

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BORIS ZILBEROV,

Petitioner,

MEMORANDUM AND ORDER
98-CV-3926 (ILG)

-against-

THE UNITED STATES OF AMERICA

Respondent.

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GLASSER, United States District Judge:

The petitioner, Boris Zilberov ("Zilberov"), a resident alien of the United States, filed this motion pursuant to 28 U.S.C. § 2255 alleging that he was denied his constitutional right to effective assistance of counsel in that his trial counsel failed to inform him that he would face mandatory deportation following his conviction. For the following reasons, his petition is denied.

BACKGROUND

On July 1, 1996, Zilberov entered into a written agreement with the United States government pursuant to which he pleaded guilty to inducing aliens to enter illegally into the United States in violation of 8 U.S.C. § 1324. The plea agreement provided that Zilberov faced "possible deportation" as a consequence of his guilty plea. See Ex. B to Gov.'s Mem. of Law at ¶ 1(g).

On December 18, 1996, this Court sentenced Zilberov to

fifteen months incarceration, three years of supervised release and a special assessment of \$50.

Zilberov appealed his conviction, contending he was denied effective assistance of counsel, and sought to withdraw his guilty plea. On March 26, 1998, the Second Circuit dismissed Zilberov's appeal, but declined to reach the merits of his ineffective assistance of counsel claim, preserving such claim for a subsequent § 2255 proceeding.

Zilberov has since completed his term of incarceration, but is currently being held at a jail in Texas pursuant to a detainer lodged by the Immigration and Naturalization Service.

On June 2, 1998, Zilberov filed this motion pursuant to 28 U.S.C. § 2255 in which he seeks to have his conviction vacated, arguing he was deprived of effective assistance of counsel because his counsel erroneously informed him prior to his guilty plea about the likelihood that he would be deported. Zilberov alleges that his counsel represented to him that there was a "possibility" he would be deported, when in fact as an aggravated felon,¹ he faced mandatory deportation.

DISCUSSION

To prevail on a claim of ineffective assistance of counsel, Zilberov must (1) overcome the strong presumption that his counsel's conduct was reasonable and show that it fell below

¹ The crime to which Zilberov pleaded guilty to pursuant to 8 U.S.C. § 1324 (a) (1) (A) is designated an "aggravated felony" by 8 U.S.C. § 1101 (a) (43) (N).

"an objective standard of reasonableness" under "prevailing professional norms;" and (2) "affirmatively prove prejudice," that is, show that "but for counsel's unprofessional errors, the result of that proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687-694 (1984); see also United States v. Aguirre, 912 F.2d 555, 560 (2d Cir. 1990).

The government argues Zilberov cannot satisfy the first prong of the Strickland standard because Zilberov's lawyer's advice regarding deportation was accurate and therefore objectively reasonable. The government is correct. On the date of Zilberov's guilty plea, July 1, 1996, Zilberov did not face mandatory deportation following his sentence because he was eligible to apply for a waiver of deportation under 8 U.S.C. § 1182(h).² Such waivers were subsequently eliminated for aggravated felons such as Zilberov when the Illegal Immigration Reform and Responsibility Act was signed into law on September

² Under 8 U.S.C. § 1182(h) (pre-amendment), "[t]he Attorney General may, in his discretion, waive the application of [certain laws relating to deportation] if . . . in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen or an alien lawfully admitted for permanent residence if it is established . . . that the alien's denial of admission would result in extreme hardship to the United States Citizen or permanent resident spouse, parent, son or daughter of such alien; and . . . No such waiver shall be provided under this subsection in the case of an alien who has been convicted of . . . murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. . . .

30, 1996, almost three months after Zilberov's plea. See Act of September 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009-639 (codified as amended at 8 U.S.C. § 1182(h)(B)). At the time of his plea, however, Zilberov had the opportunity to apply for a waiver under the law then in effect, pursuant to which deportation could be waived where the alien was the spouse, parent or child of a citizen or permanent resident. 8 U.S.C. § 1182(h)(B), amended by Act of September 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009-639. Zilberov's pre-sentence report indicates that he has a wife, two sons and two parents living in the United States. One son is a United States citizen by birth, the others are permanent residents, which would have rendered him eligible for a waiver of deportation. Thus, because Zilberov did not face mandatory deportation, his lawyer's advice that he faced the "possibility" of deportation was a legally accurate statement of the law at the time of Zilberov's plea and did not therefore fall below "an objective standard of reasonableness" under Strickland.

In addition, Zilberov cannot satisfy the first prong of the Strickland standard in light of the Second Circuit's holding that an attorney's erroneous sentence prediction does not provide the basis for an ineffective assistance of counsel claim. See United States v. Sweeney, 878 F.2d 68, 70 (2d Cir. 1989) (attorney's erroneous prediction of sentence did not render defendant's guilty plea involuntary or support a claim for

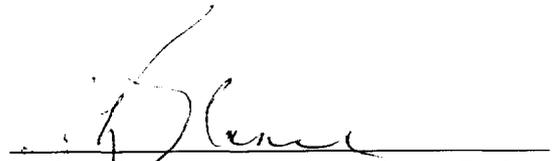
ineffective assistance of counsel). Zilberov's allegation that his counsel erroneously represented the "possibility" of his deportation upon pleading guilty is, therefore, foreclosed by Sweeney.

Because Zilberov cannot satisfy the first prong under Strickland, his entire claim should be dismissed. See Dooley v. Petsock, 816 F.2d 885, 889 (3d Cir.), cert. denied, 108 S. Ct. 182 (1987) (defendant must prevail on both parts of the Strickland test to succeed on his ineffective assistance of counsel claim).

CONCLUSION

For the reasons set forth above, the petition for relief under § 2255 is denied.

SO ORDERED.


United States District Judge

Dated: Brooklyn, New York
October 7th, 1998

Copies of the foregoing Memorandum and Order were this day sent to:

B. Allen Seidler
127 South Broadway
Nyack, New York

Dwight C. Holton
Assistant United States Attorney