UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-2986

Christopher M. Holmes

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:15-cv-03268-MDH)

JUDGMENT

Before SMITH, BOWMAN and SHEPHERD, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

February 03, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

CHRISTOPHER M. HOLMES,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 6:15-cv-03268-MDH**
	)	**6:11-cr-03021-02-MDH**
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Before the Court is Petitioner Christopher Holmes' motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. 1) and Petitioner's amended claim of ineffective assistance of counsel under 28 U.S.C. § 2255 (Doc. 16). On January 25, 2016, the Court entered an Order denying Petitioner's Grounds One, Three and Four and ordered an evidentiary hearing on Petitioner's remaining claim of ineffective assistance of counsel surrounding Petitioner's alleged lack of opportunity to discuss peremptory strikes with counsel and the exercise of peremptory strikes in his absence. (Doc. 23). The Court also allowed Petitioner to amend his motion and on May 10, 2016, the Court entered an Order denying the additional claims raised by Petitioner under Ground Five, but again stated Petitioner's claim his counsel was ineffective for failure to confer with him on peremptory strikes and the exercise of peremptory strikes in his absence would be addressed at the evidentiary hearing. (Doc. 37).

BACKGROUND

On May 24, 2016, the Court held an evidentiary hearing. The parties presented evidence and argument on Petitioner's claim of ineffective assistance of counsel for failure to confer with Petitioner on the peremptory strikes and conducting peremptory strikes in his absence.

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Testimony was received from Mr. Holmes, Bob Lewis, attorney for Petitioner's co-defendant and Kristin Jones, Petitioner's trial counsel.

As stated in the Court's prior Order, Holmes was found guilty, following a jury trial, of 1) conspiracy to distribute 5 kilograms or more of cocaine, to manufacture 280 grams or more of cocaine base, and to distribute 280 grams or more of cocaine base; 2) possession of cocaine with the intent to distribute; and 3) possession of a firearm by a convicted felon. *United States v. Horton*, 756 F.3d 569, 573 (8th Cir.) cert. denied, 135 S. Ct. 122, 190 L. Ed. 2d 93 (2014). Holmes was sentenced to life in prison. On direct appeal, the Eighth Circuit affirmed the judgment of the district court and the Supreme Court denied certiorari.[1]

During the hearing, Petitioner testified he was present during the voir dire of the jury, the strikes for cause and the empaneling of the jury. Petitioner said he was concerned about some of the potential jurors based on answers they gave during voir dire, but was in his holding cell when the peremptory strikes were made and never had a chance to discuss his concerns. However, Petitioner could not remember any specific juror he was concerned about. Petitioner claims when he returned from the holding cell the judge said "we have the jury selected." He claims he asked Ms. Jones if they selected the jury while he was in the holding cell and she "brushed him off."

Petitioner testified Ms. Jones gave him a notepad and pen in the courtroom and he took notes during the jury selection process. Petitioner stated Ms. Jones collected Petitioner's notes from him at the end of each trial day. This testimony contradicted his prior testimony during the hearing on his co-defendant's 2255 motion involving similar issues. During that hearing, Petitioner denied taking any notes during the jury selection process. The notes Petitioner now

[1] The facts of Holmes' underlying criminal case are more fully described in the Eighth Circuit opinion on direct appeal, *United States v. Horton*, 756 F.3d 569 (8th Cir. 2014).

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acknowledges he took during the jury selection process were admitted into evidence. Petitioner's notes reflect the numbers 1, 40 and 21 with a parenthetical that states "(seen on news)." Petitioner's notes then list several numbers, some of which have been crossed out. Petitioner testified the numbers reflected potential jurors, but that at the time of the hearing he could not remember specifically what his notes meant.

Petitioner states that his attorney, Ms. Jones, told him he would have a chance to talk to her about the potential jurors, however, he claims she never did discuss any jurors or peremptory strikes with him. He further states he was never given an opportunity to discuss his notes with Ms. Jones. During the hearing, Petitioner states he does not recall any specific jurors he thought should have been stricken from the jury. He did state his notes reflect that three potential jurors stated they had seen his case on the news. According to Petitioner's notes those individuals would be panel number 1 – who was on the jury; number 40 – who was not on the jury due to defendants' peremptory challenge; and number 21 – who was not on the jury due to a strike for cause. Petitioner further testified there was a woman who stated she had been raped by a black man – this woman was not on the jury. He recalls other panel members reacting to the woman's statement, but does not recall which ones.

When asked why Petitioner did not object during trial regarding his alleged absence during the peremptory strikes, he testified he did not think he could (or should) speak directly to the judge, and that Ms. Jones would not discuss the jury with him. He further testified after his conviction his appeal counsel wouldn't "argue his thoughts" so he adopted his codefendant Horton's brief on appeal. Petitioner's appeal did not raise the issue of peremptory strikes.

The trial transcript reflects that 14 peremptory strikes were given to both defendants at trial to share between them. Tr. 161. Mr. Lewis and Ms. Jones testified they conducted the

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peremptory strikes for both defendants by consensus. Ms. Jones further testified that at the time of Petitioner's trial she had conducted 40 jury trials, but only one in federal court. She stated the main difference in federal court jury selection is that she is not allowed to directly question the potential jurors because the questioning is done primarily by the district judge. Ms. Jones testified in the weeks leading up to trial she met with Petitioner multiple times. She further testified it is her normal practice to first consult with her client prior to conducting peremptory strikes. Ms. Jones does not specifically recall discussing the peremptory strikes with Petitioner during his trial, but also does not recall anything different from her usual practice occurring in this case. She believes a deviation from her regular practice would have stuck out in her mind.

Mr. Lewis testified regarding his involvement in the trial representing Petitioner's co-defendant. Mr. Lewis is a very experienced attorney who has tried numerous criminal trials in both state and federal court. He described the jury selection process during Petitioner's trial, and testified that Ms. Jones and he executed the peremptory strikes by consensus. Mr. Lewis recalled both defendants were present when the peremptory strikes were discussed with Ms. Jones. He testified Mr. Holmes and his codefendant were always brought in and out of the courtroom together. He further stated his consultations with his client occurred in the courtroom during the trial. Mr. Lewis stated Mr. Holmes was present at counsel table, but made no comment during the conversation between himself and Ms. Jones regarding peremptory strikes.

Petitioner testified at the hearing it took 2 minutes to be transported upstairs from the holding cell on the day of the hearing. He stated he counted off the time to himself as they moved him to the courtroom. The Court admitted into evidence the court security officer's daily log and the United States Marshal's log. The Court also took judicial notice of the civil record and criminal record in Petitioner's cases.

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The trial transcript indicates that, on the date in question, the Court stood in recess at 4:13 p.m. after voir dire and strikes for cause were completed. Tr. 162. According to the CSO daily activity log, Petitioner and his co-defendant, Carlous Horton, were returned from the courtroom to a holding cell at 4:15 p.m. Gov. Ex. 4. The same activity log indicates Petitioner and Holmes were taken from the holding cell back to the courtroom at 4:52 p.m. Gov. Ex. 4. The transcript indicates the Court reconvened at 4:57 p.m. Tr. 162. The minute entry sheet indicates peremptory strikes were returned to the Court at some point during the recess that took place from approximately 4:14 p.m. to 4:57 p.m. Doc. 350. Following the recess, the transcript reflects the entire venire panel re-entering the room at 4:57 and the Court then read off the names of the fourteen selected jurors. Tr. 162.[2]

STANDARD

A prisoner may move to vacate, set aside, or correct a sentence alleging "that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]" 28 U.S.C. § 2255. A claim of ineffective assistance of counsel may suffice to prevail under section 2255 but the "petitioner faces a heavy burden." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996). In such cases, the court must scrutinize the ineffective assistance of counsel claim under the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984).

Under *Strickland*, a prevailing defendant must prove "both that his counsel's representation was deficient and that the deficient performance prejudiced the defendant's case."

[2] The time reference in the transcript, CSO daily activity log, and minute sheet do not necessarily reflect reference to the same source of time measurement. None of the witnesses were able to testify as to how the time recordings reflected in the transcript, CSO log, Marshal's log and minute sheet were determined.

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Cheek v. United States, 858 F.2d 1330, 1336 (8th Cir. 1988). As to the "deficiency" prong, the defendant must show that counsel "failed to exercise the customary skills and diligence that a reasonably competent attorney would [have] exhibit[ed] under similar circumstances." *Id.* (quoting *Hayes v. Lockhart*, 766 F.2d 1247, 1251 (8th Cir. 1985)). Courts are highly deferential to the decisions of counsel and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. A reviewing court must look at the circumstances as they appeared to counsel at the time of the proceeding and should rarely second-guess an attorney's tactics or strategic decisions. *Lacher v. United States*, No. 05-3175-CV-S-RED, 2006 WL 744278 (W.D. Mo. Mar. 23, 2006). As to the "prejudice" prong, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cheek*, 858 F.2d at 1336 (quoting *Strickland*, 466 U.S. at 694).

ANALYSIS

Petitioner's § 2255 claim for ineffective assistance of counsel during jury selection is hereby denied because Petitioner has failed to satisfy the *Strickland* prongs.

A. Petitioner failed to establish counsel's performance was deficient.

First, Petitioner fails to establish that his trial counsel's performance was deficient. Petitioner alleges his trial counsel acted deficiently by exercising peremptory strikes in his absence and failing to confer with Petitioner prior to and after exercising peremptory strikes in his absence.

"A criminal defendant's right to be present at every stage of a criminal trial is rooted, to a large extent, in the Confrontation Clause of the Sixth Amendment and is protected to some extent by the Due Process Clause of the Fifth and Fourteenth Amendments." *United States v.*

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Picardi, 739 F.3d 1118, 1123 (8th Cir. 2014) (quoting *United States v. Smith*, 230 F.3d 300, 309 (7th Cir. 2000)). The Sixth Amendment protects a defendant's right to be present where the defendant is confronting witnesses or evidence against him, *see Picardi*, 739 F.3d at 1123, and the Due Process Clause protects a defendant's right to be present "to the extent a fair and just hearing would be thwarted by his absence, and to that extent only . . . in light of the record as a whole." *See United States v. Gagnon*, 470 U.S. 522, 526-27 (1985) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934)). Federal Rule of Criminal Procedure 43 further codifies the right to be present. As explained by the Eighth Circuit, "the codified right expressed in Rule 43 . . . 'is broader than the constitutional right, and includes the right of the criminal defendant to be present during all stages of his or her trial.'" *Picardi*, 739 F.3d at 1123 (quoting *Smith*, 230 F.3d at 309-310). Rule 43 states that, unless provided otherwise, "the defendant must be present at . . . every trial stage, including jury impanelment[.]" Fed. R. Crim. P. 43(a)(2).

"To be sure, the process of 'impaneling' a jury – at which Fed. R. Crim. P. 43 insures the defendants' presence – encompasses all the steps of selecting a jury, including the peremptory striking of members of the venire." *United States v. Chrisco*, 493 F.2d 232, 236 (8th Cir. 1974). The Eighth Circuit holds that a criminal defendant is sufficiently "present" at impaneling of the jury to satisfy both Rule 43 and the Constitution where: (1) the defendant was present in the courtroom while the potential jurors were questioned, (2) the defendant had an opportunity to register his opinions of the venire with counsel, and (3) the defendant was present in the courtroom when the clerk gave effect to the strikes by reading off the list of jurors who had not been stricken. *See id.* at 236-37; *United States v. Gayles*, 1 F.3d 735, 738 (8th Cir. 1993); *see generally Williams v. Kemna*, 311 F.3d 895, 898 (8th Cir. 2002) (citing *Cohen v. Senkowski*, 290 F.3d 485, 490 (2d Cir. 2002)).

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Here, as in *Chrisco* and *Gayles*, the peremptory strikes were executed during a recess. The testimony and evidence clearly show that Petitioner was present in the courtroom when the potential jurors were questioned and when the strikes were "given effect." Thus, the only question before the Court is whether Petitioner had sufficient opportunity to discuss his opinions of potential jurors with trial counsel. Upon review of the evidence and the diverging testimonies on that issue, the Court finds the testimony of defendant's trial counsel, Ms. Jones, and co-defendant's trial counsel, Mr. Lewis, is credible and that Defendant was provided sufficient opportunity to register his opinions of the potential jurors with trial counsel.

Ms. Jones testimony was consistent with Mr. Lewis' testimony regarding the procedure they implemented with regard to the jury selection for the codefendants' trial. While Ms. Jones has no independent recollection of discussing peremptory strikes with Petitioner, she testified that it is her normal practice to do so and if her normal practice was not followed the situation would stick out in her mind. The transcript and CSO daily activity log are also consistent with trial counsel's testimony because they show Petitioner was taken down to a holding cell when the Court stood in recess after juror questioning and strikes for cause were made. Petitioner was then returned to the courtroom approximately five minutes before the proceedings reconvened. Even accounting for travel time, this left sufficient time for Petitioner to convey his opinions to trial counsel regarding the potential jurors.

Moreover, while Petitioner did not specifically recall what his notes meant, of the 24 potential juror numbers he had written down on his notepad, only 5 of those individuals were on the jury. It is unclear what exactly Petitioner's notes mean based on Petitioner's testimony, but a review of his notes shows that 14 potential juror numbers were crossed out and out of those 14 individuals only 2 were on the jury. In addition, 2 of the potential juror numbers that Petitioner

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did not cross out in his notes were on the jury. Petitioner testified he cannot remember a specific juror he wanted to strike. However, the woman he said made a statement about being raped by a black man was not on the jury. Further, two of the individuals who had seen the case on the news were not on the jury. The third individual who stated he had seen the case on the news, but remained on the jury, merely answered "I think I remember that" but there was nothing about what he heard that would cause him to feel like the defendants were guilty before he heard the evidence.

In addition, the fact that Petitioner never raised his alleged inability to discuss peremptory strikes with counsel prior to these collateral proceedings weighs against his credibility. The transcript shows that after the peremptory strike recess, but before the venire panel reentered the room, Judge Dorr stated that the jury had been selected and the clerk would read the names of the jurors/alternates to be seated; when the Judge asked if everyone understood that, Petitioner made no statement or objection to the Court. Tr. 162. Approximately thirty minutes later, after the jury had been sworn in and dismissed for the day but before the Court stood in recess, the Court asked the parties if there was "[a]nything else anybody wants to cover tonight before we recess for the evening"; Petitioner again did not bring the alleged injustice to the Court's attention. Tr. 173. The next morning, Judge Dorr asked whether there were any other issues or concerns that he should address before the jury entered the room to begin opening statements; Petitioner remained silent. Tr. 177-178. Judge Dorr made similar statements throughout the trial yet Petitioner never raised the issue now presented.

Petitioner testified he did not raise the issue during trial because he thought he could only speak through his trial counsel. However, Petitioner offered no testimony that he raised the alleged injustice to trial counsel or requested trial counsel to bring the issue to the Court's

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attention at any point after the jury was seated. Further weighing against Petitioner's credibility are his motive to lie in this litigation (he is facing a life sentence that has been affirmed on appeal) and the sheer number of injustices that he alleges occurred in this case (see record from below, Eighth Circuit opinion, and Court's previous orders denying Petitioner's 2255 claims).

In light of the foregoing, the Court finds the testimony of Ms. Jones credible. According to Ms. Jones' testimony, Petitioner was provided a legal pad and pen prior to voir dire, he was advised to take notes and it is her regular practice to give her client the opportunity to discuss his notes and opinions of the potential jurors with her prior to impaneling of the jury. Ms. Jones testified nothing sticks out to her that her regular practice was not followed in this case. Further, both Ms. Jones and Mr. Lewis testified they exercised the co-defendants' peremptory strikes by consensus and using their professional judgment. With regard to Petitioner's claim of absence, it is undisputed Petitioner was present when the list of juror names was read off and made no objection. Mr. Lewis testified the defendants were present in the courtroom prior the peremptory strikes being made. He further testified Mr. Holmes was at the table but did not say anything during jury selection.

Based on the foregoing, the Court finds Petitioner had sufficient opportunity to discuss the potential jurors with counsel. *See, e.g., Chrisco*, 493 F.2d at 236 (8th Cir. 1974) (holding Constitution and Rule 43 satisfied where "it seems clear from the record that appellants discussed their misgivings with counsel during or immediately following the formal impaneling process and that the decision was made by counsel not to raise any objection at that time"); *United States v. Fontenot*, 14 F.3d 1364, 1370 (9th Cir. 1994) (sufficient where "Fontenot had the opportunity to discuss his misgivings with counsel during and immediately following voir dire, prior to exercising his peremptory challenges"); *see also Allen v. United States*, No.

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4:07CV00027 ERW, 2011 WL 1770929, at *13 (E.D. Mo. May 10, 2011) (counsel sufficiently consulted with defendant regarding jury selection where defendant provided his attorney a list of three potential jurors who he wanted stricken).

Because Petitioner was present in the courtroom during the questioning of potential jurors, had the opportunity to convey his impressions of the potential jurors to counsel, and was present in the courtroom when the peremptory strikes were given effect, the record shows Petitioner was sufficiently "present" at impaneling of the jury to satisfy both Rule 43 and the Constitution. Thus, Petitioner has failed to establish trial counsel acted deficiently during jury selection.

B. Petitioner failed to establish prejudice resulting from counsel's allegedly deficient performance.

Even if the Court were to assume trial counsel did act deficiently, Petitioner further failed to establish prejudice resulting from his trial counsel's allegedly deficient performance. The Court rejects Petitioner's argument that counsel's allegedly deficient performance results in prejudice. Petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Here, Petitioner argues "if not for trial counsel's deficient performance, Petitioner would have, at the least, been convicted of a much lesser charge."[3]

The Court finds this evidence insufficient to show a reasonable probability that, but for Ms. Jones' alleged errors, the result of the trial would have been different. First, a review of

[3] It should be noted Ms. Jones testified that while she got along fine with the Defendant, he refused to consider or discuss any idea of a plea offer. Ms. Jones said she repeatedly tried to get him to consider a plea that would have carried a mandatory 20 year sentence, as opposed to the life sentence he would be subject to if found guilty at trial. Ms. Jones said based on her review of the government's evidence she felt the evidence was "overwhelmingly" against her client.

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Petitioner's notes reflects that out of the 24 potential jurors, whose numbers he had listed without any explanation, only 5 were on the jury and two of those panel members were not crossed out. Defendants only had 14 peremptory strikes between them and therefore some panel members on Defendant's list of 24 were certain to find their way onto the jury. Second, even assuming Petitioner had the opportunity to convey his impressions to counsel regarding certain potential jurors, Ms. Jones had no duty to follow Petitioner's suggested strikes and there is no evidence that Ms. Jones failed to "exercise the customary skills and diligence" that a reasonably competent attorney would have exercised in making the strikes that she did.[4] Third, the exercise of peremptory strikes is rarely between one believed to be a clearly favorable juror and one believed to be a clearly unfavorable juror. Rather, it is often trying to estimate which potential juror is most unfavorable. Ms. Jones is an experienced criminal defense attorney and should not be second guessed for the exercise of her best professional discretion. Finally, the evidence presented against Petitioner at trial was so overwhelming that it is unlikely the jury would have found in his favor regardless of jury composition. The trial transcript shows the case was submitted to the jury at approximately 10:24 a.m. and the jury returned their verdict at approximately 11:48 a.m. finding Petitioner guilty of all 3 counts submitted against him.

In sum, even assuming Ms. Jones' representation was deficient as alleged by Petitioner, Petitioner failed to establish a reasonable probability that, but for counsel's alleged unprofessional errors, the result of his trial would have been different.

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[4] The Court has reviewed the voir dire questions and answers related to the venire woman's statement that she had been raped by a black man and notes that that there was nothing especially inflammatory about the woman's comment. Moreover, the Court asked various questions both before and after that comment regarding race and the ability to be impartial. No potential juror indicated they could not be impartial on the basis of race. Further, there is evidence that counsel for both defendants exercised the peremptory strikes by consensus, in effect, giving the defendants the benefit of two competent attorney's impressions.

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DECISION

The files and records conclusively establish that Petitioner's claims based on ineffective assistance of counsel based on a lack of opportunity to discuss peremptory strikes with counsel and the exercise of peremptory strikes in his absence do not warrant relief under 28 U.S.C. § 2255. Accordingly, the Court hereby **DENIES** Petitioner's § 2255 motion and amended motion.

CERTIFICATE OF APPEALABILITY

The Court finds Petitioner failed to make a substantial showing of the denial of a constitutional right, as required for issuance of a certificate of appealability. 28 U.S.C. § 2253(c)(2); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997) ("A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings."). Therefore, the Court shall not issue a certificate of appealability as to Petitioner's § 2255 claim related to the peremptory strikes.

IT IS SO ORDERED.

Dated: June 15, 2016

/s/ Douglas Harpool

DOUGLAS HARPOOL
UNITED STATES DISTRICT JUDGE

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