 supervised release and now appeals.

Dejean first challenges the district court's denial of his motion to withdraw his guilty plea. To prevail on his motion, Dejean was required to show a "fair and just reason" for seeking withdrawal. Fed. R. Crim. P. 11(e)(2)(B). This court reviews the denial of such motions for an abuse of discretion. *United States 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

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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 sentencing 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 Dejean's Plea agreement. See *United States v. Bond*, 414 F.3d 542, 549 (5th Cir. 2005). Therefore, 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.

VIII

STATEMENT OF JURISDICTION

Judgment was entered in the Fifth Circuit September 8, 2022 in case No. 21-30755. This Court has jurisdiction conferred 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 defence.

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STATEMENT OF THE CASE

On May 22, 2017, deputies with the Jefferson Parish Sheriff'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 Lugar 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

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to counts 2 through 4 of the Superseding Indictment. Pursuant to the Plea Agreement, Appellee agreed to dismiss Count 1 at Sentencing.

On April 27, 2020, Appellant filed a Motion to withdraw guilty plea. Appellant maintained "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 imprudently 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 received a total sentence of 190 months in the B.O.P., three years

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supervised release, and \$ 300 special assessment.

The basis of counsel's 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 that this court has not considered the facts in the plea agreement that do not construe admittance to conduct worthy of U.S.S.G 2A2.1 (a)(2). It shall be shown that the district court lacked jurisdiction by relevant evidence in the record of the district court.

Question 2 discloses lack of effective assistance of counsel in 4 different instances which are: (1) Dejean was with evidence to prove he was innocent, (2) Dejean was made to accept a plea agreement without understanding his position, (3) Dejean was subject to illegal search and seizure in the automobile, and (4) Counsel failed to advocate Dejean's Sixth Amendment right to a jury.

This case should be vacated in regards to question 1 and in regards to the 4 parts of question 2 this case should either be set aside or vacated.

ARGUMENT

Question 1: Did the district court lack jurisdiction in sentencing Dejean under U.S.S.C. 2A2.1(a)(2) without a jury finding proof beyond a reasonable doubt?

As is disclosed by this Court's ruling in *Apprendi*, 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 of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt. See *Apprendi v. New Jersey* (2000) 530 U.S. 466, 147 L. Ed. 435, 120 S. Ct. 2348. However this court must take into consideration that Dejean did not wish to sign a plea agreement that disclosed he engaged in conduct that involved him in a shooting, which is why the first plea agreement was rejected by Dejean. The factual basis of the new agreement instead reads as follows:

(ROA, 118-121)

On May 21, 2017, the St. Benard Parish Sheriff's Office ("SBSO") responded to a report of an incident in the vicinity of St. Claude Ave. and Mehele Ave. SBSO developed a 2004 Infiniti FX... as a suspect vehicle. SBSO then entered the Infiniti into the National Crime Information Center ("NCIC") database, requesting that other law enforcement agencies conduct an investigatory stop of the Infiniti should it be located.

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Thus in order for an enhancement under USSC 2A2.1(a)(2) to be applied a jury must be summoned in order to increase Dejean a gargantuan degree. See *Blakely*, 542 U.S. at 313-314, 159 L.Ed.2d 403, 124 S.Ct. 2531 (citation omitted) ("[t]he Framers would not have thought it too much to demand that, before depriving a man of [ten] more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State.")

Such is exactly what happened to Dejean who turned down a plea agreement and had the government rewrite it so it does not make such conclusion of admittance. However the Court due to the P.S.R. disclosing a shooting in such ran the sentencing proceeding as if such were reasonable to be found by a preponderance of the evidence. See *United States v. Booker*, 543 U.S. 220 (2004) (In our judgment the fact that the Guidelines were promulgated by the Sentencing Commission, rather than Congress, lacks constitutional significance. In order to impose the defendant's sentences under the Guidelines, the judges in these cases were required to find an additional fact, such as drug quantity, just as the judge found the additional fact of serious bodily injury to the victim in *Jones*.)

There was no mention of a shooting in the factual

basis and there is no suggestion that Dejean was responsible only that the 2004 Infinity FX is a suspect vehicle and should be stop'd if the Infinity is located, which is not a "fact" that Dejean admitted to a shooting. See *Blakely v. Washington*, 542 U.S. 246 (2004) (Nor does it matter that the judge must, after finding a aggravating fact, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts require a sentence enhancement or merely allow it, the verdict alone does not authorize the sentence.)

Let the Court be put in remembrance that the "statutory maximum" in this instance is not the maximum that the statute allows but is in accordance with the plea of guilt which does not place Dejean at a level 27 pursuant to USSG 2A2.1(a)(2) but extremely lower on the offense level. See *Ring v. Arizona*, 536 U.S. 584 (2002) (the maximum he would receive if punished according to the facts reflected in the jury verdict alone (quoting *Apprendi, supra*, at 483, 147 L Ed 2d 435, 120 S Ct 2348)); *Harris v. United States*, 536 US 545, 563, 153 L Ed 2d 514, 122 S Ct. 2406 (2002) (plurality opinion) (same); Cf. *Apprendi, supra*, at 488, 147 L Ed 2d 435, 120 S Ct. 2348 (facts admitted by the defendant).

With the record of the "factual basis" and "Plea Agreement" both disclosing Dejean did not admit to a shooting that took place on May 21, 2017, Dejean is protected by the Sixth Amendment from USSC 2A2.1 (a)(2) being implemented by the district court. 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.)

Question 2: Was defense Counsel ineffective in the District Court?

A defendant who claims ineffective assistance of counsel as to require reversal of a conviction has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. See *Strickland v. Washington*, 466 U.S. 668 (1984).

What has not been recognized in the first certiorari brief is that Dejean had valid claims of innocence which were not advocated by counsel. Such was the reason the State of Louisiana sought to drop this case. There are two types of possession which are actual and constructive. See *United States v. McCoy*, 396 Fed. App'x 991 (5th Cir. 2016) (quoting *United States v. Anderson*, 559 F.3d 348, 353 (5th Cir. 2009)) ("Gun possession can be established by (1) actual, physical possession of the firearm, (2) sole control and occupancy of a place where a firearm is found, or (3) joint occupancy of a place where a firearm is found, combined with some evidence of the defendant's access to and knowledge of the firearm.) However counsel was deficient in that the government could not prove that Dejean knew a shooting had taken place or a firearm was in the vehicle which is verified by a witness who disclosed who the actual shooter was. See Appendix for 2:18-cr-00120-GGG-JVM Doc. 128 P. 41-46. Further it is disclosed by witness that Dejean "loaned" the car to said shooter. See Appendix for 2:18-cr-00120-GGG-JVM Doc. 128 P. 30-35. With such facts being relevant evidence it must be shown that Dejean "knew" the firearm was in the vehicle due to such being in the center console where tools had to be used to reach them, which evidence shows five sets of fingerprints but not Dejeans. See Appendix for 2:18-cr-00120-GGG-JVM Doc. 128 P. 54-55. See *United States v. Fields*, 72 F.3d 1200, 1212 (5th Cir. 1996) (The evidence must show 'at least a plausible inference' that [the

defendant] knew of and had access to the gun." Counsel's performance was deficient in that with such evidence and witnesses to account for the inference that Dejean had nothing to do with the incident taken place on May 21, 2017.

Dejean was to go to trial and let his fate rest in the jury. See *McMann v. Richardson*, 397 U.S. 759 (1970) (The right to counsel is the right to effective assistance of counsel.);

Strickland v. Washington, 466 U.S. 668 (1984) (Counsel can deprive a defendant of the right to effective assistance of counsel simply by failing to render adequate legal assistance).

Such deficient performance prejudiced Dejean in that: (1) Dejean was robbed of the chance to prove his innocence and made to take responsibility for a shooter who is not only responsible for the crime but dead due to a shootout with officers as well as connection to other shootings which are confirmed by witnesses. See Appendix for 2:18-cr-00120-GGG-JVM Doc. 128 P. 41-46, (2) had counsel done the due diligence to investigate before telling Dejean that the best action is to plead guilty a motion to dismiss for lack of evidence could have been filed on his behalf, and (3) had trial not gone as planned a motion for acquittal could've been filed with the evidence in Dejean's arsenal, and chance of appeal. See *Strickland v. Washington*, 466 U.S. 668 (1984) (Actual or constructive denial of the assistance of counsel altogether is legally

presumed to result in prejudice.)

Counsel was deficient in the plea hearing in that he did not explain that the government would use the shooting to enhance Dejean who was confused when he heard this in the proceeding;

MR. SHIH: Your Honor, sorry to interrupt. Actually there is no agreement in the plea agreement as to immunizing the defendant as to other criminal conduct. The agreement just says that if he pleads guilty to Counts 2 through 4, we'll dismiss Count 1, but it does not include a promise that we will not charge him with other conduct in the future.

THE COURT: Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about that? Or would you like to have your attorney ask any questions of the government about that?

THE DEFENDANT: Yes, sir.

MR. SCHWABE: It means - that's exactly what it means is that - let me get to that portion so that we can talk about that issue. That they agreed to dismiss Count 1 and they will not bring forth Count 1 because that's gone. That is correct, right? There is no - the charge that is Count 1 is gone?

MR. SHIH: Well, it would have to be dismissed at the time of sentencing.

MR. SCHWABE: Right. In other words, assuming the Court

the Court dismisses it, the agreement would eliminate Count 1 from the equation.

THE COURT: Correct. Do you understand?

THE DEFENDANT: Yes, sir.

As can be seen counsel does not explain that the government intends to use the contents of the shooting or possibly, just that Count 1 will be dismissed and for such reason Dejean because of the deficient performance of counsel was locked into an agreement that allowed for the government to still use the shooting which Dejean denied the first plea agreement in order that the second not include the shooting. See *Cuyler v. Sullivan*, 446 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.); *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.)

The deficient performance prejudiced Dejean in that counsel was aware by the denial of the first plea agreement that Dejean did not want to be made to be accountable for the shooting and had he told Dejean that this was the government's intent, Dejean would have not agreed to further

the proceeding and take his chances at trial which is why he sought to withdraw his plea. Such further prejudiced Dejean in that he lost his 3 points for acceptance of responsibility when counsel could've saved Dejean wasted time and effort by disclosing the intent or possibility of the government to include the shooting as relevant conduct. See *Strickland v. Washington*, 466 U.S. 668 (1984) (Even if a criminal defendant shows that particular errors of defense counsel were unreasonable, the defendant must show that they actually had an adverse effect on the defense in order to establish ineffectiveness of counsel violative of Sixth Amendment rights.)

Again counsel's performance was deficient in that he did not move to suppress the evidence that was found in a warrantless search when (1) the car was searched on the scene of arrest, and (2) then the car was taken back to homicide division and searched again without guns or drugs being found. However when the car was towed to private facility it was released and not under Fourth Amendment search warrant or inevitable discovery doctrine. See *Nix v. Williams*, 467 U.S. 431 (1984) (Evidence pertaining to the discovery and condition of a murder victim's body is properly admitted, even if the accused led police to the body after being interrogated unconstitutionally in the absence of counsel, where it would ultimately or inevitably have been discovered even if no constitutional or statutory violation had taken place.)

The deficient performance of counsel prejudiced Dejean in that there are only a few delineated exceptions to the exclusionary rule which do not fix this equation because inevitable discovery was no longer possible after Homicide released the vehicle to be impounded after two searches of 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 se unreasonable under the 4th Amendment, subject only to a few specially established and well delineated exceptions.) With the items in question not being discovered under a valid search warrant, Plain view doctrine, or inevitable discovery doctrine such violated Dejean's reasonable expectation of privacy by the tow truck driver breaking into his console without Dejean's consent. See *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.); *Cady v. Dombrowski*, 413 U.S. 433 (1973) (Vehicles are "effects" within the meaning of the Fourth Amendment provision guaranteeing the right of the people to be secure in their "effects" against unreasonable searches); *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness on a Sixth Amendment claim of

ineffective assistance of counsel, the defendant must prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.); See also *Strickland v. Washington*, 466 U.S. 668 (1984).

However the more disturbing act of counsel in the sentencing proceeding is that *Apprendi v. New Jersey* has been in effect since the year 2000 and is a well known case by all United States attorneys. Thereby it is unreasonable that counsel would allow for Dejean to be brought before the district Court in a sentencing proceeding without filing a motion that a jury be present in accordance with Dejean's Sixth Amendment rights. See *United States v. Booker*, 543 U.S. 220 (2004) (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.) Further Dejean rejected the first plea agreement due to it having the conduct of Dejean admitting to a shooting. Upon a new agreement being made no shooting was mentioned or Dejean being a suspect, only a 2004 Infiniti FX. With counsel being aware of these facts it is unreasonable and deficient performance to not request a jury to be present to prove such evidence beyond a reasonable doubt. See

Blakely v. Washington, 542 U.S. 296 (2004) (Regardless of whether Congress or a Sentencing Commission concluded that a particular fact must be proved in order to sentence a defendant within a particular range, "[t]he Framers would not have thought it too much to demand that, before depriving a man of [ten] more years of his liberty, the State should suffer the modest inconvenience of submitting the accusation to the unanimous suffrage of twelve of his equals and neighbors, rather than a lone employee of the State.") See Cuyler v. Sullivan, 446 U.S. 335 (1980) (Counsel, however, can also deprive a defendant of the right to effective assistance simply by failing to render "adequate legal assistance.")

(Counsel's deficient performance prejudiced Dejean in that Dejean had various witnesses to prove that he was not involved in the shooting which would've been different had a jury of 12 of his peers heard the testimony that: (1) Antonio Jones was the shooter in this instance on May 21, 2017. See Appendix for 2:18-CR-00120-GGG-JVM Doc. 128 P. 40-42, (2) witness testified that the only other person in the car was Daquan Fontenot. See Appendix for same citing and pages in Doc. 128, and (3) No DNA of Dejean was on them. See Appendix for 2:18-CR-00120-GGG-JVM Doc. 128 P. 54-55. See *In Re Winship*, 397 U.S. 358 (1970) (Due process commands that no man shall lose his liberty unless the government

has borne the burden of convincing the fact finder of his guilt; to such end, the reasonable-doubt is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue, and the use of such standard is indispensable to command the respect and confidence of the community in applications of the criminal law, it being critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned.); See also *Strickland v. Washington*, 466 U.S. 668 (1984) (Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.)

CONCLUSION

In accordance with question 1 this judgment should be vacated and corrected upon remand to the District court. In accordance with question 2 in the 4 different parts of ineffectiveness of counsel this case should be set aside and vacated in its specific aspects of the argument.

Date: 3-15-2023

Respectfully

Davonte Dejean

Pro Se: DAVONTE DEJEAN

#37538-034

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I

AFFIDAVIT

I Davonte Dejean, being over 18 years of age do swear all facts and statements herein are true and correct not meaning to mislead any under the penalty of perjury.

Date: 3-15-2023

Davonte Dejean
DAVONTE DEJEAN

II

CERTIFICATE OF GOOD FAITH

This brief for rehearing is presented in good faith and not for purposes of delay. Question 1 and 2 are limited to intervening circumstances of controlling effect due to applicability of the Sixth Amendment to control in any instance when a provision of the Constitution which is to include the United States Code comes in conflict with the Amendments. However Question 2 presents a ground not previously presented in regards to ineffective assistance of counsel.

Date: 4-5-2023

Respectfully

Davonte Dejean
DAVONTE DEJEAN