FILED
United States Court of Appeals
Tenth Circuit

September 4, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DONALD BRIAN WINBERG,

Defendant - Appellant.

No. 19-1005
(D.C. Nos. 1:17-CV-00511-PAB &
1:14-CR-00160-PAB-1)
(D. Colo.)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KARLIEN RICHEL WINBERG,

Defendant - Appellant.

No. 19-1006
(D.C. Nos. 1:17-CV-01394-PAB &
1:14-CR-00160-PAB-2)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, **O'BRIEN**, and **MATHESON**, Circuit Judges.

Donald and Karlien Winberg, appearing pro se, seek certificates of appealability ("COA") to challenge the district court's denials of their 28 U.S.C. § 2255 motions for a

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

writ of habeas corpus. *See* 28 U.S.C. § 2253(c)(1)(B) (requiring a COA to appeal an order denying a § 2255 motion). Exercising jurisdiction under 28 U.S.C. § 1291, we deny their requests and dismiss these matters.[1]

I. BACKGROUND

The Winbergs, husband and wife, were indicted on 18 counts of wire fraud and two counts of conspiracy to commit wire fraud. The charges stemmed from the Winbergs' soliciting, across multiple states and over several years, numerous large-scale purchases or sales of hay, corn, and other crops without intending to pay or deliver. In 2015, they each pled guilty to two counts of conspiracy to commit wire fraud in exchange for dismissal of the other charges. They were each sentenced to 87 months in prison and ordered to pay $1.5 million in restitution. We dismissed their appeals based on the waiver of appeal rights in their plea agreements. *See United States v. Karlien Winberg*, 667 F. App'x 707 (10th Cir. 2016) (per curiam); *United States v. Donald Winberg*, 646 F. App'x 632 (10th Cir. 2016) (per curiam). As discussed below, their plea agreements also included collateral review waivers.

The Winbergs filed two separate § 2255 motions. Each asserted the same five claims: (1) selective prosecution; (2) the government failed to disclose evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (3) their guilty pleas were coerced

[1] Because the Winbergs are pro se, we construe their filings liberally, but we do not act as their advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

due to deficient legal representation; (4) ineffective assistance of counsel (IAC); and (5) evidence was admitted in violation of *Crawford v. Washington*, 541 U.S. 36 (2004).[2] In separate orders, the district court denied the motions and denied a COA. The Winbergs have filed identical briefs and COA applications in this court, insisting their "cases are identicle [sic] in nature and are seeking indenticle [sic] reliefs." Aplt. Opening Br. at 3.

II. **DISCUSSION**

A. ***COA Requirement and Standard of Review***

The Winbergs may not appeal the district court's denial of their § 2255 motions without a COA. 28 U.S.C. § 2253(c)(1)(B); *see United States v. Gonzalez*, 596 F.3d 1228, 1241 (10th Cir. 2010). To obtain a COA, they must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and show "that reasonable jurists could debate whether . . . the petition[s] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

[2] Mrs. Winberg's § 2255 motion included a sixth claim—that her criminal history was improperly calculated. She also moved to amend her § 2255 motion to add five more claims. She does not address these claims in her appellate briefing, so we do not address them. *United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003) (declining to address a § 2255 claim that was not included in the COA application or brief to this court).

In their combined opening brief, the Winbergs do not argue their *Brady* or *Crawford* claims. We therefore decline to address them. *See United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003) (declining to address a claim raised in a § 2255 motion that was not included in the COA application or brief to this court); *see also Toevs v. Reid*, 685 F.3d 903, 911 (10th Cir. 2012) (noting the waiver rule, for which "[a]rguments not clearly made in a party's opening brief are deemed waived," applies even to pro se litigants who "are entitled to liberal construction of their filings"). We address only the claims for selective prosecution, coerced guilty pleas, and IAC.

B. ***Plea Agreement and Collateral Review Waiver***

A defendant's waiver of the right to bring a collateral attack is generally enforceable and requires dismissal of a § 2255 motion. *See United States v. Cockerham*, 237 F.3d 1179, 1181 (10th Cir. 2001). Here, as part of their plea agreement, the Winbergs expressly waived their "right to challenge [their] prosecution, conviction, or sentence and/or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255." R. (19-1005) at 47; R. (19-1006) Vol. 2 at 46. The agreement listed three exceptions to the collateral review waiver: "(1) . . . an explicitly retroactive change in the applicable guidelines or sentencing statute; (2) . . . a claim that the defendant was denied the effective assistance of counsel; or (3) . . . a claim of prosecutorial misconduct." R. (19-1005) at 47; R. (19-1006) Vol. 2 at 46. The Winbergs confirmed in open court at their change-of-plea hearings that they understood this waiver.

To determine whether a collateral review waiver bars a § 2255 claim, a court must assess: "(1) whether the disputed [claim] falls within the scope of the waiver of [collateral review] rights; (2) whether the defendant knowingly and voluntarily waived his [collateral review] rights; and (3) whether enforcing the waiver would result in a miscarriage of justice." *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (per curiam); *see also United States v. Viera*, 674 F.3d 1214, 1217 (10th Cir. 2012) (applying *Hahn* to collateral review waiver).

C. ***COA Analysis***

1. **IAC and Coerced Guilty Pleas**

The district court first addressed the Winbergs' IAC claims, noting their exclusion from the collateral review waiver. Because the Winbergs based their coerced guilty plea claim on deficient performance of counsel, the court treated it as part of the IAC claims, and so do we.

To demonstrate IAC in the negotiation of their guilty pleas, the Winbergs must show (1) their attorneys' "representation fell below an objective standard of reasonableness"; *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) (internal quotation marks omitted); and (2) but for the deficient representation, "there is a reasonable probability that . . . [they] would not have pleaded guilty and would have insisted on going to trial," *id.* at 59. As to the latter, the "mere allegation that [they] would have insisted on trial" is not sufficient. *Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001) (internal quotation marks omitted). Rather, they must show that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*,

559 U.S. 356, 372 (2010). Prejudice is presumed when (1) there is a "complete denial of counsel" at a "critical stage" of the litigation; (2) counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." *United States v. Cronic*, 466 U.S. 648, 659-60 (1984).

In their § 2255 motions, the Winbergs raised a litany of complaints about their attorneys but offered few specifics. They alleged their attorneys spent inadequate time on their cases, were distracted by billing issues, had a conflict due to a fee-splitting arrangement, and lacked experience in fraud cases. The Winbergs further alleged their attorneys did not read "five apple boxes" of evidence, review and investigate the government's evidence, provide the Winbergs with discovery from the government, ask for a suppression hearing, conduct an investigation, hire an investigator or inform the Winbergs of their right to an investigator, adequately communicate with them, inform them of their sentencing exposure, contest the amount of loss the victims claimed, or argue prosecutorial misconduct. R. (19-1005) at 238-40; R. (19-1006) Vol. 1 at 272-76. The Winbergs claim they did not understand the charges and did not realize they were "actualy [sic] innocent" until they conducted their own research in a prison law library. Aplt. Opening Br. at 13. They contend that, but for the allegedly deficient representation, they "would have insisted on going to trial." *Id.* at 21. As previously noted, the coerced-

guilty-plea claims were based solely on their dissatisfaction with their attorneys and are therefore part of the IAC claims.[3]

The district court first found the Winbergs' statements at their plea hearings undercut their IAC claims.[4] They acknowledged having had sufficient time to review the plea agreements, discussed the agreements with their attorneys, and satisfaction with their attorneys' representation. Such statements "carry a strong presumption of verity" and "constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). The court also noted that in the § 2255 motions, the Winbergs offered only conclusory allegations regarding their attorneys' performance and possible prejudice. In their brief to this court, the Winbergs insist their IAC claims were "not conclusory," Aplt. Opening Br. at 15, but they do not point to specifics. The Winbergs' plea hearing statements' "presumption of verity" is a "formidable barrier" that easily withstands their "conclusory allegations unsupported by specifics" or "contentions that in the face of the record are wholly incredible." *Blackledge*, 431 U.S. at 74.

Based on our review of the record, we conclude reasonable jurists would not find debatable or wrong the district court's denial of the Winbergs' IAC claims.

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[3] The Winbergs have not contested the court's characterization of this claim.

[4] The Winbergs filed written statements in advance of their pleas, in which they acknowledged, *inter alia*, (1) the charges and possible sentences had been explained to them; (2) their guilty pleas had not been induced by promises or threats; and (3) they were "satisfied with [their] attorney[s]" and believed they had "been represented effectively and competently." R. (19-1005) at 69; R. (19-1006) Supp. 1 at 25.

2. **Selective Prosecution**

The Winbergs claimed selective prosecution in their § 2255 motions, contending (1) their inability to deliver crops or payment that they owed to others was due to a drought, not fraud; and (2) they "were the only ones that were criminally prosecuted as a result of [a] drought," which "would imply some form of selective prosecution." R. (19-1005) at 231; *see also* R. (19-1006) Vol. 1 at 268. The district court denied the claim based on the Winberg's collateral review waiver.[5]

The Winbergs do not dispute the district court's determination the claim fell within the scope of waiver. They therefore have waived any challenge to that ruling. *See Toevs*, 685 F.3d at 911. They rely on the other two *Hahn* factors—whether they "knowingly and voluntarily waived" their collateral review rights and "whether enforcing the waiver would result in a miscarriage of justice." *Hahn*, 359 F.3d at 1325.

The district court found the waivers were knowing and voluntary based on the Winbergs' representations at their plea hearings and their written statements filed in advance of their pleas. *See id.* (noting courts should focus on the plea agreement and colloquy in "determining whether a waiver of appellate rights is knowing and voluntary"). The Winbergs counter that their attorneys' allegedly deficient representation

[5] In their opening brief, the Winbergs raise, for the first time, a distinct claim of vindictive prosecution. *Compare United States v. Furman*, 31 F.3d 1034, 1037 (10th Cir. 1994) (providing the elements of a claim of selective prosecution), *with United States v. Contreras*, 108 F.3d 1255, 1262-63 (10th Cir. 1997) (providing the elements of a claim of vindictive prosecution). Because the Winbergs did not allege vindictive prosecution in their § 2255 motions, we decline to address this claim. *See United States v. Mora*, 293 F.3d 1213, 1216 (10th Cir. 2002).

rendered their waiver not knowing and voluntary. *See Romero v. Tansy*, 46 F.3d 1024, 1033 (10th Cir. 1995) (noting "[p]erformance by defense counsel that is constitutionally inadequate can render a plea involuntary"). This argument fails for the same reasons their IAC claims fail, as addressed above.

The "miscarriage of justice" factor applies only "[1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful." *Hahn*, 359 F.3d at 1327 (internal quotation marks omitted). Regarding the fourth element, a waiver is "otherwise unlawful" if it "embod[ies] an error that seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Ibarra-Coronel*, 517 F.3d 1218, 1222 (10th Cir. 2008) (internal quotation marks omitted). We "look[] to whether the *waiver* is otherwise unlawful, not to whether another aspect of the proceeding may have involved legal error." *United States v. Shockey*, 538 F.3d 1355, 1357 (10th Cir. 2008) (internal quotation marks omitted).

The Winbergs do not argue that the district court relied on an impermissible factor or that their sentence exceeds the statutory maximum. They cannot rely on "ineffective assistance of counsel in connection with the negotiation of the waiver," *Hahn*, 359 F.3d at 1327, for the same reasons we rejected their IAC claims above. Finally, although the Winbergs do not explicitly contend waiver should be excused as being "otherwise unlawful," *id.*, they argue enforcing the waiver would be a miscarriage of justice because they are actually innocent. We need not decide whether actual innocence would satisfy

Hahn's "miscarriage of justice" exception because the Winbergs' innocence claim lacks merit.

To establish actual innocence, the Winbergs "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (internal quotation marks omitted). The Winbergs have not demonstrated actual innocence in their § 2255 motions or their briefs to this court. They insist that drought caused their failure to deliver crops or make payments and there was no intent to defraud. But in their statements filed in advance of their guilty pleas, in the plea agreements themselves, and in interviews with a probation officer for their presentence investigation reports, the Winbergs repeatedly agreed that the factual summary supporting guilt in their plea agreements was true and accurate. They admitted their guilt at their sentencing hearings. Their statements at their hearings are incompatible with their post hoc attempts to justify their criminal conduct. Finally, the Winbergs claim in their brief to this court "that they have smoking gun evidence that would exonerate them completly [sic]." Aplt. Opening Br. at 42. But they have presented no such evidence.

Based on our review of the record, we conclude reasonable jurists would not find debatable or wrong the district court's denial of the Winbergs' selective prosecution claim as barred by the collateral review waiver.

III. **CONCLUSION**

We deny the Winbergs' requests for a COA and dismiss these matters. We deny their motions to proceed in forma pauperis.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge