FILED
United States Court of Appeals
Tenth Circuit

September 1, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

IGNACIO SALCIDO, JR.,

Defendant - Appellant.

No. 22-2105
(D.C. Nos. 2:20-CV-00897-KG-JFR &
2:16-CR-04290-KG-JFR-1)
(D. N.M.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **MORITZ**, **EID**, and **CARSON**, Circuit Judges.

Ignacio Salcido, Jr., proceeding pro se,[1] seeks a Certificate of Appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion. We deny Mr. Salcido's COA request and dismiss the matter.

BACKGROUND

Mr. Salcido pleaded guilty in the United States District Court for the District of New Mexico to charges of transporting a minor across state lines to engage in illegal

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[*] This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

[1] Because Mr. Salcido proceeds pro se, we construe his arguments liberally, but we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

sexual activity. *See* 18 U.S.C. § 2423(a). As part of his guilty plea, he admitted the following facts:

> On or about August 22, 2016, in Doña Ana County, New Mexico, and elsewhere, [Mr. Salcido], who was 38 years old on that date, knowingly transported an individual, Jane Doe, who was under eighteen (18) years old on that date, in interstate and foreign commerce with the intent to engage in sexual intercourse with Jane Doe. [Mr. Salcido] could be charged with a criminal offense for engaging in sexual intercourse with Jane Doe, specifically, a violation of [N.M. Stat. Ann. § 30-9-11(G)(1)]. At the time of his arrest, [Mr. Salcido] told . . . officers that [he] believed Jane Doe was seventeen (17) years old and would soon be eighteen (18) years old.

R. vol. 2 at 42–43. Mr. Salcido later moved to withdraw his guilty plea, but the district court rejected the motion and accepted the plea as originally agreed. The district court sentenced him to the statutory minimum of 10 years' imprisonment.

Mr. Salcido pursued a direct appeal, but this court granted the government's motion to enforce the appeal waiver contained in his plea agreement and dismissed the appeal. *See United States v. Salcido*, 783 F. App'x 800, 800, 802 (10th Cir. 2019) (citing *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (per curiam)). Mr. Salcido also filed a motion pursuant to 18 U.S.C. § 3582(c) to reduce his sentence, but the district court denied it. On appeal, this court agreed Mr. Salcido was not entitled to relief but vacated the decision and remanded with instructions to change the disposition of the motion from a denial to a dismissal due to lack of jurisdiction. *See United States v. Salcido*, 849 F. App'x 230, 231–32 (10th Cir. 2021).

Mr. Salcido thereafter filed a § 2255 motion. The district court denied the motion after adopting the recommendation of the magistrate judge. The magistrate judge concluded Mr. Salcido waived in his plea agreement the right to pursue, in a § 2255

motion, his claim of actual innocence and his claims that his attorney misled or coerced him into pleading guilty. *See* R. vol. 2 at 47 ("[Mr. Salcido] agrees to waive any collateral attack to [his] conviction(s) and any sentence, including any fine, pursuant to [28 U.S.C. § 2255], except on the issue of defense counsel's ineffective assistance."). The court considered the merits of Mr. Salcido's claims of ineffective assistance of counsel—such as his claims that counsel did not make documents available to him or otherwise adequately investigate his case—but it rejected those claims for failure to show prejudice:

> Even assuming that counsel did not provide a copy of or otherwise discuss the Form 13 [Presentence Investigation Report (PSR)][2] with [Mr. Salcido] prior to his guilty plea, the controlling statute at issue in [Mr. Salcido]'s case, 18 U.S.C. § 2423(a), carries a mandatory minimum sentence of ten years imprisonment, up to life. After sustaining his objections to certain Guideline enhancements, . . . this Court imposed a sentence of 120 months, the minimum sentence authorized under law. . . . [Mr. Salcido] did as well as he otherwise could, absent dismissal of the case or being convicted under a different statute. And whether [Mr. Salcido] would have received the same sentence had he been convicted after trial is far from certain. Nonetheless, assuming without deciding that it was ineffective for counsel to not review the Form 13 PSR with his client, [Mr. Salcido] is unable to demonstrate that he suffered prejudice.

R. vol. 1 at 127. After reviewing the PSR, the magistrate judge concluded the evidence against Mr. Salcido—which included the testimony of his son, an

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> [2] A Form 13 PSR is an abbreviated presentence investigation with primary focus on the defendant's criminal history and Sentencing Guidelines analysis. It is generally completed prior to a defendant's adjudication of guilt, does not involve the interview of the defendant, and is often used by counsel to inform the parties in plea negotiations.

R. vol. 1 at 78 n.5.

unrelated third party, and the victim herself, as well as DNA evidence from the victim's clothing—was very strong, so it was unlikely Mr. Salcido would have obtained an acquittal if he proceeded to trial. Concurring in this conclusion, the district court denied the motion and denied a COA. This application followed.

DISCUSSION

"The issuance of a COA is a jurisdictional prerequisite to an appeal from the denial of an issue raised in a § 2255 motion." *United States v. Gonzalez*, 596 F.3d 1228, 1241 (10th Cir. 2010); *see also* 28 U.S.C. § 2253(c)(1)(B). To obtain a COA, Mr. Salcido must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2). For claims the district court addressed on the merits, he must show "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For claims the district court resolved on a procedural ground, he must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reasons would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Mr. Salcido seeks a COA to press three arguments. First, he argues counsel was ineffective for not showing him the Form 13 PSR before he pleaded guilty. Second, he argues he "entered into [the plea] agreement coached and coerced," and that his attorney was generally ineffective, resulting in "a total misrepresentation of the facts in this case," Aplt. Combined Opening Br. & Appl. for COA at 4. Third, he argues the court should have allowed him to withdraw his guilty plea, and that when he admitted he acted with

criminal intent he was "still afraid of what was happening," *id.*, so denying his motion to withdraw the plea violated due process.

We deny a COA on the first issue. To establish ineffective assistance of counsel, Mr. Salcido must show (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). To show prejudice, Mr. Salcido "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The district court concluded that, assuming the truth of Mr. Salcido's allegation that counsel did not show him the Form 13 PSR before he pleaded guilty and assuming this error was objectively unreasonable, Mr. Salcido failed to demonstrate prejudice. Had he proceeded to trial, given the strong evidence against him, a jury likely would have convicted him, and he therefore would have faced a sentence equal to or potentially much longer than the sentence he received. Mr. Salcido offers no basis for reasonable jurists to find that the district court's assessment of his constitutional claim was debatable or wrong, so he is not entitled to a COA.

We deny a COA on the second issue because Mr. Salcido's allegations of misconduct are too generalized and conclusory to support a claim for ineffective assistance of counsel or a resulting due process violation. *See United States v. Fisher*, 38 F.3d 1144, 1147 (10th Cir. 1994) (concluding allegations "without supporting factual averments" are insufficient to support a claim of ineffective assistance of counsel).

We deny a COA on the third issue because the district court dismissed it on a procedural ground—the plea waiver—and Mr. Salcido does not offer any argument that this procedural ruling was incorrect. In his report and recommendation, the magistrate judge concluded Mr. Salcido's "claim that his lawyer misled, coerced and/or deceived him into pleading guilty and that such chicanery resulted in a Due Process violation, amounts to a collateral attack on his conviction and therefore is . . . waived." R. vol. 1 at 84. The district court adopted the recommendation in full. Mr. Salcido's failure to address this procedural dismissal waives any such argument before this court. *See Becker v. Kroll*, 494 F.3d 904, 913 n.6 (10th Cir. 2007) ("An issue or argument insufficiently raised in the opening brief is deemed waived.").

CONCLUSION

We grant Mr. Salcido's motion to proceed without prepayment of costs or fees, but we deny a COA and dismiss this matter.

Entered for the Court

Joel M. Carson III
Circuit Judge