NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 16-4721

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Apr 30, 2018
DEBORAH S. HUNT, Clerk

JERMAINE MOORER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

ORDER

Before: COLE, Chief Judge; GIBBONS and BUSH, Circuit Judges.

Jermaine Moorer, a federal prisoner proceeding pro se, appeals the district court's order denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2013, Moorer pleaded guilty in the Cuyahoga County Court of Common Pleas to a drug-trafficking offense and received a four-year sentence. The next year, a federal grand jury returned an indictment charging Moorer and 28 other defendants with conspiracy to possess with intent to distribute and to distribute heroin, cocaine base, and cocaine along with related drug, firearm, racketeering, and money-laundering offenses. Moorer pleaded guilty pursuant to a written plea agreement to conspiracy to possess with intent to distribute and to distribute at least 500 grams but less than 2 kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 846. At sentencing, the government acknowledged that the federal conspiracy charge

encompassed the same conduct underlying Moorer's state conviction. The district court sentenced Moorer to 102 months of imprisonment to run concurrently with his state sentence.

On appeal, Moorer argued in part that the federal prosecution of his case was barred by double jeopardy. The government moved to dismiss Moorer's appeal based on the appellate-waiver provision in his plea agreement. This court granted the government's motion to dismiss.

Moorer subsequently filed a § 2255 motion to vacate, asserting in relevant part that the federal prosecution of his case was barred by double jeopardy. The district court denied Moorer's § 2255 motion. Moorer appealed, and the district court granted a certificate of appealability as to his double-jeopardy claim.

On appeal, Moorer argues that the federal government interfered in the State of Ohio's sovereignty and added the appellate-waiver provision to his plea agreement to preclude review of its involvement in the State's prosecution. In reviewing the denial of a § 2255 motion, we review the district court's legal conclusions de novo and its factual findings for clear error. *Braden v. United States*, 817 F.3d 926, 929 (6th Cir. 2016).

In his plea agreement, Moorer waived his rights to appeal his conviction or sentence and to challenge his conviction or sentence collaterally through a § 2255 proceeding. On direct appeal, this court determined that Moorer's guilty plea was knowing and voluntary and that his issues on appeal, which included his double-jeopardy argument, fell within the scope of the appellate-waiver provision. "A § 2255 motion may not be used to relitigate an issue that was raised on appeal absent highly exceptional circumstances." *DuPont v. United States*, 76 F.3d 108, 110 (6th Cir. 1996) (quoting *United States v. Brown*, No. 94-5917, 1995 WL 465802 (6th Cir. Aug. 4, 1995)). Given that this court has already held that Moorer's appellate waiver is valid and that his double-jeopardy claim falls within the scope of that waiver, he cannot relitigate those issues.

Regardless, Moorer's double-jeopardy claim fails on its merits. The Double Jeopardy Clause of the Fifth Amendment guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. "The dual sovereignty doctrine holds that the double jeopardy clause 'does not apply to suits by separate sovereigns,

[illegible] F.2d 41, 43 (1st Cir. 1989). Therefore, "[a] prosecution in state court under state law, including a criminal or otherwise punitive proceeding, followed by a prosecution in federal court under federal law, does not violate the constitutional prohibition on double jeopardy." [illegible]

[illegible]

[illegible] show that the state of Idaho was "merely a tool" of the federal government [illegible] sovereign authority to prosecute and acting only as the tool of the federal government [illegible] to do [illegible]

[illegible] also a [illegible] mandatory 12 years based upon those findings.

The case proceeded up until June [illegible] the defense filed a motion to suppress [illegible] that [illegible]

even if both are criminal suits for the same offense.'" *United States v. Louisville Edible Oil Prods., Inc.*., 926 F.2d 584, 587 (6th Cir. 1991) (quoting *United States v. A Parcel of Land*, 884 F.2d 41, 43 (1st Cir. 1989)). Therefore, "[a] prosecution in state court under state law, including a criminal or otherwise punitive proceeding, followed by a prosecution in federal court under federal law, does not violate the constitutional prohibition on double jeopardy." *United States v. Holmes*, 111 F.3d 463, 467 (6th Cir. 1997).

Relying on *Bartkus v. Illinois*, 359 U.S. 121 (1959), Moorer contends that the dual sovereignty doctrine does not apply because the federal government interfered in the State's prosecution. *Bartkus* suggests that a state or federal government "cannot sidestep the constraints of the Double Jeopardy Clause through a 'sham' prosecution by an ostensibly different sovereign." *United States v. Djoumessi*, 538 F.3d 547, 550 (6th Cir. 2008). We have recognized that "the *Bartkus* sham-prosecution exception is a narrow one and, so far as this circuit is concerned, it is an exception that has yet to affect the outcome of a single case." *Id.* at 550.

Even accepting the existence of the sham-prosecution exception, Moorer has failed to show that the State of Ohio was "merely a tool" of the federal government, "somehow ceding its sovereign authority to prosecute and acting only because the [federal government] told it to do so." *Id.* At Moorer's sentencing, the government explained its involvement in the state's prosecution:

> MR. KATSAROS: . . . The defendant was charged in January of 2013 with—at the state level for possession of over a kilogram of cocaine. He also had in his residence approximately $187,000.
>
> The search warrant that was used in order to get that warrant was based on the main confidential informant in our case, in the Makupson case, who had did numerous controlled buys with Mr. Makupson and had integrated the entire DTO.
>
> He was charged at the time, Your Honor, with the felony trafficking F-1. He was also charged with an MDO specification and one-year gun spec and was facing mandatory 12 years based upon those offenses.
>
> The case proceeded up until June and the defense filed a motion to suppress. At that time, Your Honor, the FBI agent had extreme fear that based upon that suppression motion that the CI was going to get outed during the suppression hearing.

THE COURT: How—help me. This is in the state case?

MR. KATSAROS: Correct, Your Honor.

He's currently serving a four-year term in the state case.

THE COURT: I saw that.

MR. KATSAROS: So based upon the fear that the confidential informant would be exposed at that time through the suppression hearing, the FBI agent spoke to the Cuyahoga County Prosecutor's Office and was requesting that they try and resolve the case by any means based on the fact that it would potentially destroy the entire investigation relative to Mr. Makupson.

They obliged. They reduced the drug amount in that case, Your Honor, from over a kilogram down to 27 to 100 grams and entered into an agreed sentence with Mr. Moorer and his attorney at that time for a four-year sentence, thereby not having the suppression hearing move forward.

And the idea at that point, Your Honor, was for the Government later, when we finalized the Makupson case, to charge Mr. Moorer with in essence the same conduct that was part of the state case . . . .

The government's explanation shows cooperation between the state and federal authorities, which "is the conventional practice between the two sets of prosecutors throughout the country." *Bartkus*, 359 U.S. at 123. The key to whether a prosecution is a sham "is whether the separate sovereigns have made independent decisions to prosecute." *United States v. Clark*, 254 F. App'x 528, 533 (6th Cir. 2007) (quoting *United States v. Angleton*, 314 F.3d 767, 774 (5th Cir. 2002)). The State of Ohio obtained a search warrant and charged Moorer well before the federal agent contacted state prosecutors. The record does not support "a conclusion that the state prosecution was a sham and a cover for a federal prosecution." *Bartkus*, 359 U.S. at 124.

For these reasons, we **AFFIRM** the district court's order denying Moorer's § 2255 motion to vacate.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

JERMAINE MOORER, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	Case No. 1:14-CR-00214 Case No. 1:16-CV-01874 ORDER [Resolving Doc. Nos. 905, 906, 908, 917[1]]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On July 25, 2016, Defendant Jermaine Moorer petitioned for habeas corpus relief under 28 U.S.C. § 2255.[2] He also filed motions for an evidentiary hearing and to appoint counsel in pursuit of his § 2255 claim.[3] On September 26, 2016, Moorer filed a motion to disqualify the tribunal.[4] For the following reasons, the Court **DENIES** Defendants' motions.

I. Background

On February 4, 2013, Defendant Moorer was charged with a drug trafficking offense in the Cuyahoga County Court of Common Pleas.[5] On July 25, 2013, the Court of Common Pleas sentenced Moorer to four years' imprisonment.[6]

On June 18, 2014, in a federal case, Defendant Moorer and others were charged with conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841 (a)(1),

[1] All citations are to the criminal docket, Case No. 1:16-CV-01874.
[2] Doc. 905. The Government responds. Doc. 927.
[3] Docs. 906, 908.
[4] Doc. 917.
[5] *See Ohio v. Jermain M Moorer*, CR-13-571064-A, Cuyahoga County Court of Common Pleas.
[6] *See id.*; *see also* Doc. 737 at 12.

(b)(1)(B), and 846 (Count 1); and with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count 11).[7]

Defendant Moorer's state court trafficking offense conduct was included in the overt acts of the federal indictment.[8] The parties agreed that the state and federal charges were for essentially the same conduct.[9]

On November 10, 2014, Moorer pled guilty to Count 1 in his federal case.[10] The Government moved to dismiss Count 11 pursuant to the plea agreement.[11] This Court sentenced Defendant Moorer to 102 months' imprisonment, to be served concurrently with his state sentence and also with credit for time served, followed by five years' supervised release.[12]

On March 4, 2015, Defendant Moorer filed an appeal.[13] Moorer argued (1) the federal prosecution was barred by double jeopardy, (2) that he did not knowingly and voluntarily enter into his plea agreement, and (3) the Court did not properly consider 18 U.S.C. § 3553(a) factors in determining his sentence.[14]

On February 17, 2016, the Sixth Circuit dismissed the appeal based on Moorer's appellate waiver in the plea agreement.[15]

On July 25, 2016, Moorer petitioned this Court for habeas corpus relief under 28 U.S.C. § 2255.[16] He also filed motions for an evidentiary hearing and to appoint counsel in pursuit of his § 2255 claim.[17] On September 26, 2016, Moorer filed a motion to disqualify the tribunal.[18]

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[7] Doc. 1 at 1, 69.
[8] Doc. 465 at 16.
[9] Doc. 737 at 12.
[10] Doc. 353 at 2.
[11] *Id.* at 3; *see also* Doc. 550 at 1.
[12] Doc. 550 at 2-3.
[13] Doc. 591.
[14] Doc. 16 at 2, *USA v. Jermaine Moorer*, Dkt. 15-3203 (6th Cir. 2015).
[15] Doc. 889.
[16] Doc. 905.
[17] Docs. 906, 908.
[18] Doc. 917. The Government responds. Doc. 927.

In his § 2255 petition, Moorer cites four grounds for relief. He repeats the three arguments he made on direct appeal to the Sixth Circuit Court of Appeals.[19] He also argues that his sentence is not being properly enforced because the Bureau of Prisons ("BOP") has not recognized his time served.[20]

II. Legal Standards

A. 28 U.S.C. § 2255 Relief

Title 28 United States Code Section 2255 gives a federal prisoner post-conviction means of collaterally attacking a conviction or sentence that he alleges violates federal law. Section 2255 provides four grounds upon which a federal prisoner may challenge his conviction or sentence:

> 1) That the sentence was imposed in violation of the Constitution or laws of the United States;
> 2) That the court was without jurisdiction to impose such sentence;
> 3) That the sentence exceeded the maximum authorized by law; or
> 4) That the sentence is otherwise subject to collateral attack.[21]

To prevail on a § 2255 motion alleging a constitutional error, the movant "must establish an error of constitutional magnitude which had a substantial and injurious effect or influence on the proceedings."[22]

B. Evidentiary Hearing

The decision to grant a habeas petitioner's request for an evidentiary hearing is left to the sound discretion of the district court.[23] "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's

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[19] Doc. 905 at 6, 10, 14.
[20] *Id.* at 17.
[21] **Error! Main Document Only.**28 U.S.C. § 2255(a).
[22] *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)).
[23] *Schriro v. Landigrand*, 550 U.S. 465, 473 (2007).

factual allegations, which, if true, would entitle the applicant to federal habeas relief."[24] A hearing is unnecessary if the movant's allegations are contradicted by the record, are inherently incredible, or are conclusions rather than statements of fact.[25]

C. Appointment of Counsel

There is no constitutional right to appointed counsel in habeas proceedings.[26] "The decision to appoint counsel for a federal habeas petitioner is within the discretion of the court and is required only where the interests of justice or due process so require."[27] Appointment of counsel is only justified in "exceptional circumstances,"[28] and is unnecessary where claims are "relatively straightforward" and arise under settled law.[29]

D. Disqualification of District Judge

Under 28 U.S.C. § 455, a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[30] A judge can be disqualified on the basis of prejudice or bias only if this prejudice or bias is personal or extrajudicial.[31] "'Personal [or extrajudicial] bias is prejudice that emanates from some source other than participation in the proceedings or prior contact with related cases."[32] In arguing for the recusal of a judge, a movant must also "'point to any specific facts [judge] obtained from presiding over [other cases] which would raise a question about his impartiality.'"[33] The movant must also identify "rulings or actions

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[24] *Id.* at 474.
[25] *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999).
[26] *Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002) (citing *McCleskey v. Zant*, 499 U.S. 467, 495 (1987)).
[27] *Mira v. Marshall*, 806 F.2d 636, 638 (6th Cir. 1986).
[28] *Gilber v. Barnhart*, No. 09-11223, 2009 WL 4018271, at *1 (E.D. Mich. Nov.19, 2009).
[29] *Bookstore v. Addison*, No. 02–6014, 2002 WL 31538688, at *2 (10th Cir. Nov. 6, 2002).
[30] 28 U.S.C. § 455(a).
[31] *See United States v. Hartsel*, 199 F.3d 812, 820 (6th Cir. 1999).
[32] *Youn v. Track, Inc.*, 324 F.3d 409, 423 (6th Cir. 2003).
[33] *United States v. Jamieson*, 427 F.3d 394, 405 (6th Cir. 2005) (citing *Hartsel*, 199 F.3d at 820).

during the [proceeding] that indicate partiality or the use of 'personal knowledge of disputed evidentiary facts' on the part of the district judge."[34]

III. Discussion

A. 28 U.S.C. § 2255

Grounds 1-3

Defendant Moorer's first three §2255 arguments fail. Under the law of the case doctrine, "findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation."[35] The doctrine "requires lower courts to adhere to the commands of a superior court."[36]

On appeal, Moorer argued (1) the federal prosecution was barred by double jeopardy, (2) that he did not knowingly and voluntarily enter into his plea agreement, and (3) the Court did not properly consider 18 U.S.C. § 3553(a) factors in determining his sentence.[37] The Sixth Circuit found that Moorer knowingly and voluntarily waived his appellate rights in his plea agreement and was therefore barred from bringing these claims.[38]

Moorer brings the same arguments in his § 2255 petition.[39] Because "it is well-settled that a § 2255 motion may not be employed to re-litigate an issue that was raised and considered on appeal absent highly exceptional circumstances,"[40] Moorer's arguments are not viable here.

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[34] *Id.*
[35] *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994) (citing *United States v. Bell*, 988 F.2d 247, 250 (1st Cir. 1993)).
[36] *Id.* (citing *Bell*, 988 F.2d at 251).
[37] Doc. 16 at 2, *USA v. Jermaine Moorer*, Dkt. 15-3203 (6th Cir. 2015).
[38] Doc. 889.
[39] *Compare* Doc. 16 at 2, *USA v. Jermaine Moorer*, Dkt. 15-3203 (6th Cir. 2015) *with* Doc. 905 at 6, 10, 14.
[40] *Parks v. United States*, No. 1:08-CR-58, 2013 WL 427256, at *7 (E.D. Tenn. Feb. 4, 2013) (citing *Oliver v. United States*, 90 F.3d 177, 180 (6th Cir. 1996); *DuPont v. United States*, 76 F.3d 108, 110–11 (6th Cir. 1996); *United States v. Jones*, 918 F.2d 9, 10 (2nd Cir. 1990); *United States v. Grimes*, 573 F.Supp. 1202, 1206 (S.D. Ohio 1983)).

Even if the Court reached the merits of Defendant Moorer's claim, he would not succeed. Under the dual sovereignty doctrine, "the double jeopardy clause does not apply to suits by separate sovereigns, even if both are criminal suits for the same offense."[41] Moorer argues that the "sham-prosecution" exception, "which bars manipulation of the state system by federal officials to achieve the equivalent of a second federal prosecution," applies here.[42]

Moorer's argument fails. He argues that the state's case against him threatened to unravel the federal government's larger drug conspiracy investigation.[43] Thus, Moorer posits, the federal government contacted the state prosecutor to encourage quick resolution of the state case so as not to derail the federal investigation.[44] But "cooperation between federal and state authorities cannot, by itself, constitute a sham prosecution."[45]

Furthermore, "the key . . . is whether the separate sovereigns have made independent decisions to prosecute."[46] Moorer does not argue that the federal government orchestrated his arrest in the state case. Rather, he argues that the federal government contacted state prosecutors only *after* the state arrested him, conducted a search, and charged him.[47] It defies reason to think that "the state court was merely a tool of the federal government."[48]

Ground 4

Defendant Moorer's last argument, regarding receiving credit for time served, also fails. Although this Court ordered that Moorer be given credit for time served,[49] calculating credit for

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[41] *United States v. Louisville Edible Oil Prods., Inc.*, 926 F.2d 584, 587 (6th Cir. 1991).
[42] *United States v. Deitz*, 577 F.3d 672, 686 (6th Cir. 2009) (citing *Bartkus v. Illinois*, 359 U.S. 121, 123–24 (1959); *United States v. Aboumoussallem*, 726 F.2d 906 (2d Cir.1984)).
[43] Doc. 905 at 6-7.
[44] *Id.*
[45] *United States v. Clark*, 254 F. App'x 528, 533 (6th Cir. 2007) (citing *United States v. Angleton*, 314 F.3d 767, 774 (5th Cir. 2002)).
[46] *Id.*
[47] Doc. 905 at 6-7.
[48] *Id.* at 7.
[49] Doc. 550 at 2-3.

time served is the responsibility of the Attorney General, through the Bureau of Prisons.[50] Therefore, this Court is not authorized to compute the credit.[51]

Defendant Moorer's § 2255 petition is **DENIED.**

B. Evidentiary Hearing

The Court does not believe that Defendant Moorer is entitled to an evidentiary hearing. Because "the record refutes [Defendant Moorer's] factual allegations [and] precludes habeas relief,"[52] the Court declines to grant Moorer's request for a hearing.

C. Appointment of Counsel

As there is no constitutional right to appointed counsel in habeas proceedings[53] and Defendant Moorer's claims "arise [and fall] under settled law," [54] the Court declines to appoint counsel.

D. Disqualification of a District Judge

In his motion to recuse the assigned Judge in this case, Defendant Moorer argues that because the Judge assigned to the § 2255 petition also imposed the underlying sentence, there is a conflict of interest and the case should be reassigned.[55]

A judge can be disqualified only if his alleged bias or prejudice "emanates from some source other than participation in the proceedings."[56] Defendant Moorer cites only to the Judge's role in this case as basis for his disqualification. Accordingly, his motion is denied.

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[50] *See* United States v. Wilson, 503 U.S. 329, 335 (1992) ("Because the offender has a right to certain jail-time credit under § 3585(b), and because the district court cannot determine the amount of the credit at sentencing, the Attorney General has no choice but to make the determination as an administrative matter when imprisoning the defendant.").
[51] Defendant Moorer may present his request to the Bureau of Prisons.
[52] *Schriro*, 550 U.S. at 747.
[53] *Cobas*, 306 F.3d at 444 (citing *McCleskey*, 499 U.S. at 495).
[54] *Bookstore*, 2002 WL 31538688 at *2.
[55] Doc. 917.
[56] *Youn*, 324 F.3d at 423.

IV. Conclusion

For the reasons above, this Court **DENIES** Defendant Moorer's §2255 petition and motions for an evidentiary hearing, to appoint counsel, and to disqualify the Court. This Court also certifies that Moorer could not, in good faith, take an appeal from this order.

IT IS SO ORDERED.

Dated: November 4, 2016

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE