Appendix-A

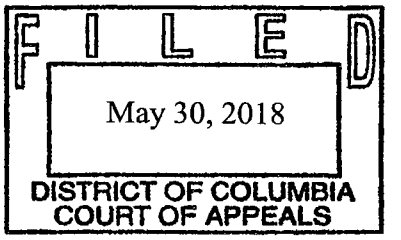
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 16-CO-1248

ALONZO D. MARSHALL, APPELLANT,

v.

UNITED STATES, APPELLEE.



Appeal from the Superior Court
of the District of Columbia
(CF1-23592-09)

(Hon. Thomas J. Motley, Trial Judge)

(Submitted March 20, 2018 Decided May 30, 2018)

Before FISHER and EASTERLY, *Associate Judges*, and FARRELL, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: A jury convicted appellant Alonzo D. Marshall of conspiracy, obstruction of justice, and first-degree murder with aggravating circumstances for his role in the August 30, 2008, killing of Michael Henry. Now, he challenges the trial court's denial of his most recent D.C. Code § 23-110 (2012 Repl.) motion alleging ineffective assistance of trial counsel. We affirm.

I.

We affirmed appellant's convictions on direct appeal and refer the reader to that decision for a more complete discussion of the facts underlying this case. *See Curry v. United States*, 11-CF-582, -595, -638 & -967, Mem. Op. & J. at 2–4 (D.C. May 19, 2014). Briefly, the government argued that appellant and his codefendants were members of a drug conspiracy and plotted to kill Henry because they believed he had "snitched" on them. The prosecutor acknowledged that appellant did not fire the fatal shot but contended that one of his codefendants did

and sought to hold appellant liable under *Pinkerton*[1] and aiding and abetting theories of liability.

While the direct appeal was pending, appellant filed a § 23-110 motion alleging that his counsel provided ineffective assistance by, among other things, failing to conduct an adequate investigation. The trial court denied that motion as well as appellant's "Motion to Reconsider and Request for Additional Time," which the court noted contained claims "subject to the procedural bar [against] successive motions." Appellant did not appeal.

Appellant's latest attack on his conviction relies on "newly discovered" testimony from Eric Nibblins. In an affidavit, Nibblins stated that, on the night of the murder, he and Henry encountered men in white face paint who threatened them with a firearm. Henry wanted to warn appellant of this danger, Nibblins continued, but, because he did not have a means of calling appellant, ran to find him. This narrative, appellant asserts, would have undercut the testimony of Kellie Warrick, a government witness who stated that she believed appellant called Henry, that Henry arrived shortly after the conversation ended, and that she subsequently saw one of appellant's codefendants and coconspirators shoot at Henry. In his affidavit, Nibblins stated that he shared what he knew with appellant's trial counsel but that the attorney never followed up with him. This failure, appellant argued, constituted ineffective assistance entitling him to a new trial under § 23-110. He also contended that Nibblins' testimony established his actual innocence under D.C. Code § 22-4135, the Innocence Protection Act ("IPA").[2]

After an evidentiary hearing in which Nibblins testified, Judge Motley rejected these arguments. In this appeal, appellant contests the trial court's ruling on his § 23-110 motion but does not challenge its denial of his IPA claim.

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[1] *See generally Pinkerton v. United States*, 328 U.S. 640 (1946).

[2] Appellant first raised these claims in a pro se "Motion to Reopen the Court's Judgment Denying [Defendant's] Initial § 23-110 Motion And/Or the Defendant's Second § 23-110 Motion." His appellate lawyer reasserted these contentions in a subsequently filed "Motion for New Trial."

II.

The trial court correctly determined that appellant's latest § 23-110 filing was successive: although it relied on different facts, the motion raised the same claim—ineffective assistance of counsel—as the initial one did. *See Richardson v. United States*, 8 A.3d 1245, 1250 (D.C. 2010). Consequently, the motion was procedurally barred unless appellant established *both* cause for his failure to discuss the Nibblins testimony in the initial § 23-110 filing *and* prejudice resulting from his failure to do so. *See, e.g., Bradley v. United States*, 881 A.2d 640, 645 (D.C. 2005).

The trial court held that appellant demonstrated neither cause nor prejudice, a determination that we assess for abuse of discretion. *Richardson*, 8 A.3d at 1251. In conducting this review, we need not analyze the court's holding on "cause" because we agree with its conclusion on prejudice. Appellant failed to carry his "burden of showing, not merely that the errors at his trial created *a possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage." *Washington v. United States*, 834 A.2d 899, 903 (D.C. 2003) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)).

We reach this conclusion, first, because Nibblins does not appear to be a particularly credible witness. Judge Motley determined that "[t]he statements Nibbins [*sic*] made in his affidavit are inconsistent with his testimony at the hearing" and identified three major discrepancies, as well as four minor ones. Second, even if credited, Nibblins' testimony would have added little to the defense. Appellant principally argues that Nibblins would have refuted Ms. Warrick's testimony, which created the impression that appellant lured Henry to the murder scene. Yet, as Judge Motley noted, appellant's trial counsel thoroughly cross-examined Ms. Warrick on this point, and she admitted that she did not know whom appellant called when he used her cellphone on the night of the murder. Moreover, lawyers for the other codefendants impeached Warrick's credibility by implying that she testified in exchange for immunity from prosecution for past crimes. Nibblins' testimony would have only marginally furthered these efforts to undermine Warrick's statements; its omission certainly did not prejudice appellant by "infecting his entire trial with error of constitutional dimensions."[3] *Washington*, 834 A.2d at 903 (quoting *Frady*, 456 U.S. at 170).

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[3] Appellant also argues that he would not have had to take the stand if Nibblins testified. However, he does not explain how his decision to testify

(continued...)

Turning, in the alternative, to the merits of appellant's claim, we agree with the trial court that appellant failed to show that his lawyer provided ineffective assistance.[4] Judge Motley reached this determination after concluding that appellant established neither deficient performance nor prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Once again, we affirm based on the court's analysis of the prejudice issue: as the prior discussion shows, there was not a "reasonable probability" that Nibblins' testimony would have affected the outcome of the trial. *Id.* at 694. Consequently, even if appellant did not procedurally default, he still would not have been entitled to relief on his ineffective assistance of counsel claim.

III.

For the reasons stated, the ruling of the trial court is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

(...continued)
harmed his defense. Additionally, although appellant does not emphasize it, Nibblins' affidavit mentions that men in white face paint threatened Henry on the night of the murder. To the extent this testimony supported an alternative theory of Henry's death, it added little to the statements appellant already elicited. Specifically, appellant called a witness who testified that she saw "boys" with face paint in the neighborhood around the time of the murder and another witness who stated a person with "white stuff on his face" shot at him that night.

[4] In reviewing the denial of an ineffectiveness claim, "[w]e accept the trial court's factual findings unless they lack evidentiary support" and evaluate its legal conclusion de novo. *Porter v. United States*, 37 A.3d 251, 256 (D.C. 2012).

(No. 16-CO-1248)

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