[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-14263

Non-Argument Calendar

DAVID CHIDDO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:20-cv-80012-RLR

Before LAGOA, BRASHER, and TJOFLAT, Circuit Judges.

PER CURIAM:

David Chiddo, a counseled federal prisoner, appeals the District Court's denial of his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. We granted a certificate of appealability ("COA") on the single issue of "[w]hether the magistrate judge erred in concluding that the factual proffer was sufficient to support Chiddo's conviction for conspiracy to possess with intent to distribute cocaine because it showed that Chiddo engaged in repeated transactions for the sale of cocaine." Chiddo argues that the factual basis for his guilty plea to conspiracy to possess with intent to distribute cocaine was insufficient and, thus, his trial counsel was ineffective for not objecting to the factual basis, his guilty plea was not knowing and voluntary, and he was actually innocent of the conspiracy offense. He argues that the factual proffer showed merely a buyer-seller relationship, not a conspiracy, because it contained only a few phone calls between himself and a known drug dealer, Marvin Lester, discussing the possible sale of only a small amount of cocaine. Because we are not convinced that Chiddo's counsel was constitutionally ineffective, we deny Chiddo's petition.

I.

On May 19, 2015, a federal grand jury in the Southern District of Florida indicted Chiddo on one count of conspiracy to

possess with intent to distribute cocaine (Count 12), one count of possession with intent to distribute cocaine (Count 13), and one count of distribution of oxycodone and cocaine (Count 14).[1] On September 11, 2015, Chiddo pled guilty to Count 12, pursuant to a written plea agreement and a stipulated statement of facts. As part of the plea agreement, the government agreed to drop the other counts against Chiddo. After the indictment but before Chiddo entered his guilty plea, Chiddo's wife, Elizabeth Flores, and their daughter were murdered by Flores's mother.

Chiddo agreed to the following facts in the factual proffer accompanying the plea agreement. In May 2012, law enforcement recorded several phone conversations between Chiddo and his codefendant Lester. In one of the phone calls, Lester said he needed "some" and asked Chiddo for "a ball,"[2] which Chiddo agreed to hold for Lester. The following month, law enforcement recorded more phone calls between the Chiddo and Lester, during which they negotiated the terms of further cocaine sales from Chiddo to Lester. After recording the phone calls between Chiddo and Lester, law enforcement officers began to surveil Chiddo and eventually witnessed him drive to a Kentucky Fried Chicken and "conduct a hand-to-hand transaction" with someone in a blue Chevrolet car. After the transaction was completed, the officers stopped the car and searched it, finding 3.6 grams of cocaine and 14

[1] Chiddo was not involved in any of the events giving rise to Counts 1–11.

[2] A "ball" refers to an eighth of an ounce of cocaine.

40-milligram Oxycodone pills. One of the individuals in the car subsequently admitted that they got the drugs from "D-Money"—a known alias for Chiddo.

On December 21, 2015, Chiddo was sentenced to 151 months' imprisonment, followed by 3 years of supervised release. One week later, Chiddo filed a Notice of Appeal and raised two issues: (1) the magistrate judge lacked authority to conduct the plea hearing and adjudicate Chiddo guilty, and (2) there was no factual basis for a conspiracy conviction and evidence only of "an incipient buyer-seller relationship." On July 9, 2018, this Court affirmed Chiddo's judgment and conviction. This Court held that Chiddo invited the magistrate judge's alleged error by signing statements indicating that he read the plea statement and factual proffer and by failing to object to the factual proffer at the plea hearing and at sentencing. Chiddo's conviction became final when the Supreme Court denied his petition for certiorari on January 8, 2019.

Chiddo timely filed a § 2255 motion on January 6, 2020. In support of his § 2255 motion, Chiddo raised two arguments: (1) his counsel was ineffective because he advised him to accept the plea on the basis of facts that did not prove a conspiracy; and (2) he did not enter into the plea voluntarily, due to both his lack of awareness of the elements of the charged conspiracy offense and his fragile emotional state following the murder of his wife and daughter.

On July 21, 2021, the magistrate judge issued a Report and Recommendation ("R&R") recommending that Chiddo's motion be denied, an evidentiary hearing be denied, and the District Court

not issue a COA. The magistrate judge first addressed whether there was a sufficient factual basis for Chiddo's guilty plea, explaining that Chiddo's other arguments depended on that determination. Based on the number of transactions between Chiddo and Lester and the number of drug types involved in the transaction, the magistrate judge concluded that there was a sufficient factual basis for Chiddo's guilty plea. The magistrate judge also concluded that Chiddo's counsel was not constitutionally ineffective by allowing him to proceed with the guilty plea, and that Chiddo did not meet his burden under *Strickland* of showing that his counsel's actions prejudiced him. The magistrate judge also rejected Chiddo's argument that he did not enter into the plea voluntarily for two reasons. First, the stipulated facts in the plea listed the elements of conspiracy, and Chiddo swore that he had reviewed the stipulated facts and understood them. Second, the District Court knew about the events concerning his wife and daughter's murder that Chiddo had gone through in the previous months, but the Court nonetheless concluded that Chiddo was competent to accept the plea.

On October 7, 2021, the District Court issued an order adopting the R&R, denying Chiddo's § 2255 motion, and stating that a COA shall not issue. Chiddo filed a motion for a COA before this Court on January 20, 2022. On April 15, 2022, this Court granted Chiddo's motion for a COA with respect to the following issue: "Whether the magistrate judge erred in concluding that the factual proffer was sufficient to support Chiddo's conviction for conspiracy to possess with intent to distribute cocaine because it

showed that Chiddo engaged in repeated transactions for the sale of cocaine."

II.

In reviewing a district court's denial of a § 2255 motion, we review findings of fact for clear error and questions of law *de novo*. *McKay v. United States*, 657 F.3d 1190, 1195 (11th Cir. 2011). We only review issues within the scope of the COA. *Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1180 (11th Cir. 2010). We may affirm the denial of a § 2255 motion on any ground supported by the record. *Beeman v. United States*, 871 F.3d 1215, 1221 (11th Cir. 2017).

This Court has recognized that § 2255 motions cannot be used as "surrogate[s] for . . . direct appeal[s]." *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (citing *United States v. Frady*, 456 U.S. 152, 165, 102 S.Ct. 1584, 1593 (1982)). Non-constitutional errors that could have been raised on direct appeal thus cannot be the basis for a collateral attack. *See Lynn*, 365 F.3d at 1232. The language of the COA presents the issue as whether the magistrate judge erred in concluding that the factual proffer in the plea agreement supported a conviction for conspiracy. This issue, however, is one that could have been raised on direct appeal because it can be resolved using the evidence available in the record. *See Mills v. United States*, 36 F.3d 1052, 1055 (11th Cir. 1994) ("A ground of error is usually "available" on direct appeal when its merits can be reviewed without further factual development."). Because we can only consider issues within the scope of the COA, the

COA should be framed in a way that centers on the issues cognizable in a § 2255 motion. Chiddo has raised an ineffective assistance of counsel claim pursuant to *Strickland*—namely, Chiddo argues that his counsel was constitutionally ineffective by encouraging him to plead guilty to conspiracy because the facts in the proffer accompanying the plea agreement did not support a conviction for conspiracy. We thus reframe the COA as follows: Did Chiddo's counsel perform his duties in a constitutionally ineffective manner under *Strickland* by encouraging Chiddo to plead guilty to an offense for which no factual support existed?

To raise a successful claim of ineffective assistance of counsel, a defendant must demonstrate both that (1) counsel's performance was deficient, meaning that it fell below an objective standard of reasonableness; and (2) the defendant was prejudiced by the deficient performance—that is, there was a reasonable probability that the result of the proceeding would have been different but for counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052, 2064, 2068 (1984). As to the first prong, the defendant must show that the advice given to him by counsel fell below the minimum standards of competency under the professional norms, not merely that it varied from best practices. *Id.* at 690, 104 S. Ct. at 2066. Our evaluation of counsel's performance is highly deferential, and there is a strong presumption that counsel acted within the professional norms set for competent assistance. *Id.* at 689, 104 S. Ct. at 2065. As to the second prong, it is not enough for the defendant to show that the error had some

conceivable effect on the outcome of the proceeding. *Id.* at 693, 104 S. Ct. at 2067. To satisfy the second *Strickland* prong, the defendant must show that "there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068 (emphasis added). Both parts of the *Strickland* test must be satisfied, so if a defendant cannot satisfy one of the prongs, then a reviewing court need not address the other. *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000).

During the plea-bargaining process, the defendant has a right to effective and competent assistance of counsel. *Lafler v. Cooper*, 566 U.S. 156, 162–63, 132 S. Ct. 1376, 1384 (2012). A defendant can overcome the otherwise voluntary and intelligent character of his guilty plea only if he can establish that the advice that he received from counsel in relation to the plea was not within the range of competence demanded of attorneys in criminal cases, in violation of *Strickland*. *See Premo v. Moore*, 562 U.S. 115, 121, 126, 131 S. Ct. 733, 739, 742 (2011) (assessing an ineffective-assistance claim regarding counsel's advice to plead guilty). When raising a claim of ineffective assistance of counsel as to a guilty plea, the defendant must show not only that the advice of counsel fell below the level of competence demanded of attorneys, but also that but for counsel's advice, he would have gone to trial. *See Hill v. Lockhart*, 474 U.S. 52, 56–59, 106 S. Ct. 366, 369–71 (1985).

"Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." Fed. R. Crim.

P. 11(b)(3). A "factual basis for the plea" simply means that "there must be evidence from which a court could reasonably find that the defendant was guilty." *United States v. Owen*, 858 F.2d 1514, 1517 (11th Cir. 1988). "[U]ncontroverted evidence of guilt" is not required. *Id.* at 1516–17. A district court must ensure that the defendant's admissions satisfy the elements of the offense to which he pled guilty. *United States v. Lopez*, 907 F.2d at 1096, 1100 (11th Cir. 1990).

To prove that a defendant participated in a conspiracy, the government must show that: (1) a conspiracy existed; (2) the defendant knew of it; and (3) the defendant, with knowledge, voluntarily joined it. *United States v. Lopez-Ramirez*, 68 F.3d 438, 440 (11th Cir. 1995). The existence of a buyer-seller relationship is not, on its own, sufficient to establish a conspiratorial agreement. *United States v. Thompson*, 422 F.3d 1285, 1292 (11th Cir. 2005).

When the charge is conspiracy to distribute drugs, there must be a showing that the drugs were not merely to support the buyer's personal drug habit. *United States v. Dekle*, 165 F.3d 826, 829–30 (11th Cir. 1999). "Where the buyer's purpose is merely to buy, and the seller's purpose is merely to sell, and no prior or contemporaneous understanding exists between the two beyond the sales agreement, no conspiracy has been shown." *United States v. Beasley*, 2 F.3d 1551, 1560 (11th Cir. 1993) (quotation marks omitted). A conspiracy may be inferred, however, when the evidence shows a continuing relationship, resulting in the repeated transfer of illegal drugs to the purchaser. *Id.*

III.

We agree with the District Court's conclusion that Chiddo's counsel was not constitutionally ineffective in encouraging Chiddo to take the plea because the proffer was sufficient to support Chiddo's conviction for conspiracy to distribute cocaine.

While the evidence presented in the factual proffer did not contain enough detail to establish conspiracy with complete certainty, we conclude that the proffer was not so bereft of factual support for conspiracy that it was inadequate or rendered Chiddo's counsel's performance deficient. *See Strickland*, 466 U.S. at 689–90, 104 S. Ct. at 2065–66. The factual proffer explicitly listed the details of four phone calls between Lester and Chiddo, during which they discussed several different drug transactions. These conversations about multiple drug transactions indicated that Chiddo and Lester had a continuing relationship, which supported an inference that they were involved in a conspiracy. *See Beasley*, 2 F.3d at 1560. In another set of phone calls, Chiddo and Lester discussed the quality of the cocaine and indicated that they had re-ups.[3] Lester also requested that Chiddo set his narcotics to the side to ensure that Chiddo would not sell it to someone else, and Chiddo agreed to Lester's request. Based on the content of these discussions, "a court could reasonably find" that the drugs were not

[3] The slang term "re-up" here refers to a new supply of illegal drugs that someone can sell. *Re-up*, Macmillan Dictionary, https://www.macmillandictionary.com/us/dictionary/american/re-up_2 (last visited Jan. 19, 2023).

for personal use but to support an ongoing distribution conspiracy. *See Owen*, 858 F.2d at 1517. Finally, at the change-of-plea hearing, Chiddo stated that he had reviewed the factual proffer, had discussed it with counsel, and agreed that it was accurate. Chiddo at no point indicated that he misunderstood the factual proffer, failed to discuss the factual proffer with counsel, or was dissatisfied with the factual proffer. Because the factual proffer contained details indicating a conspiracy between Lester and Chiddo, we conclude that it was sufficient to support Chiddo's guilty plea.

Chiddo thus has not satisfied the first prong of *Strickland* by proving that his counsel's performance fell below an objectively reasonable standard. Chiddo's counsel's recommendation that Chiddo accept the guilty plea and the proffer was reasonable because it limited Chiddo's criminal liability, increased the likelihood that the remaining two counts would be dismissed, and saved Chiddo from going to trial. As the District Court noted, if Chiddo had not pled guilty to conspiracy, he certainly would have been found guilty of Count 13 because the police witnessed the hand-to-hand sale of cocaine and oxycodone. Chiddo would have also had a much higher guideline sentence range if he had not taken the guilty plea. In order to satisfy the first *Strickland* prong, Chiddo had to overcome this Court's strong presumption in favor of counsel being competent and show that his counsel's performance fell below professional norms. *See Strickland*, 466 U.S. at 689–90, 104 S. Ct. at 2065–66. The stipulated facts in the plea formed a sufficient basis to charge Chiddo with conspiracy, and if Chiddo had not

pled guilty, he would have faced both greater criminal liability on other charges and greater sentencing exposure. Chiddo's counsel thus did not fall below professional norms by advising Chiddo to accept the plea deal.

Because Chiddo failed to show that his counsel's performance fell below an objective level of reasonableness, we affirm the District Court's denial of Chiddo's § 2255 motion.[4]

AFFIRMED.

[4] Because Chiddo failed to satisfy the first *Strickland* prong, we need not address the second *Strickland* prong. The second prong is whether counsel's performance prejudiced the defense. *See Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000).