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No. 17-6381

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 16, 2018
DEBORAH S. HUNT, Clerk

JABRIL JONES,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Jabril Jones, a federal prisoner proceeding pro se, appeals the district court's denial of his motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255, and applies to this court for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b). He also moves to proceed in forma pauperis ("IFP") on appeal.

According to the presentence report ("PSR"), Jones attempted to rob John Novotny while armed with a revolver. When Novotny threw two liquor bottles at Jones and ran away, Jones shot him in the back. Novotny was transported to the hospital in critical condition, and officers identified Jones as a suspect. His girlfriend reported to the police that Jones had told her that he had shot a man he had attempted to rob. Novotny identified Jones from a photo lineup.

In 2010, a jury convicted Jones of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The district court calculated Jones's total offense level as 37 based upon a determination that Jones's underlying offense was assault with intent to commit murder, *see* USSG § 2K2.1(c)(1)(A) (2010), and sentenced him to the statutory maximum of 120 months of imprisonment. This court dismissed Jones's 2016 appeal as untimely. *See United States v. Jones*, No. 16-5546 (6th Cir. June 7, 2016) (order).

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In September 2016, Jones filed a § 2255 motion to vacate. The district court construed Jones's motion as arguing that: (1) he was entitled to relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015); (2) the district court misapplied the sentencing guidelines because attempted murder was not presented to the jury at trial and "is not groupable" with his firearm offense; (3) trial counsel rendered ineffective assistance by failing to object to the "prosecuters [sic] misrepresentation of facts to the Jury and in [the PSR]"; and (4) Jones's "Fifth and Eig[hth] Amendment" rights were violated by "cruel and unusual punishment and excessive punishment."

Jones made ten additional filings. The district court construed six of Jones's filings as supplements or amendments to his § 2255 motion filed without leave, three as motions to amend his § 2255 motion, and one as a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). The government responded to Jones's initial § 2255 motion shortly after Jones had filed his first supplement or amendment.

The district court denied the petition and declined to issue a COA. It held that: (1) Jones's § 2255 motion was untimely, but the government forfeited the statute of limitations by failing to raise it in their response to Jones's motion; (2) to the extent that Jones attempted to raise new claims in his amendments, they were time-barred; (3) Jones was not entitled to relief under *Johnson* because he was not convicted as an armed career criminal; (4) the offense level for assault with intent to murder was properly cross-referenced under § 2K2.1; (5) judicial fact-finding is appropriate with respect to sentencing enhancements; (6) the sentencing guidelines were properly applied; (7) Jones failed to offer any facts supporting his claims of ineffective assistance of counsel or violations of the Fifth and Eighth Amendments; and (8) Rule 60(b) does not provide relief from judgment in a criminal case.

In his application for a COA, Jones argues that: (1) his sentence was unconstitutionally enhanced for attempted murder based on facts "neither admitted in a plea or [sic] proved to a jury beyond reasonable doubt"; (2) counsel rendered ineffective assistance because he did not object to the prosecutor's references to an "intent to kill" or "attempted murder"; (3) the cross-reference in his sentence to attempted murder was unconstitutional; and (4) his Fourth Amendment rights were violated because the federal government did not attach a criminal complaint to his arrest warrant. Because Jones does not challenge the district court's disposition

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of his *Johnson*, Fifth and Eighth Amendment, and Rule 60(b) claims, they are considered to be abandoned and are not reviewable. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002). In addition, he fails to challenge the district court's determination that his § 2255 motion and later-filed claims are untimely.

To be issued a COA, the petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Jurists of reason would not debate the district court's conclusion that Jones failed to establish that he was unconstitutionally sentenced. Jones was not convicted of assault with intent to commit murder, nor was it "grouped" with the firearm offense for which he was convicted. Instead, the district court determined, based on the facts in the PSR, that Jones used the firearm to shoot Novotny when Novotny attempted to avoid being robbed. The district court was not required to submit these facts to a jury because it did not rely on them to increase the statutory minimum, *see Alleyne v. United States*, 570 U.S. 99, 103 (2013), and Jones was not sentenced above the statutory maximum, *see Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Nor does Jones claim that he disputed the facts in the PSR during sentencing. *Cf. United States v. Shannon*, 803 F.3d 778, 788 (6th Cir. 2015).

Jurists of reason would not debate the district court's dismissal of Jones's ineffective assistance of counsel claim. Courts review ineffective-assistance claims under the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984). This requires a defendant to show (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced the defense. *Id.* at 687. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). This is a highly deferential standard of review, and to establish prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

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proceeding would have been different." *Id.* at 689, 694. The review of a state court's determination that counsel satisfied *Strickland*'s deferential standard is doubly deferential: "The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Jones claimed that counsel rendered ineffective assistance by failing to object to the prosecutor's misrepresentation of the facts. In his application for a COA, he explains that he believes that the prosecutor should have submitted evidence to the jury to show that Jones had "[a]n '[i]ntent to [k]ill' or '[a]ttempted murder.'" Jones did not present that basis to the district court, but, even if he had done so, the claim would have been without merit for the reasons already discussed.

Jones now argues, as he did in the last four pleadings that he filed in the district court, that he is being imprisoned in violation of the Fourth Amendment because the arrest warrant in the docket was not attached to a criminal complaint. As discussed, the district court properly dismissed this claim as time-barred and, in any case, it is without merit. The rules cited by Jones do not require that a warrant be physically attached to a complaint in order to be valid. *See* Fed. R. Crim. P. 4(b); Fed. R. Crim. P. 41(d)(1).

Accordingly, this court **DENIES** Jones's motion for a COA and **DENIES** as moot his IFP motion.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Blakley v Washington

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US v Booker

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APP. #5

No. 17-6381

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 21, 2018
DEBORAH S. HUNT, Clerk

JABRIL JONES,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: COLE, Chief Judge; SUHRHEINRICH and THAPAR, Circuit Judges.

Jabril Jones, a pro se federal prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APP #6

No. 17-6381

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 05, 2018
DEBORAH S. HUNT, Clerk

JABRIL JONES,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: COLE, Chief Judge; SUHRHEINRICH and THAPAR, Circuit Judges.

Jabril Jones petitions for rehearing en banc of this court's order entered on May 16, 2018, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk