



Valladares v. United States

833 F.2d 1543 (1987) | Cited 1 times | Eleventh Circuit | December 16, 1987

Before: Hill, Hatchett and Anderson, Circuit Judges.

Hill, Circuit Judge.

Appellant, Nelson Valladares, was convicted of possession and conspiracy to possess marijuana with intent to distribute in violation of 21 U.S.C. § § 846, 841(a)(1) and (b)(6). He was sentenced to 40 years of imprisonment and fined \$375,000. The conviction was affirmed on direct appeal. See *United States v. Simmons*, 725 F.2d 641 (11th Cir.), cert. denied, 469 U.S. 827, 105 S. Ct. 108, 83 L. Ed. 2d 52 (1984).

Valladares then moved to vacate and set aside his sentence pursuant to 28 U.S.C. § 2255. He alleged newly discovered evidence, inadequacy of an interpreter at his trial, and ineffective assistance of counsel. The motion was denied, as was a motion to vacate the initial denial, and Valladares appeals.

On appeal, Valladares first argues that he is entitled to a new trial based on newly discovered evidence. That evidence consists of testimony from two of the members of the drug conspiracy, David Blackston and Carroll Ziegler, stating that appellant was not involved in the illegal activity. In order to prevail on a motion for a new trial based upon newly discovered evidence, a convicted defendant must show that the evidence: (1) is newly discovered; (2) is material and not merely cumulative or impeaching; (3) will probably produce an acquittal; and (4) that the defendant did not fail to learn of the evidence due to his lack of diligence. *Bentley v. United States*, 701 F.2d 897, 898 (11th Cir.1983). The decision of the district court on such a motion will not be disturbed absent an abuse of discretion. *United States v. Russo*, 717 F.2d 545, 550 (11th Cir.1983).

At trial, the government's central evidence against Valladares was the testimony of three eyewitnesses who identified Valladares as a member of the drug conspiracy. At the hearing on the current motion, Blackston and Ziegler, neither of whom was one of the three trial witnesses, testified that they did not know Valladares until they met him in prison after his trial. They could not, however, explain the established fact that there were a number of telephone calls to Valladares' phone from their residences at the time that the drugs in question were brought into this country. Given this evidence, and the fact that the two new witnesses were unable to remember anyone who was involved in the conspiracy, the district court found that their testimony was not credible and would not change the result of the trial. That finding was amply supported and that decision was not an abuse of discretion.

Valladares' second claim is that he was denied a fair trial and the right to confront witnesses because



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an interpreter was not present on the first day of his trial. He also argues that the federal statute requiring interpreters in some cases, 28 U.S.C. § 1827(d), was violated.

The district court made no findings of fact relating to this issue. Indeed, this claim was not present in appellant's section 2255 motion before the district court, nor was it mentioned in his opening statement at the hearing below, nor in his motion to reconsider the denial of section 2255 relief. The issue is argued for the first time on appeal.

The record on this issue is unclear, and there appear to be factual discrepancies regarding Valladares' fluency in English and regarding the presence or absence of the interpreter at his trial. Such matters should have been presented to the district court. Because neither the factual nor legal issues were so presented, they will not be considered on appeal. See *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360-61 (11th Cir.1984).

Appellant's final claim is that he was denied effective assistance of counsel. Valladares argues that his counsel failed to develop an alibi defense fully, and that he was not allowed to testify. He also argues to this court that there was a disabling language barrier between himself and his lawyer, but as with the claim involving the interpreter, this issue was not raised prior to this appeal and it was not ruled upon by the district court. Thus, this court need not consider the issue.

A review of the record reveals that appellant cannot sustain the burden of proving, under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), that his counsel's efforts were outside the range of professional competence and that the fairness of the result was consequently undermined. Trial counsel testified that he attempted to gather alibi evidence, but that there was not enough material. There was also testimony that Valladares himself chose not to take the stand. Moreover, Valladares conceded that, if he had testified, he would have admitted that he had tried to "fix" the case by attempting to influence the trial judge. Appellant falls far short of establishing a claim of ineffective assistance of counsel on these grounds. As to any inability to communicate due to a language barrier, the record was not developed in the district court and we will not speculate on such an issue raised for the first time on appeal.

The decision of the district court is **AFFIRMED**.

