[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-13185
Non-Argument Calendar

D.C. Docket Nos. 1:16-cv-21420-WPD; 1:12-cr-20234-WPD-1

AMAURY VILLA,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(February 13, 2018)

Before MARTIN, JULIE CARNES, and HULL, Circuit Judges.

PER CURIAM:

Amaury Villa, proceeding pro se, appeals the district court's denial of his 28 U.S.C. § 2255 motion to vacate his sentence.

I.

In April 2012, Villa was indicted for his role in a conspiracy to sell pharmaceuticals stolen from an Eli Lilly Company warehouse in Connecticut. The indictment charged Villa with one count of conspiracy to sell stolen goods, four counts of selling stolen goods, and one count of possession of stolen goods, all in violation of 18 U.S.C. § 2315. Villa pled guilty to the charges of conspiracy and possession of stolen goods, and the other counts were dismissed. The terms of his plea agreement stated that "[t]he value of the stolen goods for which the defendant will [be held] accountable under Guidelines Section 2B1.1 will be determined by the court at the time of sentencing."[1]

The Probation Office prepared a presentence investigation report ("PSR") that stated Villa was "responsible for approximately $80,000,000 worth of pharmaceuticals stolen from" Eli Lilly. This value was used in the calculation of Villa's sentencing guideline range. Ultimately the PSR calculated a guideline range of 168 to 210 months of imprisonment.

[1] Villa alleges that during plea negotiations the government proposed including a provision that he would be responsible for a loss amount of $80,000,000. Villa rejected that loss amount calculation.

At the sentence hearing Villa objected to the application of a two-level enhancement for being a person in the business of receiving and dealing in stolen property. The Government did not oppose the objection, and the district court recalculated Villa's guideline range as 140 to 175 months of imprisonment. Villa then objected to portions of his criminal history in the PSR, which the Court sustained in part. This did not change the guideline range. Importantly, Villa did not object to the PSR's calculation of the loss amount. The district court sentenced him to 140 months.

Villa appealed his sentence, arguing for the first time that the district court improperly calculated the loss amount. See United States v. Villa, 589 F. App'x 532, 532 (11th Cir. 2015) (per curiam) (unpublished). This Court affirmed, finding no plain error in the guidelines calculation. Id. at 533.

After his appeal concluded, Villa moved to vacate his sentence under 28 U.S.C. § 2255. He argued that his counsel was constitutionally ineffective for not objecting to the loss amount used to calculate his guideline range.[2] According to Villa, if his counsel had properly investigated and objected to the loss amount in the PSR, his responsibility for the loss would have been limited to $25 million.

Villa found support for his argument in two places. First, in a 2013 lawsuit between Eli Lilly and its insurer, an expert report prepared by the insurer estimated

[2] Villa was represented by new counsel in the district court for his § 2255 motion.

the "transfer-in price" of the stolen pharmaceuticals to be approximately $36–38 million. This transfer-in price reflects the internal value the particular warehouse placed on the pharmaceuticals. This measure omits the expected profits and overhead costs for Eli Lilly that would normally be part of the market price of the pharmaceuticals. An expert report from Eli Lilly in that same case estimated the transfer-in price as approximately $42 million. Second, in a 2013 civil suit against Villa, a jury found that Villa and his brother were each responsible for $10 million of losses to Eli Lilly, for a total of $20 million.

Without waiting for the government to respond, the district court denied Villa's § 2255 motion. The court found Villa's counsel could not be deficient for failing to introduce evidence that did not yet exist at the time Villa was sentenced. The court also found that an insurance company's estimate of its responsibility on a claim is not necessarily the same as the loss amount for sentencing purposes, which should instead be based on the fair market value of the goods. Villa moved for reconsideration, which the district court denied.

Proceeding pro se, Villa appealed. This Court granted a certificate of appealability on the issue of whether counsel was ineffective for failing to investigate, challenge, or object to the $80,000,000 loss amount used to calculate Villa's advisory sentencing range under the Sentencing Guidelines.

II.

In § 2255 proceedings, "we review a district court's legal conclusions de novo and factual findings for clear error." Devine v. United States, 520 F.3d 1286, 1287 (11th Cir. 2008) (per curiam). "A claim of ineffective assistance of counsel is a mixed question of law and fact that we review de novo." Id. "We review the district court's denial of an evidentiary hearing in a § 2255 proceeding for abuse of discretion." Winthrop-Redin v. United States, 767 F.3d 1210, 1215 (11th Cir. 2014).

III.

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063–64 (1984). The two-part Strickland test for ineffective assistance of counsel requires the movant to show that: "(1) his trial counsel's performance was deficient; and (2) that his trial counsel's deficient performance prejudiced the defense." Rosin v. United States, 786 F.3d 873, 877 (11th Cir. 2015) (quotation omitted). If the movant fails to establish either prong, the reviewing court need not address the other prong. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

To prove the deficient performance prong, the petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 687, 104 S. Ct. at 2064. "The

proper measure of attorney performance [is] reasonableness under prevailing professional norms." Id. at 688, 104 S. Ct. at 2065. This standard is highly deferential. Id. at 689, 104 S. Ct. at 2065.

To prove the prejudice prong, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. A reasonable probability is one "sufficient to undermine confidence in the outcome." Id.

Under the Sentencing Guidelines in effect at Villa's sentencing, a 24-level enhancement applied if the loss was between $50,000,000 and $100,000,000. United States Sentencing Guidelines § 2B1.1(b)(1)(M)–(N) (2011). A 22-level enhancement applied if the loss was between $20,000,000 and $50,000,000. Id. § 2B1.1(b)(1)(L)–(M). The application notes provided that the district court "need only make a reasonable estimate of the loss" based on "[t]he fair market value" of the property stolen. Id. § 2B1.1 cmt. n.3(C)(i). "Fair market value" is not a uniform measure, such as retail value, but rather is taken from the market the property was in at the time of the offense. United States v. Machado, 333 F.3d 1225, 1228 (11th Cir. 2003). "The market value of stolen property is the price a willing buyer would pay a willing seller" at the time and place of the offense. United States v. Robinson, 687 F.2d 359, 360 (11th Cir. 1982) (per curiam).

"[I]f the fair market value is impracticable to determine or inadequately measures the harm," then the court should use "the cost to the victim of replacing th[e] property." USSG § 2B1.1 cmt. n.3(C)(i) (2011). "The loss to the victim is . . . determined within the factual context of the case, utilizing wholesale, retail, or other relative values as the circumstances require." Machado, 333 F.3d at 1228. The district court's estimate of loss must not be speculative, but a reasonable estimate will be upheld on appeal. United States v. Patterson, 595 F.3d 1324, 1327 (11th Cir. 2010).

This district court did not err when it determined that Villa's counsel was not ineffective. Even accepting that his counsel's performance was deficient, Villa has failed to establish that he was prejudiced by that performance. Had counsel been able to investigate and produce evidence concerning the value of the pharmaceuticals, the district court still would have been obliged to accept the market value as the loss amount. USSG § 2B1.1 cmt. n.3(C)(i); Machado, 333 F.3d at 1228. The evidence offered by Villa does not cast doubt on the market value used by the court. First, the amount of Eli Lilly's insurance claim does not measure the market value, but instead accounts for the cost of production, profit margins, and negotiated rates between the company and its insurer. Second, the transfer-in value measures Eli Lilly's internal value for the pharmaceuticals it produced, but does not account for the overhead or expected profits that would be

part of the market value. These alternative measures could have been accepted by the court if the market value "is impracticable to determine or inadequately measures the harm," USSG § 2B1.1 cmt. n.3(C)(i), but there is no indication that this court could not accurately estimate the market value of "brand-name pharmaceuticals sold in wholesale quantities throughout the country." Given the mandate for courts to use the fair market value as the measure of loss, Villa's argument falls short of demonstrating a reasonable probability of prejudice that is "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

Finally, we generally prefer for a district court to hold a hearing to develop the record on ineffective assistance of counsel claims. Rosin, 786 F.3d at 879. Indeed, an evidentiary hearing must be held on a motion to vacate "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). However, the district court does not have to hold a hearing "if the allegations are patently frivolous, based upon unsupported generalizations, or affirmatively contradicted by the record." Winthrop-Redin, 767 F.3d at 1216 (quotation omitted). And we have previously held that it is not an abuse of discretion to decline to hold an evidentiary hearing where the record shows no prejudice in an ineffective-assistance-of-counsel claim.

Rosin, 786 F.3d at 879. For this reason, to the extent Villa challenges the district court's decision not to hold an evidentiary hearing, he is not entitled to relief.

AFFIRMED.