

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

FERNANDO ROCHA FUENTES,)	
)	
Petitioner)	
)	
v.)	Civil Action No. 5:08cv80101
)	Criminal Case No. 5:07cr00012-2
UNITED STATES OF AMERICA,)	
)	
Respondent)	By: Michael F. Urbanski
)	United States Magistrate Judge

REPORT AND RECOMMENDATION

Petitioner Fernando Rocha Fuentes (“Fuentes”) brings this action under 28 U.S.C. § 2255, alleging that his counsel provided ineffective assistance by forcing him to accept a plea agreement with the United States, and failing to file an appeal when requested to do so. By Order dated February 2, 2009, the court referred this matter to the undersigned and directed that an evidentiary hearing be held to determine whether Fuentes requested his attorney, Aaron Cook (“Cook”), to file an appeal. Such a hearing was conducted on June 9, 2009. As there is no credible evidence to indicate that Cook was requested to file an appeal or was otherwise ineffective, it is **RECOMMENDED** that this petition be **DISMISSED**.

I.

On April 19, 2007, Fuentes was named in four counts of a nine count indictment charging conspiracy to distribute more than 500 grams of methamphetamine in violation of 21 U.S.C. § 846 (Count 1); possession of methamphetamine with intent to distribute (Count 5); and two counts of possession of a firearm in furtherance of separate drug trafficking crimes (Counts 6 and 7). On September 26, 2007, Fuentes entered into a written plea agreement with the United States in which he agreed to plead guilty to two of the four counts: Count 1 alleging drug

conspiracy, and Count 6 alleging a firearms violation. Transcript of Guilty Plea Hearing (hereinafter, Guilty Plea Tr.) July 26, 2007, at 2. During his guilty plea hearing, both the United States and the court explained to Fuentes that the mandatory minimum terms associated with these two counts would result in a total sentence of 15 years, consisting of 10 years for Count 1 and 5 years for Count 6. Guilty Plea Tr. 2-3, 10-12.

At both Fuentes' guilty plea hearing and sentencing hearing, the court explained to him that by agreeing to the government's terms, he would forfeit any right to appeal and to collaterally attack his sentence under 28 U.S.C. § 2255. Transcript of Sentencing Hearing (hereinafter, Sentencing Tr.) Oct. 10, 2007, at 28; Guilty Plea Tr. 14-16. Fuentes was told that should he ignore the terms of his plea bargain and actually file an appeal, any benefit conferred upon Fuentes through the agreement potentially could be lost. Sentencing Tr. 28. Lastly, the court conveyed to Fuentes in his sentencing hearing that in order to initiate the appeal process, a notice of appeal must be filed within ten (10) days after sentencing; and this process can be performed by the clerk on Fuentes' behalf if so requested. *Id.* In exchange for Fuentes' agreement to the plea bargain's terms, the United States agreed to dismiss his remaining two charges. Guilty Plea Tr. 3-4.

Fuentes never indicated at his guilty plea hearing or his sentencing hearing his desire to appeal. Nor did he file a notice of appeal or make any request to have the clerk do so. Now, in his habeas corpus petition, Fuentes claims he expressly directed his attorney to file a notice of appeal regarding the weapons charge, and that his attorney provided ineffective assistance in refusing to abide by his wishes.

At the June 9, 2009 evidentiary hearing, Fuentes testified via video conference link as follows. Fuentes stated that, contrary to his guilty plea, he never possessed a weapon at any time. According to Fuentes, he relayed this information to Cook in three different meetings the

two had prior to his guilty plea hearing. Fuentes acknowledged that an interpreter was present on each of the occasions. Fuentes also claimed that he specifically asked Cook to file an appeal both before his guilty plea hearing and following his sentencing hearing while they were both still present in the courtroom. Fuentes further testified that following his sentencing, and after directing Cook to file an appeal, Cook responded by stating he would visit Fuentes in jail. Such a visit never occurred. Fuentes also claimed that both he and an unknown friend of his wife each placed a call to Cook regarding the issue of appeal, but were unable to speak to Cook.

Cook testified at the evidentiary hearing that he has been a practicing attorney for fourteen years with experience trying criminal cases in federal court. Cook testified that he regularly filed appeals in federal court, and had done so even for clients who had waived their right to appeal through a plea agreement. According to Cook, Fuentes was in no way coerced into accepting the government's plea agreement since it is his professional policy to always leave those decisions to his client. He also testified that prior to Fuentes' acceptance of the government's terms, he was fairly certain the case would proceed to trial and was preparing for such an event. Cook stated, however, that trial involved a huge risk for Fuentes in terms of the 25 year mandatory minimum jail time he faced on the second gun charge. As such, Cook stated that Fuentes felt it was advantageous to enter into the plea agreement. Once this decision was made, Cook testified he met with Fuentes to discuss the plea agreement's terms, including its appeal waiver provision. During that meeting, Cook was assisted by an interpreter and also provided Fuentes with a Spanish translation of the plea agreement.

Cook further testified that no discussion of appeal occurred at the guilty plea or sentencing hearing. Cook stated that after the sentencing hearing, he sent a closing letter to Fuentes dated October 10, 2007, which contained all of his contact information should Fuentes require further assistance. Cook testified that if Fuentes had at any time vocalized his desire to

appeal, he would have complied with this request. Cook further testified that during his meetings with Fuentes before the guilty plea hearing, he could not recall anything being said regarding an appeal, nor were there any statements made by Fuentes which were not interpreted. Cook also stated it was his policy to accept collect calls from known clients such as Fuentes. Therefore, if Fuentes had placed a call to Cook, it would have been accepted. Cook recalled no such call, and his office records did not indicate that such a call was ever received.

While Fuentes and Cook disagree as to whether Fuentes directed Cook to file an appeal, the undersigned finds Fuentes' account not to be credible as it is entirely inconsistent with the allegations in his petition, Cook's testimony, and the events recorded in the guilty plea and sentencing transcripts. Further, it is inconceivable that Fuentes would enter into a plea agreement to avoid the 25 year mandatory term associated with the second gun charge and then turn around and file an appeal which would lead to reinstatement of that charge.

Fuentes stated in his memorandum in support of his habeas petition that following his sentencing, he expressly asked Cook to file a notice of appeal. Yet during the evidentiary hearing, Fuentes testified that he directed Cook to file an appeal both before his guilty plea hearing and immediately following his sentencing hearing. It appears even Fuentes is confused as to when he supposedly requested this appeal since the facts related by him are not consistent. In contrast, Cook consistently testified that he was not requested to file an appeal at any time. Cook explained that there was no reason for him not to file an appeal had he been asked to do so, and would have done so if such a request had been made. Fuentes had every opportunity to write Cook a letter directing him to file an appeal since Fuentes provided him with his contact information, however, Fuentes did not do so. Furthermore, Fuentes was told at his sentencing hearing that he could file a notice of appeal with the assistance of the clerk's office, yet no such effort was made.

The fact that a rational defendant when placed in Fuentes' shoes would not have appealed this sentence adds credibility to Cook's testimony that Fuentes never mentioned the subject of appeal. Had Fuentes proceeded to trial and been found guilty on the second weapons charge, he would have been sentenced to an additional 25 years of mandatory time to be served consecutively. By accepting the government's plea agreement, Fuentes avoided the risk of the additional 25 years on the second gun charge. Had Fuentes filed an appeal, this substantial advantage would have been jeopardized, a result which no rational defendant would wish.

Moreover, Fuentes waived his right to appeal any issue regarding his sentence through his acceptance of the plea agreement. In fact, not only did Cook testify that he discussed the appeal waiver provision of the plea agreement with Fuentes, the waiver of appeal was addressed in open court at both his guilty plea hearing and sentencing hearing. Similarly, the court explained at the sentencing hearing that if he chose not to uphold his end of the bargain by filing an appeal, he would risk losing any advantage previously gained by entering into the plea agreement. Thus, Fuentes should have known that filing an appeal would have conflicted entirely with his plea agreement, and there is no credible evidence to suggest such a request was made.

II.

In support of his 28 U.S.C. § 2255 motion, Fuentes alleges Cook provided ineffective counsel by (1) forcing Fuentes to accept the government's plea agreement and (2) failing to file a notice of appeal after Fuentes directed him to do so. With regard to the first issue, the Fourth Circuit has emphasized that "a defendant's solemn declarations in open court affirming [a plea] agreement... 'carry a strong presumption of verity.'" United States v. White, 366 F.3d 291, 295 (4th Cir. 2004) (quoting Blackledge v. Allison, 431 U.S. 63, 74 (1977)). Thus, "in the absence of extraordinary circumstances, allegations in a § 2255 motion that directly contradict the

petitioner's sworn statements made during a properly conducted Rule 11 colloquy are always 'palpably incredible' and 'patently frivolous or false.'" United States v. Lemaster, 403 F.3d 216, 221 (4th Cir. 2005) (internal citations omitted).

On the matter of his plea agreement, Fuentes claims that:

Prior to the acceptance of the plea agreement offered by the government in this case, Petitioner met with counsel (and an interpreter) on approximately four occasions—purportedly to discuss the defense that would be presented on Mr. Fuentes' behalf. Ultimately, however, counsel advised his client to accept the Agreement. Counsel's advice, and the fact that Petitioner had no choice but to accept it, was the result of constitutionally defective action of counsel in two areas.

Defendant's Supporting Memo (hereinafter, Def.'s Mem.) Oct. 21, 2008, at 11.

The transcript from petitioner's guilty plea hearing and his written acceptance of the plea agreement, however, reflect just the opposite and make it plain that Fuentes entered into his plea agreement willingly and voluntarily. Guilty Plea Tr. 9. Fuentes initialed each page and signed the last page of the agreement. Plea Agreement (hereinafter, Plea Agt.) July 26, 2007, at 1-9. The agreement plainly provided that Fuentes was pleading guilty to both charges stipulated in the agreement, including Count 6, one of the two gun charges. Plea Agt. 1. In exchange for this, the government agreed to dismiss his remaining charges, including the second gun charge. Id at 2.

Fuentes stated in his guilty plea hearing that he had not been forced by anyone to accept the government's agreement, and that he understood the charges to which he had agreed to plead guilty. Guilty Plea Tr. 9. The record reflects that Fuentes was provided with a translation of the document, and its terms and conditions were explained to him by Cook through an interpreter. Id at 8. Fuentes also told the court during this proceeding that he was not under the influence of any drugs, medication, or alcoholic beverages. Id at 7. Fuentes stated he had not been promised

anything other than what was set forth in the plea agreement, and the plea agreement constituted the entire understanding between petitioner and the government. Id at 8-9. Lastly, Fuentes indicated he understood the maximum penalties associated with the charges to which he was pleading guilty, including imprisonment for ten years to life for Count 1 and imprisonment of five years, to be served consecutively, for Count 6. Id at 10-11.

In short, Fuentes' claim that counsel was ineffective by forcing him to accept the government's plea agreement is meritless. The guilty plea hearing record reflects Fuentes' admission that he had not been coerced into entering the plea agreement, no extraneous promises concerning the agreement had been made to him, and that he understood the plea agreement's terms and conditions. Guilty Plea Tr. 7-9. Accordingly, the undersigned recommends that this claim be dismissed.

III.

As to Fuentes' claim that Cook provided ineffective counsel by failing to file an appeal after being requested to do so, the undersigned finds this allegation to be meritless. The Sixth Amendment to the Constitution guarantees the right to counsel in judicial proceedings. Strickland v. Washington, 466 U.S. 668, 684 (1984). This right includes the right to effective assistance of counsel. Id at 686. In order to prove one's counsel was ineffective, a defendant must show (1) the representation provided by counsel "fell below an objective standard of reasonableness," and (2) "counsel's deficient performance somehow prejudiced the defendant." Id at 688, 694. Failing to file a notice of appeal when directed to do so constitutes ineffective assistance. Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000).

Even if not expressly requested to file an appeal, counsel may be ineffective for failing to consult with a client about an appeal under certain circumstances. Flores-Ortega, 528 U.S. at 478. The Court has defined "consult" to mean "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 consulted with a client concerning the subject of appeal yet failed to file an appeal after such a request was made, then counsel's failure is "professionally unreasonable." Id. However, if counsel did not consult, then courts should inquire whether that attorney acted in a professionally deficient manner by failing to have such a conversation concerning the topic of appeal. Id.

As a constitutional matter, counsel's failure to consult with a defendant concerning an appeal is not always considered "unreasonable" or "deficient." Flores-Ortega, 528 U.S. at 479. Rather, counsel has a constitutional duty to consult with a client concerning an appeal when (1) a rational defendant would want to appeal, or (2) the defendant made a reasonable effort to demonstrate he had an interest in appealing. Id. at 480. To determine this second factor, courts should consider the information counsel already knew or should have known, and whether or not the conviction followed a trial or a guilty plea—in which case the defendant could have received a smaller sentence as well as bargained to end the judicial proceedings. Id. Furthermore, it should also be scrutinized whether or not the plea bargain waived all or some of defendant's appellate rights. Id.

Fuentes fails to meet the first prong of the Strickland test as the evidence received at the evidentiary hearing makes it plain that Cook's representation did not fall below an objective standard of reasonableness. Instead, Cook made a significant effort by way of an interpreter to review the plea agreement with Fuentes in its entirety—including its waiver of appeal. When asked about the agreement and his understanding of the document, Fuentes responded at the guilty plea hearing as follows:

THE COURT: Was that agreement read to you or did you read it?

THE INTERPRETER: Yes, he, referring to his attorney, he instructed that this document be translated for me.

MR. COOK: May I clarify?

THE COURT: Yes.

MR. COOK: I visited with him and reviewed it with the interpreter. From this document, I also provided him with a written Spanish translation of this agreement, word for word.

THE COURT: Is that correct, Mr. Fuentes?

THE DEFENDANT: Yes.

THE COURT: Do you understand that agreement?

THE DEFENDANT: Yes.

THE COURT: Is there anything about the agreement which you do not understand?

THE DEFENDANT: No, everything is fine.

Guilty Plea Tr. 8. Fuentes made it clear to the court that he understood the charges to which he was pleading guilty in the plea agreement. Id at 9. The court also addressed the waiver of appeal during the guilty plea hearing, and Fuentes clearly understood he was waiving his right to appeal.

THE COURT: ...do you understand that you are waiving your right to appeal sentencing issues or to appeal a sentence within the guideline range on the ground that your sentence is unreasonable?

THE DEFENDANT: Yes.

THE COURT: Do you also understand that you're waiving your right to collaterally attack your plea and sentence? Has that been fully explained to you and do you understand it?

THE DEFENDANT: Yes.

Id at 14. Further, in response to the court's inquiry, petitioner stated that he was fully satisfied with counsel's representation. Id at 7.

In conclusion, there is no credible evidence to suggest Fuentes ever requested Cook to file an appeal. The facts relayed by Fuentes during the evidentiary hearing were inconsistent with the facts he asserted in his memo, Cook's evidentiary hearing testimony, as well as the events recorded at both Fuentes' guilty plea hearing and sentencing hearing. It was Fuentes' decision to accept the government's plea agreement, and after doing so, its terms and conditions were explained to him privately by Cook, and by the government and the court at his guilty plea and sentencing hearings. Fuentes significantly minimized his risk by accepting the plea agreement. Even so, the court advised he could note an appeal, and that the clerk would assist him in this regard, yet there is no evidence that he made any such effort. Nor was Cook required to consult with Fuentes regarding an appeal as there is no evidence to support that Fuentes made any effort to demonstrate to Cook his interest in appealing his sentence, and no rational defendant would seek an appeal given the risk of an additional 25 years on the second gun charge. As such, Cook's representation did not fall below an objective standard of reasonableness. Fuentes' claim is meritless, and it is **RECOMMENDED** that it be **DISMISSED**.

IV.

The Clerk of the Court is directed immediately to transmit the record in this case to the Honorable Samuel G. Wilson, United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note any objections to this Report and Recommendation within ten (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk of the Court is hereby directed to send a certified copy of this Report and Recommendation to plaintiff and counsel of record.

ENTER: This 23rd day of June, 2009.

/s/ Michael F. Urbanski
United States Magistrate Judge