

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-3795

UNITED STATES OF AMERICA

v.

BERNARD OUMA YONGO,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Crim. No. 02-cr-00543)

District Judge: The Honorable Stewart Dalzell

Submitted Under Third Circuit LAR 34.1(a)
September 25, 2007

Before: McKEE, BARRY, and FISHER, Circuit Judges

(Opinion Filed: October 4, 2007)

OPINION

BARRY, Circuit Judge

This is an appeal from an order of the United States District Court for the Eastern District of Pennsylvania denying Appellant Bernard Ouma Yongo's motion for relief pursuant to 28 U.S.C. § 2255 on the ground of ineffective assistance of counsel. Because

we find that Yongo has not demonstrated that his trial counsel rendered ineffective assistance by failing to offer a document into evidence or to argue that Fed. R. Evid. 804(b)(3) could not be constitutionally applied to exclude that document, we will affirm.

I.

On May 12, 2002, Yongo entered the United States at the Philadelphia International Airport, on a flight that originated in Kenya. He carried one suitcase and one briefcase. When he presented himself for customs inspection, he was sweating profusely, even though it was not hot inside the customs hall. Yongo declared that his destination was a Best Western hotel and that he carried gifts valued at \$100. He stated that he had traveled to Philadelphia to visit his brother, a student there.

Customs officials opened Yongo's briefcase and found that it contained several wooden carvings wrapped in newspaper. After the officials removed the carvings, the empty briefcase seemed to them to weigh more than it should, and an x-ray of the briefcase revealed that it had abnormally thick walls. The officials then probed the briefcase and discovered a white powder that field-tested positive for heroin. Subsequent laboratory analysis confirmed the powder to be approximately 1,501 grams of heroin hydrochloride, with 64% purity. Heroin hydrochloride qualifies as a Schedule I controlled substance.

Special Agent for the U.S. Customs Service Richard Stingle read Miranda warnings to Yongo, who then signed a written waiver. Yongo offered Stingle an account of his plans that bore little resemblance to his initial statement. He said that the briefcase

belonged to his childhood friend Gabriel and that Gabriel's cousin Peter Odhiambo had paid for Yongo's plane ticket in exchange for delivery of the briefcase to him in the United States. Yongo had earlier purchased a cheaper, unconfirmed ticket, and Odhiambo paid \$2,304 to upgrade it. Yongo also stated that he had traveled to the United States in order to attend his niece's graduation and planned to stay with his sister, although he did not know her address or phone number and the graduation had already occurred.

On September 10, 2002, a grand jury indicted Yongo on one count of knowingly and intentionally importing more than one kilogram of heroin into the United States from Kenya, in violation of 21 U.S.C. §§ 952(a) and 960(b). In December 2002, the United States embassy in Nairobi sent a document ("the Embassy Document") to the government, which memorialized a report that a "source" had made to officials at the embassy on December 3, 2002. The source stated that a woman named Janet Anyando Odhiambo recruited unknowing Kenyans to travel to the United States carrying briefcases containing cocaine. According to the source, the travelers believed that they were transporting wooden curios. The source also explained that he had been in an intimate and professional relationship with Odhiambo until she ended the relationship on December 2, 2002, the day before the source gave his statement to embassy officials. The government provided the Embassy Document to Yongo during discovery.

The District Court held a status conference on January 30, 2003. Yongo and the government both believed that Yongo's childhood friend Gabriel was the unnamed source to which the Embassy Document referred. Yongo sought to have the government

extradite Gabriel to the United States, believing that his testimony would be exculpatory. The government maintained that it considered the Embassy Document to be unreliable and that although Yongo had characterized Gabriel as a co-conspirator, there was no additional evidence of Gabriel's participation and no charges or official requests for extradition pending against him. The Court told Yongo that even if Gabriel were brought to the United States, he would have counsel appointed and would likely be advised not to testify unless he received a grant of immunity.

A two-day jury trial began on March 10, 2003. During the trial, Yongo addressed the Court, stating:

There's certain evidences that I've requested my lawyer to present before the Jury, but he has totally refused that. He is not going to present those evidences, and I feel those evidences are vital for my case . . . [T]here's a document which was sent by the American Embassy in Nairobi to the Government here for the purposes of serving my case. That document also has not been presented for the Jury.

App. 323-24. The government argued that the Embassy Document was not admissible. The Court stated: "Physical evidence, Mr. Yongo, doesn't come in by itself. It has to be attached to a person." App. 325. On May 11, 2003, the jury found Yongo guilty.

The Court subsequently sentenced Yongo to 120 months of imprisonment and five years of supervised release. He appealed, arguing that the evidence presented at his trial was insufficient to convict him. We affirmed that judgment. See United States v. Yongo, 102 Fed. Appx. 260 (3d Cir. 2004).

On March 9, 2005, Yongo filed a pro se petition pursuant to 28 U.S.C. § 2255

challenging his conviction on multiple grounds. He claimed that the District Court erred in excluding the Embassy Document and two tape recordings, that the government violated his Fifth Amendment rights by refusing to file motions for downward departure under 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, and that the Court violated his Fifth Amendment rights by not departing from the statutory minimum sentence.

In its response, the government argued that all of the claims had been waived. Yongo then filed a response in which he blamed his attorney for the waiver and accused him of “not acting on my best interest” App. 108.

On July 11, 2005, the District Court denied the petition and, treating Yongo’s response as a claim of ineffective assistance of counsel that had been raised properly in the petition, denied this as well. The Court issued a certificate of appealability from the portion of its order in which it denied Yongo’s claim that his counsel was ineffective for failing to offer the Embassy Document. Yongo timely appealed.

II.

We have jurisdiction pursuant to 28 U.S.C. §§ 2253 and 1291. Under Strickland v. Washington, 466 U.S. 668, 687 (1984), a prisoner seeking relief on the ground of ineffective assistance of counsel must show, first, that counsel’s assistance fell below an objective standard of reasonableness for counsel in criminal cases, and, second, that counsel’s deficient performance prejudiced the defense. We exercise plenary review of the District Court’s adjudication of each of those two prongs, Duncan v. Morton, 256 F.3d 189, 200 (3d Cir. 2001), and we review the Court’s underlying factual findings for

clear error, Gov't of Virgin Islands v. Weatherwax, 77 F.3d 1425, 1430 (3d Cir. 1996).

We begin our analysis with the prejudice prong of the Strickland standard. If Yongo has failed to establish prejudice, then we need not reach the question of the reasonableness of counsel's performance. See Rolan v. Vaughn, 445 F.3d 671, 678 (3d Cir. 2006). To satisfy the prejudice prong, Yongo must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Outten v. Kearney, 464 F.3d 401, 414 (3d Cir. 2006). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Yongo argues that counsel should have offered the Embassy Document under Fed. R. Evid. 804(b)(3), the "against interest" hearsay exception, and that he also should have challenged the constitutionality of applying Fed. R. Evid. 804(b)(3) to exclude it. Neither argument has merit.

A.

Even if Yongo's counsel had offered the Embassy Document, it would not have been admissible, and therefore Yongo has not demonstrated that he was prejudiced. A hearsay statement made by an unavailable declarant may be admitted pursuant to Rule 804(b)(3) if, at the time of its making, "it so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Fed. R. Evid. 804(b)(3). The parties do not dispute the unavailability of Gabriel, the alleged declarant, so we are left to

determine whether that statement was sufficiently against his interest to be reliable. This determination must be made “by viewing [the statement] in context” and “in light of all the surrounding circumstances.” Williamson v. United States, 512 U.S. 594, 603-604 (1994).

Although we conclude that the statement, assuming it was made by Gabriel, was against his interest, we also conclude that it was not sufficiently reliable to be admitted under Rule 804(b)(3). The “against interest” exception is not limited to a declarant’s direct confession of criminal guilt; it also applies to statements that tend to subject the speaker to criminal liability. See United States v. Palumbo, 639 F.2d 123, 132 (3d Cir. 1981). To be sure, the statement allegedly made by Gabriel provided information about Odhiambo’s contacts and procedures. Gabriel also stated, however, that he “would run errands, transmit e-mails, and arrange air transportation” App. 96. He thus “implied his personal participation” in the drug-smuggling conspiracy and “strengthened the impression that he had an insider’s knowledge.” Id. His statement was “against interest” for purposes of Rule 804(b)(3).

But although Gabriel identified Odhiambo by name and shifted blame onto her, the naming of another person as a participant in a crime could well be the product of motivations which undermine the statement’s trustworthiness. The Advisory Committee that drafted Rule 804(b)(3) recognized this danger. Its Note cautions that “a statement admitting guilt and implicating another person . . . may well be motivated by a desire to curry favor” The Supreme Court has also cautioned that “When one person accuses

another of a crime under circumstances in which the declarant stands to gain by inculcating another, the accusation is presumptively suspect” Lee v. Illinois, 476 U.S. 530, 541 (1986).

Yongo argues that tape-recorded phone calls made by Odhiambo’s cousin Mary Atieno to Yongo’s sister, in which Atieno accuses Yongo of having “disappeared with our things, ” A-69, 78, corroborate the Embassy Document. Any such calls, however, do not go nearly far enough. Gabriel supposedly made his statement at the embassy one day after Odhiambo ended their romantic relationship. The statement is not signed, and the Embassy Document does not reveal Gabriel’s identity. Moreover, the Embassy Document refers to the drug Odhiambo trafficks in as cocaine, even though Yongo was found smuggling heroin. Viewed “in light of all the surrounding circumstances,” the Embassy Document was not sufficiently reliable to meet the requirements of Rule 804(b)(3). Williamson, 512 U.S. at 604.

Yongo has not shown that but for counsel’s failure to offer the Embassy Document into evidence the result of his trial would have been different – the Embassy Document was not admissible.¹ Having failed to show that he was prejudiced, Yongo’s claim for ineffective assistance of counsel based on counsel’s failure to offer the Embassy Document itself fails.

¹ Because we find the statement itself to be inadmissible hearsay, we do not reach the government’s argument that an embassy officer authored the actual document relaying what the unnamed source said, resulting in double hearsay.

B.

There is a second albeit related reason, Yongo argues, why counsel was ineffective. In Ohio v. Roberts, 448 U.S. 56 (1980), the Supreme Court stated that the Confrontation Clause does not preclude the admission of an unavailable witness's out-of-court statement if it bears "adequate indicia of reliability." Id. at 66. Under Roberts, a hearsay statement contains "adequate indicia of reliability" if it falls within a "firmly rooted hearsay exception" or has "particularized guarantees of trustworthiness." Id. According to Yongo, a statement that falls within a "firmly rooted" hearsay exception allows, for example, the introduction of a party admission with no additional showing of reliability, while, had it been offered, he would have been required to corroborate the Embassy Document - an "against interest" statement - before it could be admitted. Yongo argues that counsel was ineffective for failing to challenge the constitutionality of this "discriminat[ory]" result. Petr.'s Br. 28. Again, we disagree.

The Supreme Court has carved out a category of hearsay exceptions that it considers to be "firmly rooted" based on whether in light of "longstanding judicial and legislative experience," Idaho v. Wright, 497 U.S. 805, 817 (1990), they "rest upon such solid foundations that admission of virtually any evidence within them" would be reliable. Roberts, 448 U.S. at 66. The Court has sought to "allow the introduction of statements falling within a category of hearsay whose conditions have proven over time to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath and cross-examination at a trial." Lilly v. Virginia, 527

U.S. 116, 126 (1999). It deemed the spontaneous declaration exception “firmly rooted,” for example, because it “is at least two centuries old,” “widely accepted among the States,” and carries “substantial guarantees of . . . trustworthiness . . . [that] cannot be recaptured even by later in-court testimony.” White v. Illinois, 502 U.S. 346, 355-356, n.8 (1992).

In Lilly, however, the Supreme Court defined three groups of “against interest” statements, and found the third group, statements made by a declarant implicating an alleged accomplice, to be “inherently unreliable.” Lilly, 527 U.S. at 136. Because this type of hearsay statement, the same type as the Embassy Document, does not qualify as “firmly rooted,” it cannot be admitted without a demonstration of “particularized guarantees of trustworthiness.” See Roberts, 448 U.S. at 66. The application of a supplemental trustworthiness test, according to Lilly, allows for evidence to be admitted in exceptional cases where an “against interest” statement of an unavailable witness is “incontestably probative, competent, and reliable” Lilly, 527 U.S. at 131.

Roberts and Lilly mandate that had the Embassy Document been offered, Yongo would have been required to demonstrate its trustworthiness because as an “against interest” statement in which a declarant seeks to transfer blame to a third party, it does not fall within a “firmly rooted” hearsay exception. The fact that the Supreme Court has designated other hearsay exceptions as “firmly rooted,” and thus inherently trustworthy, does not render a trustworthiness requirement for an “against interest” statement unconstitutional. Therefore, even if counsel had challenged the constitutionality of the

requirement, the argument would not have been successful. Again, Yongo has not demonstrated the requisite prejudice and his claim of ineffective assistance of counsel on this ground also fails.

III.

For the foregoing reasons, we will affirm the judgment of the District Court.
