IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-12227-E

ZAVIEN BRAND,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Zavien Brand has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's order dated March 21, 2018, denying his motion for a certificate of appealability and denying as moot his motion for leave to proceed *in forma pauperis* in the appeal of the denial of his motion to vacate sentence, 28 U.S.C. § 2255. Because Brand has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motion, his motion for reconsideration is DENIED.

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ORDER:

Zavien Brand is a federal prisoner serving a 372-month total sentence after pleading guilty to 11 counts, including multiple counts of distributing cocaine base, being a felon in possession of a firearm, and possessing a firearm in furtherance of a drug-trafficking crime. He seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP"), in order to appeal his 28 U.S.C. § 2255 motion to vacate sentence.

In order to obtain a COA, a § 2255 movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To merit a COA, a movant must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

Claim 1:

Brand argued that his counsel rendered ineffective assistance by failing to file a notice of appeal. At the evidentiary hearing held before the magistrate judge, Brand stated that his counsel told him to sign the appeal waiver in conjunction with the guilty plea because Brand would still be able to appeal. However, his trial counsel testified at the evidentiary hearing that, after meeting with Brand for over an hour and advising him of his appellate rights, Brand had declined to file an appeal.

Reasonable jurists would not debate the district court's denial of this claim. To succeed on a claim of ineffective assistance of counsel, a movant must show that (1) his counsel's performance was deficient, and (2) he was prejudiced by this deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficient-performance prong requires a movant to show that counsel acted unreasonably in light of prevailing professional norms. *Id.* at 688. Credibility determinations by the district court are entitled to great deference. *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985).

Here, the magistrate judge determined that counsel's testimony at the evidentiary hearing, that Brand had instructed him not to file an appeal, was more credible than Brand's account. The district court later adopted that finding, so that credibility determination is entitled to great deference. *Anderson*, 470 U.S. at 575. On appeal, Brand has given no reason to second-guess the district court's determination. Consequently, because reasonable jurists would not debate the district court's denial of this claim, no COA is warranted.

Claim 2:

Brand argued that the district court lacked jurisdiction to impose a 25-year mandatory-minimum sentence because the indictment failed to charge that a second or

subsequent conviction under 18 U.S.C. § 924(c) would require the district court to impose an enhanced sentence.

Reasonable jurists would not debate the district court's denial of this claim. Although *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013), holds that any fact that increases the mandatory-minimum sentence is an element of the offense that must be found beyond a reasonable doubt, a prior conviction is an exception to this beyond-a-reasonable-doubt requirement. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (involving facts that increase the applicable statutory maximum sentence); *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (establishing that a sentencing enhancement based on a prior conviction was not subject to the Sixth Amendment requirement for a jury to determine the fact beyond a reasonable doubt).

Here, when Brand pleaded guilty, the agreement cautioned him that he faced a mandatory-minimum sentence of 25 years. The district court considered Brand's two convictions under § 924(c), which occurred at separate times, although they were charged in the same indictment, to provide a sufficient prior conviction to require the 25-year mandatory-minimum sentence. This determination was not in error because Brand's sentence was enhanced based on a prior conviction, to which he pled guilty. *Alleyne*, 133 S. Ct. at 2155. Consequently, because reasonable jurists would not debate the district court's denial of this claim, no COA is warranted.

Claims 3 & 4:

Brand also argued that his counsel rendered ineffective assistance during the plea negotiations by failing to advise him that he would be receiving a 25-year mandatory-minimum sentence and by not objecting to the 25-year mandatory-minimum sentence.

Reasonable jurists would not debate the district court's denial of these claims. Counsel's performance cannot be deficient for failing to raise issues that have no merit. *Card v. Dugger*, 911 F.2d 1494, 1520 (11th Cir. 1990). A defendant's guilty plea made knowingly, voluntarily, and with the benefit of competent counsel, waives all nonjurisdictional defects in the proceedings. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). This waiver extends to claims of ineffective assistance of counsel that do not attack the voluntariness of the guilty plea. *Bradbury v. Wainwright*, 658 F.2d 1083, 1087 (5th Cir. Unit B Oct. 1981).

Here, the district court did not err by concluding that Brand's counsel did not render ineffective assistance of counsel. The sentencing court properly applied the mandatory-minimum sentence to Brand, and, based on the plea agreement he signed and acknowledged he understood, he had knowledge that, by pleading guilty, he would receive a mandatory-minimum sentence of 25 years' imprisonment. Accordingly, Brand's counsel cannot be considered to have rendered ineffective assistance for failing to raise this argument. *Card*, 911 F.2d at 1520. Moreover, because his claims do not challenge the voluntariness of his plea agreement, and because the record reflects that he knew of the mandatory-minimum prior to pleading guilty, Brand waived these arguments by signing his plea agreement. *Tollett*, 411 U.S. at 267. No COA is warranted as to either claim.

Accordingly, because reasonable jurists would not debate the district court's denial of Brand's § 2255 motion, his motion for a COA is DENIED. His IFP motion is DENIED AS MOOT.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE