United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted March 15, 2023
Decided March 31, 2023

Before

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 22-2115

TAIWO K. ONAMUTI,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:21-cv-01627-JRS-DML

James R. Sweeney II,
Judge.

ORDER

Taiwo Onamuti has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal and find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, Onamuti's request for a certificate of appealability and his request for counsel are **DENIED**.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

TAIWO K. ONAMUTI,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1:21-cv-01627-JRS-DML
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

Order Granting Motion to Vacate Conviction and Sentence on Count 21, Denying Motion to Withdraw Plea Agreement, and Denying Motion for Evidentiary Hearing

"Taiwo Onamuti, a Nigerian citizen, pleaded guilty to identity theft and defrauding the U.S. Treasury out of $5 million through illegitimate tax refunds." *United States v. Onamuti*, 983 F.3d 892, 893 (7th Cir. 2020). As a result of this conduct, Onamuti was charged with eleven counts of presenting false claims, in violation of 18 U.S.C. § 287 (Counts 1-11); nine counts of identity theft, in violation of 18 U.S.C. § 1028(a)(7) (Counts 12-20); two counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A (Counts 21-22); and one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371 (Count 23). *Id.*; Cause No. 1:16-cr-093-JRS-MJD (hereinafter "Crim. Dkt."). Onamuti entered a plea agreement and pleaded guilty to Counts 1, 12, and 21. Crim. Dkt. 186 (Plea Agreement). The Court sentenced Onamuti to 204 months imprisonment (60 months on Count 1; 180 months on Count 12, and 24 months for Count 21). Crim. Dkt. 279 at p. 211. Following the terms of the plea agreement, the United States dismissed the remaining counts. Crim. Dkt. 264, 266.

Now before the Court is Onamuti's motion for relief pursuant to 28 U.S.C. § 2255. Onamuti seeks an order vacating his guilty plea, conviction and sentence on the grounds that he is actually

innocent of the Aggravated Identity Theft conviction in Count 21.[1] He argues that his counsel was ineffective for 1) failing to challenge the two counts of aggravated identity theft, (Counts 21-22); and 2) advising him to plead guilty. The United States agrees that Onamuti is not guilty of aggravated identity theft as charged.

For the reasons explained below, Onamuti's aggravated identity theft conviction and sentence shall be vacated. No resentencing hearing is necessary, and Onamuti shall not be permitted to withdraw his plea agreement.

I. The § 2255 Motion

A motion pursuant to 28 U.S.C. § 2255 is the presumptive means by which a federal prisoner can challenge his conviction or sentence. *See Davis v. United States*, 417 U.S. 333, 343 (1974). A court may grant relief from a federal conviction or sentence pursuant to § 2255 "upon the ground that 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 is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). "Relief under this statute is available only in extraordinary situations, such as an error of constitutional or jurisdictional magnitude or where a fundamental defect has occurred which results in a complete miscarriage of justice." *Blake v. United States*, 723 F.3d 870, 878-79 (7th Cir. 2013) (citing *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996); *Barnickel v. United States*, 113 F.3d 704, 705 (7th Cir. 1997)).

[1] Onamuti originally argued that his counsel was ineffective, resulting in an involuntary plea, because counsel failed: 1) to move to dismiss the aggravated identity theft counts; 2) challenge the venue of the identity theft offense; and 3) inform him of the immigration consequences of his plea. Dkt. 1. In reply, Onamuti withdrew all claims except those based on his counsel's failure to challenge the Aggravated Identity Theft conviction directly or during plea negotiations. Dkt. 17.

II. Ineffective Assistance of Counsel

Onamuti's plea agreement included a broad appellate waiver—to forgo appeal "on any ground." *United States v. Onamuti*, 983 F.3d 892, 895 (7th Cir. 2020). Specifically, excluded from this waiver, however, were any claims of ineffective assistance of counsel brought pursuant to § 2255. Crim. Dkt. 186, ¶ 24. Onamuti's § 2255 motion asserts that his counsel was deficient by failing to move to dismiss both counts of aggravated identity theft and for advising him to plead guilty pursuant to the plea agreement.

The United States agrees that Onamuti's conviction for aggravated identity theft, 18 U.S.C. § 1028A, must be vacated because it was improperly predicated upon 18 U.S.C. § 287. The United States further contends without explanation that the case should be set for resentencing on the remaining two counts. Onamuti argues that not only is he entitled to be resentenced without Count 21, he is also entitled to withdraw his guilty plea.

A. Dismissal of Aggravated Identity Theft Counts

Onamuti argues that his counsel was ineffective for failing to move to dismiss both counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A (Counts 21-22). Dkt. 1 at 7. In order to prove ineffective assistance of counsel, Onamuti must meet the two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984). He must show that (1) his attorney performed deficiently, and (2) the deficiency in performance prejudiced him. *Id.*

The United States agrees that had counsel filed a motion to dismiss the aggravated identity theft charges in Counts 21 and 22, his motion would have had been meritorious. Dkt. 15 at p. 11. The parties agree that Onamuti should not have been convicted of aggravated identity theft under Count 21, and that Count 22 was properly dismissed. Under § 1028A(a)(1), "whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or

uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." Subsection (c) of the statute enumerates the qualifying predicates. The United States explains, that Onamuti's § 1028A offense was predicated upon a violation of § 287. Dkt. 16 at p. 13 (citing Crim. Dkt. 91 at 12.). But Section 287 is not enumerated in § 1028A(c). Section 287 is found in chapter 15, which is not one of the enumerated chapters. Thus, both parties agree that Count 21 was invalid at the time Onamuti pleaded guilty and remains invalid. Dkt. 16 at p. 13.

The United States does not dispute that Onamuti has demonstrated that his attorney performed deficiently in failing to challenge the aggravated identity theft counts and as a result Onamuti was prejudiced because he is now serving a two-year consecutive term of imprisonment on Count 21.

1. A Resentencing Hearing is Unnecessary

The United States suggests that the Court should "resentence [Onamuti] on the remaining counts after some, but not all counts, are vacated." *United States v. Sprenger*, 14 F.4th 785, 795 (7th Cir. 2021) (*quoting McKeever v. Warden SCI-Graterford*, 486 F.3d 81, 88 (3d Cir. 2008)).

While the Court agrees that Onamuti is entitled to the issuance of an amended judgment that vacates his conviction and sentence on Count 21, a plenary resentencing hearing is not required. There are no circumstances under which the undersigned would sentence Onamuti to less than the statutory maximum sentence of 5 years or 60 months on Count 1 and 15 years or 180 months on Count 12. Crim. Dkt. 279 at p. 187-189. Nor would the Court increase Onamuti's sentence by resentencing him to serve consecutive sentences on Counts 1 and 12, which would amount to a 20-year sentence. *See* 18 U.S.C. § 3584 (providing that the terms of imprisonment may run concurrently or consecutively). The Court originally concluded that the 180-month

sentence on Counts 1 and 12 was sufficient but not greater than necessary to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed correctional treatment in the most effective manner after considering all the sentencing factors set forth in 18 U.S.C. § 3553(a). The "total punishment" of 15 years imprisonment on Counts 1 and 12 remains appropriate. U.S.S.G. § 5G1.2(b)-(d). No new evidence related to those Counts has been presented that would warrant a resentencing.

2. The Guilty Plea and Plea Agreement Shall Not be Withdrawn

The dismissal of Count 21 does not entitle Onamuti to withdraw his entire guilty plea and plea agreement. The Seventh Circuit has explained:

> When a defendant enters a guilty plea to multiple counts and one plea is subsequently invalidated, we consider whether the defendant's plea to the remaining counts "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970); *see McKeever v. Warden SCI-Graterford*, 486 F.3d 81, 86 (3d Cir. 2007) ("We decline to adopt a rule that renders a multi-count plea agreement per se invalid when a subsequent change in the law renders a defendant innocent of some, but not all, of the counts therein and reject the argument that such a plea could never be entered by a defendant voluntarily and intelligently."). But as we have indicated previously, "there is no absolute right to withdraw a guilty plea ... and a defendant seeking to do so faces an uphill battle after a thorough Rule 11 colloquy." *United States v. Bradley*, 381 F.3d 641, 645 (7th Cir. 2004) (quotations and citation omitted). In fact, we have an "obligation to ensure that guilty pleas are not lightly discarded because of the presumption of verity accorded the defendant's admissions in a Rule 11 colloquy." *Id.* (cleaned up).

United States v. Sprenger, 14 F.4th 785, 791–92 (7th Cir. 2021).

Onamuti's plea to the remaining counts "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Such that the dismissal of Count 21 does not require that the entire plea be withdrawn. This is not a case where the charges are

interdependent. Meaning, the United States could convict Onamuti of Counts 1 and 12 without also convicting him of Count 21. *See United States v. Bradley,* 381 F.3d 641 (7th Cir. 2004) (charges were interdependent because to prove the defendant guilty of the § 924(c) charge, the government was required to prove the § 841(a)(1) charge described in the indictment). For these reasons, vacating Count 21 does not require the withdrawal of the remainder of the plea agreement.

Accordingly, an amended judgment shall issue vacating the conviction and consecutive two-year sentence associated with Count 21.

B. Counsel's Assistance During Plea Negotiations was Constitutionally Adequate

Onamuti argues "he was denied effective assistance of counsel resulting in his entry of an involuntary guilty plea on all counts where his attorney misled him to believe that he was properly charged with violation of 18 U.S.C. § 1028A, and that if convicted he faced multiple consecutive terms of imprisonment." Dkt. 17 at p. 2.

Onamuti's right to effective counsel "extends to the plea-bargaining process." *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). "In the plea bargaining context, reasonably competent counsel will attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis before allowing his client to plead guilty." *Anderson v. United States*, 981 F.3d 565, 573 (7th Cir. 2020) (citation and internal quotation marks omitted).

To establish prejudice, Onamuti must show that "the outcome of the plea process would have been different with competent advice." *Lafler*, 566 U.S. at 163. Thus, Onamuti must show prejudice "by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). "The decision whether to go to trial or plead guilty involves 'assessing the respective consequences of a conviction after trial

and by plea.'" *Anderson v. United States*, 981 F.3d 565, 577 (7th Cir. 2020) (quoting *Lee,* 137 S. Ct. at 1966). Counsel's advice to plead guilty, even to Count 21 (which will now be vacated), was competent advice under the circumstances. *Harris v. United States*, 13 F.4th 623 (7th Cir. 2021) (when assessing counsel's performance, the "options available to the defense" at the time the defendant pleaded guilty and was sentenced is determinative. *Id.* at 630).

Onamuti states under penalty of perjury that he "accepted the plea offer, in part, to avoid the two 2-year consecutive terms of imprisonment counsel advised that he faced if he were convicted. But for this advice, [Onamuti] would never have entered a plea of guilty in this case. Instead, he would have insisted on a trial." Dkt. 1 at p. 5.

The Court rejects this testimony. The criminal record does not reflect that Onamuti would have rejected the plea deal in favor of going to trial but for his attorney's deficient advice as to Counts 21 and 22. Instead, Onamuti's "plea to the remaining counts 'represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" *United States v. Sprenger,* 14 F.4th 785, 791–92 (7th Cir. 2021) (quoting *North Carolina v. Alford,* 400 U.S. 25, 31 (1970)). This conclusion is based on the Court's familiarity with this case and the fully developed criminal record.

The record reflects the following:

On September 1, 2017, Onamuti appeared before Judge Lawrence to plead guilty to three counts of the Second Superseding Indictment—one count each of false claims, identity theft, and aggravated identity theft. Crim. Dkt. 191, 229. Judge Lawrence conducted an hour long, Rule 11 colloquy through a Yoruban interpreter. Crim. Dkt. 229 at 2. Onamuti testified that he learned to speak and write English growing up in school, and a few minutes into the hearing, Onamuti specifically sought permission to provide his answers in English. Crim. Dkt. 229 at 5–6. Onamuti

spoke English for the remainder of the proceeding, while still receiving the benefit of the Yoruban translation. Crim. Dkt. 229 at 6.

During that colloquy, Onamuti displayed a thorough understanding of his plea agreement, going so far as to point out an error in the United States' calculation of the total offense level (Crim. Dkt. 229 at 7–10) and to correct Judge Lawrence when he misstated the scope of the plea agreement's appellate rights waiver (Crim. Dkt. 229 at 27–28). Onamuti swore that he understood that he faced up to five years' imprisonment for Count One (false claims) and up to 15 years' imprisonment for Count Twelve (identity theft). Crim. Dkt. 229 at 18–19. Onamuti twice swore that he understood that the Court must impose a consecutive, two-year term of imprisonment for Count 21 (aggravated identity theft) (Crim. Dkt. 229 at 20, 31) and that he understood that the Court need not accept his or the Government's sentencing recommendations. Crim. Dkt. 229 at 30–31. Onamuti swore that he understood that he "may very well be deported" as a result of his guilty pleas, (Crim. Dkt. 229 at 25), and affirmed in his plea agreement that he "want[ed] to plead guilty regardless of any immigration consequences that [his] plea may entail, even if the consequence is [his] removal from the United States." Crim. Dkt. 186 at 15.

On December 6, 2017, Judge Lawrence held an ex parte hearing to address letters Onamuti submitted to the Court in which he challenged the presentence investigation. Dkt. 230 at p. 2. During that hearing, Onamuti explained that he was concerned with the two-year consecutive sentence in Count 21 because he only wanted a sentence of time served on that count. *Id.* at p. 3-4. Mr. Onamuti's attorney explained that they "negotiated very hard in the plea negotiations to try to reach an agreement that did not include pleading guilty to the identity theft charge in the second superseding indictment" but that the United States would not agree to a plea agreement without an aggravated identity theft conviction. *Id.* at p. 6. Judge Lawrence listened to Onamuti's theory that

he should be sentenced to time served on Count 21 but pointed out that he had explained during the September 1, 2017, change of plea hearing that the sentence on the aggravated identity theft count would run consecutive. *Id.* at p. 4. Judge Lawrence concluded that he had accepted Onamuti's plea and saw no reason to set it aside. *Id.* at p. 12.

Onamuti's attorney withdrew shortly thereafter, and new retained counsel appeared. Onamuti then moved to withdraw his guilty pleas. Crim. Dkt. 236 and 245. Onamuti argued that his pleas were not knowing and voluntary because his former lawyer made certain false assurances. Crim. Dkt. 236. Onamuti asserted that he entered his pleas of guilty because his former lawyer assured him that he would receive a sentence of time served. Crim. Dkt. 236 at 1. But these arguments were rejected because Onamuti told Judge Lawrence that he understood that the Court must impose a consecutive, two-year sentence on Count 21 and that he faced up to 15 years' imprisonment on Count 12. Likewise, Onamuti contends that he entered his pleas of guilty because his former lawyer assured him that he would be sentenced at "level 6." But Onamuti told Judge Lawrence that he understood that the Court was not bound by his or the Government's recommendations (Crim. Dkt. 229 at 30–31), and Onamuti understood that the Government recommended an offense level of 32 (see Crim. Dkt. 229 at 7–10). The court concluded that Onamuti's submission seeking to withdraw his guilty plea was false. Crim. Dkt. 256 at p. 4. And further denied his motion for an evidentiary hearing explaining that "[a] motion to withdraw a guilty plea may be denied without a hearing where the movant does not offer substantial evidence that impugns the validity of the plea." *United States v. Jones*, 381 F.3d 615, 618 (7th Cir. 2004). The Court further found that Onamuti's unsworn assertions that contradict both themselves and his sworn statements at his change of plea hearing did not entitle him to an evidentiary hearing. Dkt. 256 at 5.

Onamuti raised this issue on appeal, but the appeal was dismissed. In dismissing the appeal, the Seventh Circuit noted that "[u]pon a proper showing, the district court may hold a hearing and receive testimony revealing what advice counsel provided and the defendant's decision-making process in choosing a particular course of action in the trial court." *United States v. Onamuti*, 983 F.3d 892, 895 (7th Cir. 2020) (quoting *Day v. United States*, 962 F.3d 987, 992 (7th Cir. 2020) (explaining the showing required to receive an evidentiary hearing on a § 2255 motion)).

Given the record set forth above, this showing has not been made in this case now brought pursuant to § 2255.

C. Evidentiary Hearing is Unnecessary

Onamuti is not entitled to an evidentiary hearing on his claim that his counsel was ineffective in advising him to plead guilty consistent with the plea agreement he was offered. There is nothing Onamuti could say at an evidentiary hearing that would permit the Court to conclude anything other than the fact that his plea was knowingly and voluntarily made and that counsel's advice to plead guilty was competent advice under the circumstances.

A hearing is required when "a petitioner alleges facts that, if true, would entitle him to relief." *Id.* (quoting *Torres-Chavez v. United States*, 828 F.3d 582, 586 (7th Cir. 2016) (quotation marks omitted)). But a judge may deny a hearing if the petitioner's allegations are "too vague and conclusory," *id.*, or if "the files and records of the case conclusively show that the prisoner is entitled to no relief," 28 U.S.C. § 2255(b).

Onamuti's claim is that had he been properly advised that Count 21 could not be applied to him, that he would not have pled guilty. But the ex parte hearing held before Judge Lawrence forecloses this claim. Crim. Dkt. 230. The hearing transcript reflects that Onamuti and his former attorney testified that while Onamuti wanted to plead guilty, but did not want to serve the

consecutive two year sentence for Count 21. Crim. Dkt. 230 at p. 3-4, 6. It further reflects that the United States refused to offer a plea without an aggravated identity theft conviction. Thus, even if counsel had successfully challenged Count 21, there is no basis to conclude that Onamuti would not have still pleaded guilty. To the contrary, a primary reservation regarding his guilty plea was Count 21. Given the fact that the conviction and sentence imposed in Count 21 will be vacated consistent with Part A of this Order, Onamuti is now in the exact position he previously testified to Judge Lawrence that he sought. That is, he wanted the benefits of the plea agreement without the consecutive two-year sentence required by Count 21. *See* Dkt. 230.

In addition, the record reflects that Counsel's advice to take the plea deal was excellent advice. The second superseding indictment charged Onamuti with 22 counts. Crim. Dkts. 91 and 235 at p. 10. The plea agreement required Onamuti to plead to only three counts and would have permitted a significant sentence reduction based on acceptance of responsibility. Crim. Dkt. 235 at p. 34.[2] The evidence upon which Onamuti was charged was overwhelming. Crim. Dkt. 279 at p. 21-95 (testimony regarding two-and-a-half-year investigation). Had Onamuti gone to trial, the United States was prepared to offer evidence that would have very likely resulted in his conviction on all but Counts 21 and 22. The sentences on these remaining 20 counts could have been imposed consecutively. Further, Onamuti's extended testimony at the nearly day-long sentencing hearing at which he claimed he was misled by his attorney and denied any participation in criminal activity was not credible. Crim. Dkt. 279 at p. 175; see also pp. 102-175, 206. Had Onamuti persisted in following his counsel's advice by accepting responsibility, his guideline range would have been much lower, and he could have received well below the 15-year statutory maximum sentence that

[2] Onamuti did not qualify for acceptance of responsibility because the statements made at his sentencing hearing were found to be false and frivolous and further that he obstructed justice. Crim. Dkt. 279 at p. 177-178, 181-187.

was imposed on Count 12. *Compare* Crim. Dkt. 214 at ¶ 99 (calculating guideline imprisonment range as 108-135 months with credit for acceptance of responsibility and without the increase for obstruction of justice); *with* Crim. Dkt. 279 at p. 187 (guideline range without acceptance of responsibility and with obstruction of justice was calculated to be 188 to 235 months, but because Count 2 has a statutory max of 180 months, the guideline range became 180 months). The imposition of the statutory maximum sentence was a result of Onamuti's actions and not his attorney's advice.

This Court has already listened to and observed hours of testimony, including testimony relating to the very arguments Onamuti now pursues, and concluded that Onamuti lies whenever it appears to him to be to his benefit. Dkt. 279 at p. 209. Additional testimony regarding whether counsel was ineffective for advising Onamuti to plead guilty is not warranted under these circumstances.

IV. Conclusion

For the reasons explained in this Order, Onamuti's § 2255 motion is **granted to the extent that** Onamuti is entitled to the issuance of an amended judgment that reflects Count 21 is dismissed, thereby reducing his total term of incarceration by 24 months and reducing his special assessment by $100. Onamuti's motions for release on bail, dkts. [18] and [22], are **denied as moot.** A copy of this Order shall be filed in 1:16-cr-93-JRS-MJD-1. The motion to vacate in the criminal case (Crim. Dkt. 289) shall be terminated.

Judgment consistent with this Order shall now issue.

IT IS SO ORDERED.

Date: 06/06/2022

James R. Sweeney II

JAMES R. SWEENEY II, JUDGE
United States District Court
Southern District of Indiana