

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

ORDER
03-C-0364-C
00-CR-0092-C-01

v.

FILIMON SANDOVAL-GOMEZ,

Defendant.

Defendant Filimon Sandoval-Gomez has filed a motion for post conviction relief pursuant to 28 U.S.C. § 2255. He contends that he was convicted unlawfully because he was deprived of constitutionally inadequate assistance of counsel. Defendant was convicted of illegal reentry into the United States after having been deported; he alleges that his court-appointed counsel failed to investigate and present mitigating evidence that at his deportation hearing he was never told that he could not reenter the United States once he was deported. Specifically, he alleges that his counsel failed to obtain the records “of the sentencing court in Atlanta to verify that [he] was not informed by the court that he could not reenter the United States.”

To prevail on a claim of ineffective assistance, a defendant must show both his counsel's performance was defective and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). In response to defendant's motion, the government has submitted an affidavit from defendant's trial counsel, in which counsel avers that the government obtained the audiotape of defendant's deportation hearing, that counsel reviewed the tape and written documents relating to defendant's deportation order and concluded that nothing in the tape would be helpful to defendant at his trial for illegal reentry. (Although defendant talks about the records of the "sentencing court in Atlanta," I assume he means the records of the deportation hearing, which is the most likely place he would have been told he could not reenter the country. It is up to the Immigration and Naturalization Service (now the Bureau of Immigration and Customs Enforcement) to decide whether a convicted individual is to be deported.) Counsel's strategic decision made after a thorough investigation of the tape is "virtually unchallengeable." Id. at 690. Even if it were not, defendant would fail on the second prong of the showing because he cannot show that the decision not to use the audiotape at trial prejudiced him in any respect.

As the court of appeals noted in its opinion affirming defendant's conviction, the government introduced ample evidence of defendant's awareness that he had reentered the United States illegally. A Wisconsin police officer and an immigration agent testified at

trial. The police officer testified that when he stopped defendant for a traffic violation and detained him briefly while trying to telephone the Immigration and Naturalization Service, defendant never said anything about believing he was in the country legally and he seemed to have no difficulty speaking English. The INS agent testified that defendant told him during an interview that he knew he should not have returned to the United States and that he had used his unexpired resident alien card to reenter. Defendant never told the agent that he believed he had permission to return. The government introduced evidence to show that defendant had signed a form after his interview with the INS agent, stating that he had illegally reentered the United States. With all of this evidence against him, defendant cannot plausibly contend that the outcome of the trial would have been different had his counsel introduced the audiotape into evidence. After all, it is not as if the audiotape provides evidence that an official told defendant that he could reenter at any time; at most it would show that no one at the hearing told defendant he could not reenter. This lack of warning means nothing in view of defendant's own concession to the INS agent that he was aware he could not return to the United States following his deportation.

In the end, this whole discussion may be pointless. Since defendant was tried, the Court of Appeals for the Seventh Circuit has held that the government need not prove an intent on the part of a defendant to reenter the United States unlawfully in order to prove a violation of 8 U.S.C. § 1326, which makes it a felony to enter the United States after

having been deported without first obtaining the consent of the Attorney General of the United States. United States v. Carlos-Colmenares, 253 F.3d 276, 278-80 (7th Cir. 2001) (intent to reenter country unlawfully is not element of violation of § 1326). Carlos-Colmenares overrules United States v. Anton, 683 F.2d 1011 (7th Cir. 1982), which held that a defendant could defend against a prosecution brought pursuant to § 1326 by showing that he had a reasonable although mistaken belief that he had the consent of the Attorney General to reenter the country.

ORDER

IT IS ORDERED that defendant Filimon Sandoval-Gomez's motion to set aside his conviction and vacate his sentence pursuant to 28 U.S.C. § 2255 is DENIED for defendant's failure to show that his conviction and sentence are illegal in any respect.

Entered this 29th day of September, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge