

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

October 14, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

HECTOR ABRAHAM COTA-HIGUERA,

Defendant - Appellant.

No. 25-2083
(D.C. Nos. 1:22-CV-00551-KWR-DLM &
1:19-CR-03103-KWR-SMV-1)
(D. N.M.)

ORDER AND JUDGMENT*

Before **MATHESON, CARSON**, and **ROSSMAN**, Circuit Judges.

Defendant-Appellant Hector Abraham Cota-Higuera is a federal inmate serving a fifteen-year prison sentence. He moved under [28 U.S.C. § 2255](#) to vacate that sentence, arguing his trial counsel was constitutionally ineffective. The district court denied the motion, and we granted a certificate of appealability (“COA”) on Defendant’s ineffective-assistance-of-counsel claim. Our jurisdiction arises under [28 U.S.C. §§ 1291](#) and 2253. We affirm.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See [Fed. R. App. P. 34\(a\)\(2\)](#); [10th Cir. R. 34.1\(G\)](#). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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](#).

I

In June 2021, without a plea agreement, Defendant pleaded guilty to five federal charges: (1) conspiracy; (2) possession with intent to distribute at least a kilogram of heroin; (3) possession of a firearm and ammunition by a prohibited person; (4) possession of a firearm with an obliterated serial number; and (5) use and possession of a firearm during and in furtherance of a drug-trafficking crime. Together, these convictions carried a fifteen-year mandatory minimum imprisonment term. In December 2021, the district court sentenced Defendant to fifteen years in prison. Approximately three months later, Defendant filed a pro se notice of appeal, which we dismissed as untimely.

Defendant then filed a § 2255 motion, asserting his trial counsel acted ineffectively by not consulting with him about an appeal.¹ The district court referred the case to a magistrate judge, who appointed Defendant new counsel and conducted an evidentiary hearing. Defendant and his trial counsel testified at the evidentiary hearing, which addressed, among other things, whether Defendant asked his trial counsel to file an appeal, whether counsel consulted with him about an appeal, and counsel's reasons for not filing a notice of appeal. The magistrate judge issued proposed findings and a recommended disposition rejecting Defendant's motion.

¹ Defendant's § 2255 motion also claimed trial counsel was ineffective for disregarding his request to file an appeal. We do not address this claim because Defendant did not present it in his opening brief and COA request before this court. See *United States v. Springfield*, 337 F.3d 1175, 1178 (10th Cir. 2003) (declining to address claim raised in § 2255 motion that was not included in COA application or appeal brief).

Over Defendant's objections, the district court adopted the recommendation, denied the § 2255 motion, and denied a COA.

We granted a COA on Defendant's claim that his trial counsel acted ineffectively by failing to consult with him about filing an appeal. The government filed a response brief urging affirmance. Defendant did not file a reply brief.

II

For a § 2255 appeal, we review the district court's factual findings for clear error and its legal conclusions de novo. *United States v. Rushin*, 642 F.3d 1299, 1302 (10th Cir. 2011). Ineffective-assistance-of-counsel claims involve mixed questions of law and fact, which we review de novo. *Id.*

"[C]riminal defendants have a Sixth Amendment right to 'reasonably effective' legal assistance." *Roe v. Flores-Ortega*, 528 U.S. 470, 476 (2000) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To prevail on an ineffective-assistance claim, a defendant must show that (1) "counsel's representation fell below an objective standard of reasonableness," and (2) counsel's "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687, 688. We may "address these two prongs in any order, and failure under either is dispositive." *Byrd v. Workman*, 645 F.3d 1159, 1168 (10th Cir. 2011). We must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct," and our "scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689, 690.

When, as here, a defendant “neither instructs counsel to file an appeal nor asks that an appeal not be taken,” we examine “whether counsel in fact consulted with the defendant about an appeal.” *Flores-Ortega*, 528 U.S. at 478. In this context, “consult” means “advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant’s wishes.” *Id.* If counsel did consult with the defendant, counsel “performs in a professionally unreasonable manner only by failing to follow the defendant’s express instructions with respect to an appeal.” *Id.*

The district court determined Defendant failed to show that his trial counsel’s representation fell below an objective standard of reasonableness because counsel consulted with Defendant about an appeal and Defendant did not give express appeal instructions. Having reviewed the matter de novo, we agree.

The district court credited trial counsel’s testimony at the evidentiary hearing. Defendant does not argue the district court was wrong to credit trial counsel’s testimony, and we discern no clear error in the district court’s factual findings. As relevant here, counsel testified that: counsel spoke with Defendant about an appeal for roughly three minutes after sentencing, advising Defendant that he had a right to appeal within fourteen days, conveying his opinion that there would be no merit to an appeal, and asking Defendant to contact counsel if he wished to appeal; Defendant did not respond to anything counsel said during the appeal discussion; and counsel did not contact Defendant after that discussion.

Defendant argues that because trial counsel did not advise him about specific advantages of taking an appeal, counsel did not “consult” with him about an appeal. But we cannot say that counsel was required to advise Defendant about advantages when counsel testified credibly that he told Defendant he did not think there were any meritorious grounds for appeal.

Defendant also argues counsel did not make a reasonable effort to discover his wishes related to appeal. But we agree with the district court that counsel was not required to demand a response from Defendant during the post-sentencing conversation. Counsel could have (and ideally would have) followed up with Defendant after their brief appeal discussion, but our review under *Strickland* is “highly deferential,” and we “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance,” 466 U.S. at 689. As the district court noted, the record shows Defendant waited several months after sentencing to contact counsel regarding an appeal, and there is a “complete lack of affirmative evidence” that he previously indicated to counsel any desire to pursue an appeal. R. at 422.

In sum, because trial counsel consulted with Defendant about an appeal and Defendant did not give express appeal instructions, Defendant has not shown that counsel performed “in a professionally unreasonable manner,” *Flores-Ortega*, 528 U.S. at 478.

III

We affirm the district court's judgment.

Entered for the Court

Joel M. Carson III
Circuit Judge