USA v. Lovett

2018 | Cited 0 times | D. Nevada | July 10, 2018

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * UNITED STATES OF AMERICA,

Plaintiff(s), v. BRENT EDWARD LOVETT,

Defendant(s).

Case No. 2:11-CR-165 JCM (GWF)

ORDER

Presently before the court is motion to vacate, amend, or correct his sentence pursuant to 28 U.S.C. § 2255. (ECF No. 305). The government filed a response (ECF No. 307), to which petitioner replied (ECF No. 308). I. Background

i. Factual summary Evidence presented at trial supports the following factual summary. Petitioner formed a number of business entities, among them Bay Resorts, Building the American Dream, Project Consu-father, Paul Hummer, served as the president of these companies, and was responsible for signing certain paperwork, including loan documents and payroll checks. However, even though Hummer was nomina

Petitioner also formed a company called Equity Resource, for which petitioner listed his company l president, petitioner effectively controlled the company.

In August of 2004, Bay Resorts leased a building at 2400 North Tenaya Way in Las Vegas, . Rent was $40,000 per month. Bay Resorts stopped paying rent, and the owner began eviction proceedings. During litigation related to these proceedings, petitioner offered to purchase the building from the owner. On June 9, 2006, the owner agreed to sell the building to petitioner for $6 million. Ms. Lovett signed documents to assist her brother with a loan for the purchase of the Tenaya building.

Petitioner coordinated the Tenaya building purchase transaction, whereby Bay Resorts would purchase the property and immediately re-convey it to Equity for a loan to finance the Equity

Resource purchase.

As a part of the loan request, petitioner made a number of false representations and omissions. Petitioner created false Equity Resource tax returns, representing assets of over $60 million. Petitioner created a counterfeit bank statement representing that Equity Resource had $3.3 million dollars in an account that actually contained $2. Petitioner represented that Equity Resource would fund $2.6 million of the $10 million purchase price. Petitioner failed to disclose the double-escrow nature of the transaction. Finally, petitioner failed to disclose the $1.3 million kickback that Bay Resorts would receive as a result of the $7.5 million loan to Equity Resource. A Lockheed representative stated at trial that Lockheed would not have approved the loan to Equity Resource if it had knowledge of these false representations and omissions.

and incomplete loan application. On August 9, 2006, Bay Resorts purchased the Tenaya building

for $6 million and immediately re-conveyed it to Equity Resource for $10 million. This re-conveyance ostensibly netted Bay Resorts close to $4 million in sale profits, 1

including approximately $1.3 million in remaining proceeds from the Equity Resource loan.

After Equity Resource defaulted on the loan, Lockheed foreclosed on the Tenaya building. The foreclosure netted approximately $2 million, which resulted in a total loss amount of

1 Bay Resorts did not in fact receive $2.6 million from Equity Resource. i. Procedural history On April 27, 2011, the government filed an indictment charging petitioner with one count of bank fraud. Trial began on February 13, 2013. On the first day of trial, petitioner moved to represent himself. The court 2

canvassed the parties regarding the propriety of the request, during

for any ext

represent himself.

After seven days of trial, the jury convicted petitioner of bank fraud. The court sentenced petitioner tion in the amount of $4,889,134.

Petitioner appealed his conviction to the Ninth Circuit. The court appointed counsel for

pro se brief. conviction and sentence. 3

II. Legal Standard

28 U.S.C.

§ 2255(a). Davis v. United States, 417 U.S. 333, 345 (1974); see also Hill

v. United States, 368 U.S. 424, 428 (1962).

Limitations on § 2255 motions a

the opportunity. United States v. Frady, 456 U.S. 152, 164 (1982). ed United States v. Johnson, 988 F.2d 941, 945 (9th Cir. 1993).

2 Prior to April 9, 2017, the Honorable Roger L. Hunt presided over this case. 3 Petitioner filed a writ of certiorari to the Supreme Court of the United States, which was denied on April 3, 2017. III. Discussion

a. The successive claim rule r opportunity to United States v. Hayes, 231 F.3d 1132, 1139 (9th Cir. 2000) (citing United States v. Redd, 759

F.2d 699, 700-01 (9th Cir. 1985)). Restating an issue by using different language does not make a previously considered claim reviewable. United States v. Currie, 589 F.2d 993, 995 (9th Cir. 1979).

Petitioner argues that certain comments made by government attorneys at trial were unfairly prejudicial. (ECF No. 305). Specifically, petitioner argues that prosecutors made inappropriate comments about his self-representation, and that they erroneously argued during closing that the government had proven federal jurisdiction. Id. at 147.

Petitioner raised both of these arguments in his direct appeal. The Ninth Circuit considered and rejected each argument. See Lovett from re-litigating these issues in a § 2255 motion. See Hayes, 231 F.3d at 1139.

b. The procedural default rule rule applies to bar collateral review under § 2255. Massaro v. United States, 538 U.S. 500, 504

(2003). The two noted exceptions to this rule are when a defendant can show both cause and prejudice, id. United States v. Ratigan, 351 F.3d 957, 962 (9th Cir. 2003).

defense impeded [his] efforts to raise the [barred] claim. . . . Objective factors that constitute cause

impracticable, and a showing that the factual or legal basis for a claim was not reasonably available

McCleskey v. Zant, 499 U.S. 467, 493-94 (1991) (internal quotations omitted). To United States v.

Lopez, 577 F.3d 1053, 1060 (9th Cir. 2009)

(quoting Stickler v. Green, 527 U.S. 263, 296 (1999)). If defendant cannot demonstrate cause and Schlup v. Delo,

513 U.S. 298, 327 (1995).

Ineffective assistance of appellate counsel can constitute the cause required to establish procedural default. Murray v. Carrier, 477 U.S. 478, 488-92 (1986) effective assistance when

Wildman v. Johnson, 261 F.3d 832, 840 Jones v. Barnes, 463 U.S. 745, 751-

issues . . . Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989).

Here, appellate counsel raised seven claims of error on appeal. 4

Focusing on these claims was a reasonable tactical decision. See id. The additional claims that petitioner argues his appellate counsel should have made 5

were frivolous and would have detracted from his already- weak claims raised on appeal. Therefore, petitioner has not established cause and prejudice to suggesting that he has a viable claim of actual innocence. Accordingly, all of petitione that he did not raise at the appellate level are barred. See Massaro, 538 U.S. at 504.

c. Ineffective assistance of counsel To prevail on a claim of ineffective assistance of counsel, a movant must show deficient performance and prejudice. See Strickland v. Washington, 466 U.S. 668, 687 (1984).

4 (1) The district court erred when it did not require proof necessary to establish that LFCU ment right to choice of counsel through self-representation constitutes reversible error; (3) failure to remove the vicarious liability instruction constructively amended the indictment; (4) due process precluded use of the vicarious liability instruction because conspiracy was not charged and the alleged relationship between the - hts, (6) cumulative error denied defendant a fair trial, (7) the district court erred in fixing the amount of mortgage fraud cases.

5 The court discusses these claims in more detail in discussion section (c)(ii). Id. at 687. Id. assessment of attorney performance requires that every effort be made to eliminate the distorting

effects of hindsight Id. conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be Id. at 689. To establish deficient performance, the petitioner Id. at 688. to deprive the

defendant of a fair

Id.

would have been different. A reasonable probability is a probability sufficient to undermine the Id. at 694. may of the traditional benefits associated with the r Faretta v. California, 422

Id. Faretta

waiver knowing and intelligent, the district court must ensure that he understands 1) the nature of the charges against him; 2) the possible penalties; and 3) the dangers and disadvantages of self-representation. United States v. Erskine, 355 F.3d 1161, 1167 (9th Cir. 2004) (internal citation and quotation omitted). Faretta, 422 U.S. at 834 n.46.

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i. Ineffective assistance of pretrial counsel 6 Petitioner alleges that appointed counsel failed to investigate his case, failed to confer with him, and failed to advise him of his rights. See (ECF No. 305 at 148). The government asserts that these conclusory statements are contradicted by the trial record in this case and that petitioner fails to provide any evidence of prejudice. (ECF No. 307).

Here, the court conducted an extensive Faretta hearing 7

with the defendant prior to granting his motion to proceed pro se. (ECF No. 119). The following is an excerpt from the minutes of the hearing that concisely summarizes the proceedings,

The Court explain[ed] the duties and obligations of counsel and inquire[d] what the [petitioner] believe[d] should or should not have been done by his attorneys. [Petitioner] respond[ed], followed by provided proper representation and that no other attorney would or could do differently. Therefore, the Court [found] that appointing complaints. . . . [T]he Court reiterate[d] the dangers and possible consequences of self-representation and strongly urge[d] [petitioner] to reconsider. Id. (emphasis in original); see also The Court again strongly urges the Defendant to reconsider his decision to represent himself - and-forth between petitioner, multiple attorneys, and the court that lasted five months, petitioner ultimately opted to represent himself pro se. 8

(ECF No. 188). Accordingly, the trial court record in this case demonstrates that petitioner was adequately advised of his rights and made an informed decision to represent himself pro se.

6 Although the court holds that petitioner procedurally defaulted on this claim, the court will address it given the constitutional implications of an ineffective assistance of counsel claim. See Sunal v. Large, 332 U.S. 174, 178 (1947) (holding that a defendant cannot attack a judgment least where the

error does not trench on any constitutional rights of defendants nor involve the

7 The referenced hearing was actually two hearings conducted on the same day (September 7, 2012). See (ECF No. 119). The Faretta canvassing took approximately 45 minutes.

8 See (ECF Nos. 119, 129, 137, 142, 152, 154, 185, 188). This lengthy back-and-forth Sixth Amendments rights by the refusal by the court, to appointment of new counsel due to being too

adequate investigation in his case in camera No. 119). The court held that it was unnecessary for petitioner to travel to conduct interviews

Id.

To the extent that petitioner claims that his self-representation constituted ineffective assistance of counsel, this argument is foreclosed by Faretta. See 422 U.S. 80 defendant who elects to represent himself cannot thereafter complain that the quality of his own

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that could support a finding of prejudice in this case. As petitioner is required under Strickland to demonstrate that assistance of counsel claim, the court will

allegedly ineffective assistance of pretrial counsel.

ii. Ineffective assistance of appellate counsel Petitioner argues that he received ineffective assistance of counsel on appeal. (ECF No. 305). As the court noted previously, appellate counsel raised numerous issues on appeal. Petitioner highlights six primary points of error that he believes appellate counsel should have raised on appeal: (1) numerous allegations of improper interference by the court during the course of the trial; (2) improper waiver of attorney representation at trial; (3) government witnesses making false statements to the grand jury; (4) discovery violations; (5) erroneous admission of evidence; and (6) a speedy trial claim.

Peti 9

However legitimate, and 10

9

Petitioner alleges that the government lodged 57 objections, whereas petitioner lodged 13.

10 This is not surprising, given that petitioner chose to represent himself pro se. comments made by

Judge Hunt during the trial do not demonstrate bias or animosity towards petitioner. Therefore, p course of trial and erroneous admission of evidence lack merit, and the choice to withhold these

arguments from an appellate brief fell within a constitutionally reasonable range of reasonable representation. See Strickland, 466 U.S. at 688. Petitioner argues that he was denied the right to represent himself. (ECF No. 305). In the alternative, petitioner argues that he did not want to represent himself but that he was forced to because none of his court- evidence, filed Id. As the court

noted previously, both of these arguments are without merit. Petitioner cannot claim that he was denied the right to represent himself because the court ultimately allowed him to represent himself at trial. Further, the court conducted numerous hearings on the topic and repeatedly informed petitioner of the dangers of self- court-appointed attorneys did nothing to prepare for trial is belied by the record. Appellate - representation was a reasonable decision under the circumstances. See Strickland, 466 U.S. at 688.

Petitioner asserts that counsel should have argued on appeal that a government witness made false statements to the grand jury. The district court considered and rejected this argument at trial, noting that petitioner often mischaracterized the verac [H]is allegations come nowhere

near the sufficient misconduct that would violate [his] due process or justify the Court in Id. Appellate counsel wisely chose not to re-raise this argument on appeal. See Strickland, 466 U.S. at 688.

Petitioner alleges that prosecutors failed to disclose evidence prior to trial. (ECF No. 305). As the government notes, petitioner does not provide facts to adequately support his assertion. 11

(ECF No.

See Strickland, 466 U.S. at 688. Petitioner argues that appellate counsel should have raised a speedy trial claim. (ECF No. 305). Petitioner waived his speedy trial right by requesting multiple pre-trial continuances. See United States v. Lam, 251 F.3d 852 856-57 (9th Cir. 2001) (holding that no Sixth Amendment speedy trial violation occurred when a defense attorney sought continuances for the purpose of trial preparation). Therefore, appellate counsel properly chose to refrain from making this frivolous argument on appeal. See Strickland, 466 U.S. at 688.

(ECF No. 305). who

court held was an excusable failure to file an opening brief with the Ninth Circuit. See Appellate Dkt. No. 56. Further, petitioner swamped both appellate counsel and the court with numerous motions, requests for rehearing, and similar filings in an attempt to represent himself pro se. In constitutionally adequate representation. See Strickland, 466 U.S. at 688.

Here, petitioner has not established that appellate counsel provided constitutionally deficient performance. See id. The choice to refrain from raising frivolous arguments on appeal

attack under Strickland Gerlaugh v. Stewart, 129 F.3d 1027, 1033 (9th Cir. 1997).

d. Petitioner claims that the sheer number of cumulative errors in this case amount to a constitutional violation. As there is no single constitutional error in [the] case, there is nothing to accumulate to the level of a

11 exist. (ECF No. 307). The government further contends that petitioner has failed to demonstrate that any evidence that did in fact exist was not given to petitioner prior to trial. Id. and a defendant's allegation that the cumulative effect of errors prejudiced his right to a fair trial fails. United States v. Lovett (alteration in original) (quoting Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002) (citing

Fuller v. Roe, 182 F.3d 699, 704 (9th Cir. 1999))).

e. Certificate of appealability The controlling statute in determining whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255. (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right. (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2). 28 U.S.C. § 2253.

Under § 2253, the court may issue a certificate of appealability only when a movant makes a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To make a for that matter, agree that) the petition should have been resolved in a different manner or that the

issues presenteSlack v. McDaniel, 529 U.S. 473, 484 (2000) (citation omitted).

The court holds that petitioner has not made the required substantial showing of the denial of a constitutional right to justify the issuance of a certificate of appealability. Reasonable jurists lief under § 2255 debatable, wrong, or deserving of encouragement to proceed further. See id. Accordingly, the court declines to issue a certificate of appealability.

f. Conclusion Accordingly, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that motion to vacate, amend, or correct (ECF No. 305) be, and the same hereby is, DENIED.

DATED July 10, 2018. _____ UNITED STATES DISTRICT JUDGE