

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-13556
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARDSON BIEN AIME,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 2:23-cr-00134-TPB-NPM-1

Before JILL PRYOR, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

Richardson Bien Aime appeals his conviction for possession with intent to distribute 50 grams or more of methamphetamine and possession of a firearm as a convicted felon. He argues that

the district court erred by failing to sua sponte inquire into a potential conflict of interest during his plea hearing where his trial counsel represented him in accepting an appeal waiver that precluded him from raising a claim of ineffective assistance of counsel on direct appeal and in a 28 U.S.C. § 2255 proceeding.

Questions involving conflicts of interest are mixed determinations of fact and law and are reviewed de novo. *United States v. Novaton*, 271 F.3d 968, 1010 n.10 (11th Cir. 2001).

“In criminal cases, an attorney’s conflict of interest may deprive a defendant of his Sixth Amendment right to assistance of counsel.” *United States v. Jones*, 52 F.3d 924, 925 (11th Cir. 1995). If no objection is raised at trial, a defendant can establish a violation of the Sixth Amendment by showing that “an actual conflict of interest adversely affected his lawyer’s performance.” *Novaton*, 271 F.3d at 1010 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980); see also *Mickens v. Taylor*, 535 U.S. 162, 164, 174 75 (2002) (providing that, if the trial court did not inquire into a potential conflict of interest about which it knew or reasonably should have known, a defendant must show that the conflict of interest actually affected his counsel’s performance). The mere possibility of a conflict of interest is “insufficient to impugn a criminal conviction.” *Cuyler*, 446 U.S. at 350.

To prove that an “actual conflict” affected the defendant’s lawyer’s performance, the defendant “must make a factual showing of inconsistent interests or point to specific instances in the record to suggest an actual impairment of his or her interests.” *Novaton*,

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271 F.3d at 1010-11 (quotation marks omitted). To demonstrate an adverse effect, the defendant must show: (1) the existence of a plausible, alternative defense strategy or tactic that might have been pursued; (2) that the alternative strategy or tactic was reasonable under the facts; and (3) a link between the actual conflict and the decision to forgo the alternative strategy or tactic. *Id.* at 1011.

Automatic reversal of a sentence is limited only to circumstances where defense counsel is forced to represent codefendants over a timely objection. *Dallas v. Warden*, 964 F.3d 1285, 1303 (11th Cir. 2020) (citing *Mickens*, 535 U.S. at 168). In the absence of joint representation of codefendants, where a trial court fails to adequately investigate any other type of conflict of interest that it knows or reasonably should know about, “reversal is only warranted if the petitioner shows an actual conflict that negatively affected his attorney’s performance.” *Dallas*, 964 F.3d. at 1303 04.

“We will not generally consider claims of ineffective assistance of counsel raised on direct appeal where the district court did not entertain the claim nor develop a factual record.” *United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir. 2002).

Bien Aime has not shown that an actual conflict of interest existed because he did not object to the conflict below, it is not clear that the appeal waiver bars a claim of ineffective assistance of counsel, and he fails to show that an actual conflict adversely affected his sentencing counsel’s representation. Bien Aime did not raise an objection to the waiver at his plea or sentencing hearing, so to show a violation of his right to independent counsel he must show that

there was an actual conflict with adversely affected his counsel's representation. *Novaton*, 271 F.3d at 1010.

It is unclear from the record, nor does the government contend, that Bien Aime's appeal waiver bars a claim of ineffective assistance of counsel. Bien Aime's appeal waiver does not mention collateral challenges or ineffective assistance of counsel. Bien Aime initially claimed that he could not raise the ineffective assistance of counsel claim on either direct appeal or in a § 2255 motion, but he raised that exact claim in his § 2255 motion, which was granted, allowing him to file this direct appeal. Bien Aime only established that there is a possibility the appeal waiver would bar his ineffective assistance of counsel claim on direct appeal, which is not sufficient to establish an actual conflict. *See Cuyler*, 446 U.S. at 350. Bien Aime also fails to show that his trial counsel had an inconsistent interest because he does not point to any instance in the record, besides the appeal waiver, that suggests his counsel's interests were impaired. *See Novaton*, 271 F.3d at 1010-11.

Even if Bien Aime were able to show a conflict, he fails to show that the potential conflict adversely affected his counsel's performance because he does not point to the existence of a plausible, alternative defense strategy that might have been pursued, beyond not to taking the plea deal which, as discussed, has not been shown to actually preclude him from raising the ineffective assistance of counsel claim. *See Novaton*, 271 F.3d at 1011.

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The automatic reversal standard is also inapplicable here because Bien Aime does not complain that his trial counsel was representing a codefendant. *See Dallas*, 964 F.3d at 1303. Bien Aime's contention that *Dallas* does not apply is incorrect: *Dallas* is the controlling precedent in this Circuit regarding automatic reversal and does not require such reversal here based on the alleged conflict of interest. *Dallas*, 964 F.3d at 1303-04. Moreover, *Dallas* simply applied the Supreme Court's test from *Cuyler*, 446 U.S. at 349-50, which required a showing that an actual conflict of interest adversely affected defense counsel's performance.

Because Bien Aime has not shown that an actual conflict existed, and even if he did, he failed to show that the potential conflict adversely affected his counsel's performance,¹ the district court did not err by failing to sua sponte inquire into and dispose of the potential conflict of interest.

AFFIRMED.

¹ Although Bien Aime argues that there was a plausible alternative defense strategy—i.e. recommending against the signing the appeal waiver—he fails to demonstrate that such strategy was reasonable under the facts, as required by *Novaton*, 271 F.3d at 1011. And, in any event, the waiver did not actually preclude him from raising the ineffective assistance of counsel claim.