

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 17-4292

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Aug 28, 2018

DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,)
)
 v.) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
 SONTAY T. SMOTHERMAN,) THE SOUTHERN DISTRICT OF
) OHIO
 Defendant-Appellant.)
)
)

ORDER

Before: KEITH, WHITE, and BUSH, Circuit Judges.

Sontay T. Smotherman, a pro se federal prisoner, appeals a district court order denying his post-conviction motions requesting the district court to take judicial notice of an alleged violation of the Court Reporter Act, to issue a writ of mandamus directing the clerk of court for the United States District Court for the Southern District of Ohio to provide him with stamped copies of two motions, and to grant him permission to inspect the grand jury proceedings. 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, a jury convicted Smotherman of possessing with intent to distribute heroin, in violation of 21 U.S.C. § 841; possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and conspiring to possess with intent to distribute more than 100 grams of heroin, in violation of 21 U.S.C. § 846. The district court sentenced him to 120 months

of imprisonment. We affirmed. *United States v. Smotherman*, 564 F. App'x 209, 214 (6th Cir. 2014).

In July 2014, Smotherman filed a 28 U.S.C. § 2255 motion, which the district court denied. This court denied Smotherman a certificate of appealability. *Smotherman v. United States*, No. 15-3665 (6th Cir. Oct. 23, 2015) (order).

Thereafter, Smotherman filed several motions for a new trial and for other post-judgment relief, which the district court denied. We affirmed the district court's orders. *United States v. Smotherman*, No. 17-3374 (6th Cir. Dec. 4, 2017) (order); *United States v. Smotherman*, No. 16-4284 (6th Cir. Aug. 23, 2017) (order); *Smotherman v. Bishop*, No. 16-6858 (6th Cir. May 26, 2017) (order); *United States v. Smotherman*, No. 15-4331 (6th Cir. May 26, 2017) (order); *United States v. Smotherman*, No. 15-4378 (6th Cir. July 1, 2016) (order), *cert. denied*, 137 S. Ct. 587 (2016) (mem.); *United States v. Smotherman*, No. 15-3928 (6th Cir. Apr. 18, 2016) (order).

In 2017, Smotherman filed motions requesting the district court to: (1) take judicial notice that the court reporter had allegedly violated the Court Reporter Act by failing to transcribe the voir dire, opening statement, and closing argument portions of his criminal proceedings; (2) issue a writ of mandamus directing the clerk of court for the United States District Court for the Southern District of Ohio to provide Smotherman with stamped copies of two motions that he submitted for filing in June 2017, claiming that his right of access to the courts was violated because the motions were not docketed; and (3) grant him permission to inspect the grand jury proceedings to aid in the presentation of his claim that members of his race were excluded from the grand jury selection process. The district court reviewed the record and noted that some portions of the criminal proceedings were not transcribed but rejected Smotherman's conclusion that the court reporter had violated 28 U.S.C. § 753(b). The district court denied the remaining motions, concluding that Smotherman failed to provide any authority supporting the issuance of a mandamus order directing the clerk to provide him with stamped copies of court filings and that his attempt to challenge the composition of the grand jury was time-barred.

On appeal, Smotherman argues that the district court erred when it denied his motions because § 753(b)(1) requires that all proceedings in criminal cases held in open court be transcribed, he provided authority to support the issuance of a writ of mandamus in order to protect his access to the courts, and his attempt to inspect the grand jury proceedings for violations of his constitutional rights is not time-barred. Smotherman also argues that the record establishes that the district court was unaware of inaccuracies in the record because the judge did not preside over the criminal trial. Smotherman requests oral argument.

The district court did not abuse its discretion when it denied Smotherman's motion for the court to take judicial notice of the court reporter's alleged violation of the Court Reporter Act. Federal Rule of Evidence 201 governs judicial notice of adjudicative facts. "Although the rule is phrased in mandatory language, courts of appeals review a district court's refusal to take judicial notice for abuse of discretion." *Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir. 2002). The district court stated that it was denying the motion, but it reviewed the record and acknowledged that Smotherman had correctly indicated that the voir dire, opening statement, and closing argument portions of his criminal proceedings had not been transcribed. Section 753(b) of the Act requires that "[e]ach session of the court . . . shall be recorded verbatim," and § 753(b)(1) identifies "all proceedings in criminal cases had in open court" as proceedings that must be recorded. Nonetheless, the district court properly concluded that there is no requirement that every proceeding be made part of the trial transcript. A defendant represented by counsel proceeding under the Criminal Justice Act, 18 U.S.C. § 3006A, must request transcription. See 28 U.S.C. § 753(f). The record reflects that Smotherman did not request that those portions of the trial be transcribed.

We review the district court's denial of a mandamus petition for an abuse of discretion. *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394, 403 (1976). "Mandamus is a drastic remedy that should be invoked only in extraordinary cases where there is a clear and indisputable right to the relief sought." *United States v. Young*, 424 F.3d 499, 504 (6th Cir. 2005). The district court may issue a writ of mandamus "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.

"[T]o establish either jurisdiction or entitlement to the writ, a court must find that a duty is owed to the plaintiff." *Maczko v. Joyce*, 814 F.2d 308, 310 (6th Cir. 1987). Moreover, the party seeking mandamus must establish that this duty is clear and non-discretionary. *Carson v. U.S. Office of Special Counsel*, 633 F.3d 487, 491 (6th Cir. 2011). The district court did not abuse its discretion when it denied Smotherman's motion because he failed to cite any authority establishing that the district court clerk was required to provide him with stamped copies of motions that Smotherman had attempted to file long after his criminal case had ended. Although Smotherman cited authority addressing a litigant's right of access to the courts, he failed to provide any authority indicating that the clerk had a clearly established duty to provide him with stamped copies of the motions he submitted for filing.

Finally, we review the district court's order denying Smotherman's request to review the grand jury proceedings under 28 U.S.C. § 1867 for an abuse of discretion. *United States v. Miramontez*, 995 F.2d 56, 59 (5th Cir. 1993). In general, a statutory challenge to the composition of the grand or petit jury must be asserted "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered" the grounds for the challenge. 28 U.S.C. § 1867(a); *United States v. Washam*, 468 F. App'x 568, 574 (6th Cir. 2012). Smotherman failed to present a timely statutory challenge. In addition, Smotherman's constitutional challenge to the composition of the grand jury is time-barred because he did not assert the challenge prior to trial, and he has not shown cause to excuse his failure to do so. See *United States v. Ovalle*, 136 F.3d 1092, 1107 (6th Cir. 1998); *see also United States v. Boulding*, 412 F. App'x 798, 802 (6th Cir. 2011).

Accordingly, we **DENY** the request for oral argument and **AFFIRM** the district court's order.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 2:12-cr-55(3)

Judge Michael H. Watson

SONTAY T. SMOTHERMAN,

Defendant.

OPINION AND ORDER

Sontay Smotherman ("Defendant") moves the Court to take judicial notice, ECF No. 410, to issue a writ of mandamus, ECF No. 412, and to permit inspection of grand jury proceeding, ECF No. 416. For the following reasons, the Court **DENIES** all of the pending motions.

Defendant moves the Court to take judicial notice of various portions of the trial transcript and docket in this case. The common thread appears to be that Defendant would like to show the Court that not all portions of the trial record were included in the official trial transcript, including voir dire, opening statements, and closing arguments. The Court has reviewed the portions of the record pointed out by Defendant but disagrees with his conclusion that "The voir dire, opening statements, closing arguments, and jury charge were not transcribed as required and mandatory under 28 USCS 753(b)(1)." The statute cited by Defendant requires each session of the court to "be recorded verbatim . .

..” 28 U.S.C. § 753(b). There is no requirement in that statute that every part of a proceeding be made a part of the trial transcript. The trial transcript makes it clear that various portions of the proceedings in this case were not requested to be made a part of the official transcript. See, e.g., Tr. 16, ECF No. 258 (“Whereupon, the prospective jurors were sworn in by the Courtroom Deputy Clerk, and the voir dire examination of the jury followed, but was not requested to be made a part of this transcript of proceedings.”). Defendant has filed a litany of motions in this proceeding related to accessing trial transcripts, all of which have been denied. This motion is likewise DENIED. The Court will not accept any additional motions related to the trial transcript in this case.

Defendant next moves the Court to issue a writ of mandamus directing the Clerk to provide Defendant with a stamped copy of two motions. Defendant has not cited authority requiring the Clerk to provide him with stamped copies of filings. Therefore, Defendant’s request for a writ of mandamus is DENIED.

Finally, Defendant moves the Court to permit inspection of the grand jury proceedings in this case. Defendant has requested this information because he believes a constitutional violation occurred during the selection of the grand jury in this case. However, Defendant is time-barred from challenging the composition of the grand jury. *United States v. Washam*, 468 F. App’x. 568, 574 (6th Cir. 2012) (“Defendants must raise any claims under the [Jury Selection and Service Act] ‘before the voir dire examination begins.’” *Id.* (quoting 28 U.S.C.