

A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13765-H

DANIEL LEE WHITE,

Petitioner-Appellant,

versus

SEC'Y, DEP'T OF CORR., *et al.*,

Respondents-Appellees.

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

ORDER:

Daniel Lee White is a Florida prisoner serving a 22-year sentence after a jury convicted him of trafficking in illegal drugs. Florida's Fifth District Court of Appeal ("Fifth DCA"), *per curiam*, affirmed his conviction, and White subsequently filed *pro se* a Fla. R. Crim. P. 3.850 motion, which the state post-conviction court denied. White then filed a habeas petition, which the Fifth DCA denied. After that, he filed a second Rule 3.850 motion, which was denied by the state post-conviction court.

Next, White moved in the district court for appointment of counsel to file a 28 U.S.C. § 2254 petition, which the district court denied. He subsequently filed a *pro se* § 2254 petition, raising 15 grounds, including ineffective assistance of counsel and trial-court error. On March 13, 2017, the district court denied the petition and denied a certificate of appealability ("COA").

Almost five months later, on August 3, 2017, White moved for reconsideration, arguing that the district court erred in failing to revisit his motion to appoint counsel, submit the case to a magistrate judge for a report and recommendation, and conduct a *de novo* review of the state post-conviction court's decision. He then objected to the district court's findings as to each of his claims, reiterating the arguments made in his state post-conviction proceedings below and his § 2254 petition, namely, that he had a valid prescription for the oxycodone pills seized from his vehicle.

The district court denied White's motion for reconsideration, finding that it merely reargued his failed prescription-drug defense. White then filed an appeal as to the district court's denial of his motion for appointment of counsel, § 2254 petition, and motion for reconsideration. The district court denied leave to proceed *in forma pauperis* ("IFP") on appeal. White now moves in this Court for a COA as well as for IFP status on appeal.

As an initial matter, this appeal is timely as to only the district court's denial of White's motion for reconsideration. *See Rinaldo v. Corbett*, 256 F.3d 1276, 1278 (11th Cir. 2001) (holding that, in a civil case, the timely filing of a notice of appeal is a mandatory prerequisite to the exercise of appellate jurisdiction). White's motion for reconsideration did not toll the appeal period for the court's denials of his § 2254 petition or motion to appoint counsel, because it was filed more than 28 days after entry of judgment. *See Fed.R.App.P. 4(a)(4)(A); Fed.R.Civ.P. 59(e).*

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court reviews the denial of a motion for reconsideration for abuse of discretion. *See United States v. Simms*, 285 F.3d 1347, 1356 (11th Cir. 2004). As a general principle, the sole grounds for granting a motion for reconsideration are

“(1) an intervening change in the controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice.” *Delaware Valley Floral Group, Inc., v. Shaw Rose Nets, LLC*, 597 F.3d 1374, 1383 (11th Cir. 2010) (quotation omitted).

Here, White’s motion for reconsideration failed to identify any change in the law or new evidence; rather, he reiterated the arguments made in his state post-conviction proceedings below and his § 2254 petition. *See Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (holding that “[a] motion for reconsideration cannot be used to relitigate old matters. . .”) (quotation marks omitted). White also argued that the district court erred in three instances, the first of which was that it failed to revisit his motion to appoint counsel. However, there is no constitutional right to counsel in federal habeas proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). Rather, the court may appoint counsel to a person seeking collateral relief, who is financially eligible, only if it determines that the interests of justice so require. 18 U.S.C. § 3006A(a)(2); *Schultz v. Wainwright*, 701 F.2d 900, 901 (11th Cir. 1983). White has not shown that the interests of justice required appointment of counsel here.

Second, White argued that the court erred when it failed to submit his § 2254 petition to a magistrate judge, prior to entering a final order. However, there is no requirement that it do so. *See* 28 U.S.C. § 636(b)(1)(B) (providing that a court “may” designate a magistrate judge to submit recommendations for the disposition of applications for post-trial relief). Finally, White argued that the district court erred when it failed to conduct a *de novo* review of the state post-conviction court’s decision. That is not the correct standard of review. *See* 28 U.S.C. § 2254(d)(1), (2), (e)(1).

Thus, we find no clear error or manifest injustice in the court’s denial of White’s § 2254 petition or motion for appointment of counsel, *see Delaware Valley Floral Group, Inc.*, 597 F.3d

1374, 1383, and White's motion for a COA is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). His motion to proceed IFP is DENIED AS MOOT.

/s/ Robin S. Rosenbaum
UNITED STATES CIRCUIT JUDGE

B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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April 05, 2018

Daniel Lee White
Okaloosa CI - Inmate Legal Mail
3189 COLONEL GREG MALLOY RD
CRESTVIEW, FL 32539-6708

Appeal Number: 17-13765-H
Case Style: Daniel White v. Secretary, Department of Corr., et al
District Court Docket No: 6:15-cv-01560-RBD-DCI

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

MOT-2 Notice of Court Action

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13765-H

DANIEL LEE WHITE,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

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

Before: WILSON and ROSENBAUM, Circuit Judges.

BY THE COURT:

Daniel Lee White has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's February 5, 2018, order denying a certificate of appealability, and denying as moot his request for leave to proceed on appeal *in forma pauperis*. Upon review, White's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DANIEL LEE WHITE,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT
OF CORRECTIONS, et al.,

Case No. 6:15-cv-1560-Orl-37DAB

Respondents.

ORDER

Petitioner initiated this action by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 8). Respondents filed a response (Doc. 17), and Petitioner filed a reply. (Doc. 21). For the reasons set forth below, the petition is denied.

I. PROCEDURAL HISTORY

Petitioner was charged with trafficking in illegal drugs and conspiracy to traffic in illegal drugs. (Doc. 18-1 at 43, 87). The case proceeded to trial, at which the trial court granted Petitioner's motion for judgment of acquittal with respect to the conspiracy charge and a jury convicted Petitioner with respect to the trafficking charge. (Doc. 18-5 at 34-35). Petitioner was sentenced to twenty-two years with a three-year mandatory minimum. (Doc. 18-5 at 38, 41).

Petitioner appealed. (Doc. 18-5 at 53). His counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), along with a motion to withdraw. (Doc. 18-6 at 321, 336).

The Fifth District Court of Appeal (the "Fifth DCA") granted the motion to withdraw (Doc. 18-6 at 338), and Petitioner filed his own brief. (Doc. 18-7 at 3). The Fifth DCA affirmed the judgment of conviction *per curiam*. (Doc. 18-7 at 34). Petitioner filed a motion for rehearing *en banc* (Doc. 18-7 at 35), but the Fifth DCA denied the motion. (Doc. 18-7 at 40).

Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. (Doc. 18-7 at 47). The trial court directed the State to file a response with respect to one of the alleged grounds for relief. (Doc. 18-7 at 84). The State responded (Doc. 18-7 at 85), and the trial court denied the motion. (Doc. 18-7 at 104). Petitioner moved for a rehearing (Doc. 18-8 at 65), but the trial court denied the motion. (Doc. 18-9 at 14). Petitioner appealed. (Doc. 18-9 at 16). The Fifth DCA affirmed *per curiam*. (Doc. 18-9 at 44). Petitioner made a motion for a rehearing (Doc. 18-9 at 45), but the Fifth DCA denied the motion. (Doc. 18-9 at 52).

Petitioner filed a petition for a writ of habeas corpus with the Fifth DCA. (Doc. 18-9 at 55). The Fifth DCA denied the petition. (Doc. 18-9 at 93). Petitioner made a motion for rehearing or rehearing *en banc* (Doc. 18-9 at 94), but the Fifth DCA denied the motion. (Doc. 18-9 at 102).

Petitioner filed a second motion for post-conviction relief. (Doc. 18-10 at 2). The trial court denied the motion. (Doc. 18-10 at 42). Petitioner made a motion for a rehearing (Doc. 18-10 at 49), but the trial court denied the motion. (Doc. 18-10 at 53). Petitioner appealed (Doc. 18-10 at 54), and the Fifth DCA affirmed *per curiam*. (Doc. 18-10 at 56).

A petition for a writ of habeas corpus followed in this Court. (Doc. 8).

II. LEGAL STANDARDS

A. Habeas Relief Under the Antiterrorism Effective Death Penalty Act ("AEDPA")

AEDPA's standard for habeas relief is clear and unambiguous: relief cannot be granted with respect to a claim adjudicated on the merits in a state court unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). AEDPA thus provides two potential avenues for relief: a determination that the outcome was itself contrary to clearly established federal law or, alternatively, a determination that the outcome was infected by an unreasonable application of the law to the facts. As the Supreme Court explained:

Under the "contrary to" clause, a federal court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the United States Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000). Regardless of the avenue taken, however, a prisoner "must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

B. Ineffective Assistance of Counsel

The standard for relief based on ineffective assistance of counsel is also clear and unambiguous: a person is entitled to relief only when counsel's conduct fell below an objective standard of reasonableness and, in addition, there is a reasonable probability that the outcome would have been different if counsel had acted reasonably (*i.e.*, that the departure from objective reasonableness prejudiced the case and, by extension, the client). *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

When evaluating performance, courts apply a "strong presumption" that the representation "fell within the 'wide range' of reasonable professional assistance." *Harrington*, 562 U.S. at 104. As the Eleventh Circuit explained:

[The test for ineffective assistance] has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial. Courts also should at the start presume effectiveness and should always avoid second guessing with the benefit of hindsight. *Strickland* encourages reviewing courts to allow lawyers broad discretion to represent their clients by pursuing their own strategy. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.

White v. Singletary, 972 F.2d 1218, 1220-21 (11th Cir. 1992).

When evaluating prejudice, courts do not look for mere foot-faults that may have "some conceivable effect on the outcome of the proceeding." *Marquard v. Sec'y for Dep't of Corr.*, 429 F.3d 1278, 1305 (11th Cir. 2005) (internal quotation marks omitted). Instead, they look for serious errors that undermine confidence in the outcome. *Smith v. Wainwright*, 777 F.2d 609, 616 (11th Cir. 1985) (citing *Strickland*, 466 U.S. at 694-95). The

Eleventh Circuit previously explained that a showing of prejudice is necessary because "attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Butcher v. United States*, 368 F.3d 1290, 1293 (11th Cir. 2004).

And, when examining a particular case, courts are not obligated to evaluate performance before evaluating prejudice. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Smith*, 777 F.2d at 616. A court can, in effect, assume deficient performance but nevertheless deny a claim because any such deficiency did not prejudice the case. After all, lawyers are sometimes dealt tough hands and there will be situations in which substandard representation could not have affected the outcome given the underlying facts or governing law.

C. AEDPA's "Unreasonable Application" Standard and Ineffective Assistance of Counsel Claims

A state court's application of *Strickland* to a post-conviction claim of ineffective assistance is subject to review in a habeas proceeding. But establishing that a state court's application of *Strickland* was unreasonable for purposes of AEDPA is especially difficult. As the Supreme Court noted:

The standards created by *Strickland* and § 2254(d) are both "highly deferential" and when the two apply in tandem, review is "doubly so." The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). *When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.*

Harrington, 562 U.S. at 105 (emphasis added). More to the point:

The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under ADEPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), "an unreasonable application of federal law is different from an incorrect application of federal law." A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

Id. at 101 (citation omitted).

D. Exhaustion of State Remedies

AEDPA separately provides that a person seeking relief must exhaust all remedies available in state court before challenging the constitutionality of a conviction in federal court. 28 U.S.C. § 2254(b)(1). This "exhaustion" requirement ensures that the state will have an opportunity to consider and, if necessary, remedy an alleged violation of a state prisoner's federal rights. *Picard v. Connor*, 404 U.S. 270, 275 (1971). To exhaust a claim, "the petitioner must afford the State a full and fair opportunity to address and resolve the claim on the merits." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). The petitioner must therefore identify the federal right at stake. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (*per curiam*) ("If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution."). As the Eleventh Circuit explained:

It is not sufficient merely that the federal habeas petitioner has been through the state courts, nor is it sufficient that all the facts necessary to support the claim were before the state courts or that a somewhat similar state-law claim was made. The petitioner must present his claims to the state courts such that they are permitted the "opportunity to apply controlling legal principles to the facts bearing upon [his] constitutional claim."

Kelley v. Sec'y for Dept. of Corr., 377 F.3d 1317, 1343-44 (11th Cir. 2004) (quoting *Picard*, 404 U.S. at 277).

When a petitioner fails to exhaust state court remedies, and the time to do so has passed, he is deemed to have procedurally defaulted the claim and will be unable to pursue habeas relief unless he can demonstrate (a) cause for the default and actual prejudice as a result of the alleged violation of federal law or (b) failure to consider the claim would result in a fundamental miscarriage of justice. *Sullivan v. Sec'y for Dept. of Corr.*, 837 F.3d 1195, 1201 (11th Cir. 2016). The "cause" that excuses a procedural default must result from "some objective factor external to the defense that prevented the prisoner from raising the claim and which cannot be fairly attributable to his own conduct," *McCoy v. Newsome*, 953 F.2d 1252, 1258 (11th Cir. 1992), while the "prejudice" that flows from the default must actually and substantially disadvantage the defense "so that [the prisoner] was denied fundamental fairness." *Id.* at 1261. A fundamental miscarriage of justice occurs only when "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Wright v. Hopper*, 169 F.3d 695, 705 (11th Cir. 1999) (quoting *Schlup v. Delo*, 513 U.S. 298, 321 (1995)).

E. State Procedural Bars

A federal court must separately honor a state court's denial of post-conviction

relief based upon a state principle of procedural default. *Harmon v. Barton*, 894 F.2d 1268 (11th Cir. 1990). Rule 3.850 of the Florida Rules of Criminal Procedure contains one such principle. It provides that a state court may dismiss a second motion for post-conviction relief when the second motion contains a ground for relief that could have been included in the first motion and the court finds there is not good cause for the prior failure to raise the ground for relief.

III. ANALYSIS

A. *Ground One*

Petitioner contends the trial court improperly denied his motion for judgment of acquittal with respect to the trafficking charge. (Doc. 8 at 6). Petitioner's statement of facts, however, suggests he actually contends his counsel was ineffective in presenting the motion. Petitioner states: "Counsel inadequately moved for J.O.A. based on credibility of State witness Carla Camacho and the testing of only one pill by F.D.L.E." (Doc. 8 at 6). Petitioner clarifies this ambiguity in his reply brief, where he states this ground for relief focuses on counsel's failure to seek dismissal or judgment of acquittal based on a prescription drug defense. (Doc. 21 at 5). The state court rejected this contention when it decided Petitioner's first motion for post-conviction relief:

With the sworn evidence, the State would have been able to file a traverse disputing the facts underlying his prescription defense. The traverse would have shown that the pills were not "obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice." The filing of a traverse would have mandated denial of the motion to dismiss. Similarly, a motion for judgment of acquittal on this basis, when the facts are viewed in the light most favorable to the State, would have been denied. Thus, either of these motions would have been futile because they would have been denied.

"Counsel cannot be deemed to be ineffective for failing to raise a motion that would have been futile."

(Doc. 18-7 at 105-06) (citation omitted).

The state court's rejection of this ground for relief constitutes a reasonable application of *Strickland*. The State's case-in-chief included substantial evidence from which the jury could find that Petitioner purchased one-hundred oxycodone pills from a confidential informant during a sting operation. The evidence included the testimony of the confidential informant (Carla Camacho) and the police officers who orchestrated the sting, operated the audio and video equipment that memorialized certain of the events and/or visually surveilled Ms. Camacho and Petitioner. A motion to dismiss, or a motion for judgment of acquittal, was doomed and counsel cannot be faulted for failing to make a futile motion.¹

Ground one is therefore denied.

¹Petitioner's arguments regarding the prescription drug defense are based on a fundamental misunderstanding of the defense. Petitioner appears to believe that, so long as he possessed a prescription for oxycodone, he could purchase the drug from anyone, or sell the drug to anyone, without any fear of criminal sanction. Put differently, he appears to believe that a prescription holder can freely engage in otherwise illegal activities with respect to the drug covered by the prescription. The prescription drug defense is far narrower. It ensures that a person who purchases a controlled substance from, for example, a pharmacist pursuant to a valid prescription, and who thereafter possesses the controlled substance, cannot be prosecuted for possession or trafficking notwithstanding the breadth of the terms "purchase", "delivery" and "possession" in the relevant criminal statutes. It also ensures that a person, perhaps a parent who picks up a prescription for a child, cannot be similarly prosecuted for these crimes. *State v. Latona*, 75 So.3d 394, 395 (Fla. 5th DCA 2011), explains: "Section 893.13(6)(a) . . . permits an individual to legally possess a controlled substance when the controlled substance was obtained pursuant to a valid prescription. The prescription defense is available to the prescription holder and any individual authorized by the prescription holder to hold the medications on his or her behalf.") (citing *McCoy v. State*, 56 So.3d 37 (Fla. 1st DCA (2010)). *McCoy v. State*, in turn, explains: the prescription drug defense "is clearly available to those who have a valid prescription written directly on their behalf for the pills in their possession." 56 So.3d at 39.

B. *Ground Two*

Petitioner contends the prosecutor engaged in misconduct during closing argument because she "repeatedly commented to the jury that the prescription drug defense does not apply to purchase or delivery, only to possession" and because the closing was "replete with character attacks, improper comments, etc. that were outside the scope of rebuttal." (Doc. 8 at 8). The state court rejected this contention when deciding his direct appeal, albeit without explanation.

Petitioner has not established there was no reasonable basis for the state court to deny relief.² Nor could he because the prosecutor's statements accurately reflected the law:

If you're allowed to have that drug, that drug, those pills are prescribed by a pharmacist, doctor, it's legally allowed to be yours and you have it by legal means, it's a defense. It's a defense to possession. . . . The prescription drug defense only applies to possession. It does not apply to purchase. It does not apply to delivery because, guess what, you can't hide behind a prescription from a doctor to legitimize the fact that you're buying pills . . . from Carla Camacho. . . . Carla Camacho is not a practitioner. She's a drug dealer. . . . Carla Camacho is not a practitioner who is acting in the course of his or her professional practice. . . . But the bottom line is the only way you're allowed to get this defense is if the drugs that you're found to be in possession of are drugs that you got either lawfully from a practitioner or pursuant to a valid prescription. That doesn't apply here.

(Doc. 18-6 at 246-48).³ The state court presumably read these statements, recognized they

²When the state court's decision is not accompanied by a written explanation, the petitioner must establish that "there was no reasonable basis for the state court to deny relief." *Richter*, 562 U.S. at 98. In evaluating a petitioner's demonstration in this regard, the habeas court "must determine what arguments or theories . . . could have supported the state court's decision". *Id.* at 102.

³Petitioner argues in his reply brief that the prosecutor's statements overlooked the possibility that a controlled substance can be lawfully possessed by an agent of the prescription holder. (Doc. 21 at 16-17). The trial transcript does not support the proposition that Petitioner held Ms. Camacho's pills as her agent.

accurately reflected the law, and concluded there was not any misconduct.

Nor were there any impermissible "character attacks" or "comments" during rebuttal. The State emphasized that the jury could convict even if it disregarded Ms. Camacho's testimony altogether – thus countering Petitioner's earlier argument that she was not credible and, as such, the jury could not convict. (Doc. 18-6 at 254). The State's rebuttal was thus well within the scope of the matters raised in Petitioner's closing. And, importantly, Petitioner did not make any objection during the State's rebuttal. The state court presumably reviewed the State's rebuttal and recognized there was not any impropriety.

Ground two is therefore denied.

C. *Ground Three*

Petitioner contends his trial lawyer provided ineffective assistance because he failed to file motions to dismiss and for judgment of acquittal based on a prescription drug defense. (Doc. 8 at 9). Petitioner acknowledges this ground for relief is identical to his first ground for relief (Doc. 21 at 5), which this Court previously denied.

Ground three is therefore denied.

D. *Ground Four*

Petitioner contends the trial court abused its discretion insofar as it limited counsel's ability to argue the prescription drug defense by precluding any mention of his valid prescription. (Doc. 8 at 11). The state court rejected this contention when deciding his direct appeal, albeit without explanation.

Petitioner has not established there was no reasonable basis for the state court to

deny relief. Prior to closing, counsel informed the trial judge that he intended to argue the prescription drug defense because Petitioner's pill bottle had been admitted in evidence during the State's case-in-chief. (Doc. 18-6 at 172). The State argued there was no foundation from which to argue the defense because there was no evidence that Petitioner possessed a prescription for oxycodone or that the label on the bottle was authentic. (Doc. 18-6 at 183-84). The trial court responded:

I think it's a valid prescription. I don't think there's any doubt about it, but there's no testimony that there are any of his pills in there, all the pills that were recovered were the only pills that were from . . . Carla Camacho. . . . I don't think there's a prohibition about saying, yes, this was a prescription bottle. That's all it was. Sort of akin to that. But I don't think you can say much more than that.

(Doc. 18-6 at 186). The trial court observed that counsel could have questioned the pharmacist called by the State during its case-in-chief (who, apparently, was the same pharmacist who filled Petitioner's prescription), but then explained:

There's a reason why you didn't do that and we all understand what the reason is, okay. So you would open the door up for other matters. . . . So now you're back to just it is - it's just a pill bottle that has a valid prescription, but that's all that it is. . . . I don't think you can go much further than that.

(Doc. 18-6 at 186-87). The state court presumably read this portion of the trial transcript and recognized the trial court properly limited counsel's argument to the evidentiary record.

Ground four is therefore denied.

E. *Ground Five*

Petitioner contends his trial lawyer provided ineffective assistance because he

failed adequately to investigate and advance a prescription drug defense and failed to file motions to dismiss and for judgment of acquittal based on that defense. (Doc. 8 at 13).

Petitioner acknowledges this ground for relief is identical to his first ground for relief (Doc. 21 at 5), which this Court previously denied.⁴

Ground five is therefore denied.

F. *Ground Six*

Petitioner contends his trial lawyer provided ineffective assistance because he failed to investigate an entrapment defense and failed to make a motions to dismiss or for judgment of acquittal based on this defense. (Doc. 8 at 14). The state court rejected this contention when deciding Petitioner's first motion for post-conviction relief, reasoning:

The Defendant agreed with the decision not to proceed with that theory of defense. He cannot now complain that he really did want to proceed under that defense. This is the type of hindsight analysis precluded by *Strickland*. Moreover, there was evidence that he had arranged to purchase the pills prior to Ms. Camacho being contacted by law enforcement to become a confidential informant. In a recorded telephone call, the Defendant did not have to be "convinced" to participate in the transaction. This evidence, taken in the light most favorable to the State, would preclude pre-trial dismissal or the subsequent entry of a judgment of acquittal because it refutes the Defendant's claim that he was not predisposed to commit the crime.

(Doc. 18-7 at 106).

The state court's rejection of this ground for relief constitutes a reasonable application of *Strickland* for at least three reasons.

⁴Petitioner mentions that counsel provided ineffective assistance by failing to investigate the defense, something he does not mention in the first or third grounds for relief. The trial transcript makes clear that counsel was aware of the defense and submitted proposed language regarding the defense that was included in two of the jury instructions.

First, the trial transcript demonstrates Petitioner's willingness to purchase oxycodone pills illegally from Ms. Camacho prior to any police involvement. Ms. Camacho testified that, prior to speaking with police and becoming a confidential informant, she spoke with Petitioner on the telephone. During the conversation, Petitioner agreed to provide Ms. Camacho with the money to purchase oxycodone pills and, in exchange, Ms. Camacho agreed to sell him some of the pills. (Doc. 18-5 at 125-28). Ms. Camacho then went to her doctor's office to pick up the prescription, where she was met by two police officers who informed her that she was under investigation for "doctor shopping" (the practice of seeing multiple physicians for the same condition for purposes of obtaining multiple prescriptions for controlled substances). (Doc. 18-5 at 128-29). Ms. Camacho informed the police officers of her earlier conversation with Petitioner and they asked if she would assist them with their investigation of him. (Doc. 18-5 at 133).⁵ Ms. Camacho agreed (Doc. 18-5 at 133), and the sting operation followed. Petitioner was predisposed to purchase drugs illegally and, as such, cannot claim entrapment. *See F.S.A. § 777.201* (entrapment defense cannot be raised on one who is ready to commit the crime).

Second, the trial transcript reflects counsel's strategic decision to not present this defense. Counsel stated: "I don't think considering what the potential could be to opening any doors as far as arguing [entrapment], I think I'll just not argue that. I think that would be the wise decision." (Doc. 18-6 at 176). Counsel's decision to avoid the defense, and thereby prevent the State from producing evidence of other drug-related activities to

⁵Petitioner appears to have been under investigation by police for approximately seven months for selling marijuana, prescription narcotics and possibly heroin from his home. (Doc. 18-1 at 23-31).

rebut the defense, was entirely reasonable and well within the range of decisions protected by *Strickland* from Monday-morning quarterbacking.

Third, Petitioner could not properly invoke an entrapment defense because he never admitted he committed a crime. Instead, he maintained the pills in the car were his pills. (Doc. 18-6 at 23). Petitioner's denial of the underlying criminal activities precluded him from invoking an entrapment defense. *See Wilson v. State*, 577 So.2d 1300, 1300 (Fla. 1991) ("Florida courts have consistently applied the rule that one who denies committing the act that constitutes the offense cannot claim entrapment.").

Ground six is therefore denied.

G. *Ground Seven*

Petitioner contends his trial lawyer provided ineffective assistance because he failed to make a motion to suppress the one-hundred oxycodone pills seized at the time of his arrest and held thereafter without a proper chain of custody. (Doc. 8 at 16). The state court rejected this contention when deciding Petitioner's first motion for post-conviction relief, reasoning:

[T]he officers developed probable cause to believe that the Defendant had committed the crime of attempted trafficking in oxycodone through audio and video surveillance. Based upon these observations, the traffic stop of the vehicle was proper. Once the vehicle was stopped, the search of the passenger compartment of the vehicle was valid. Furthermore, the Defendant fails to offer any reasonable interpretation of the evidence that would indicate a flawed chain of custody or any probability of tampering with the evidence. Therefore, suppression would not have been granted had counsel sought such relief. "Counsel cannot be deemed to be ineffective for failing to raise a motion that would have been futile."

(Doc. 18-7 at 106).

The state court's rejection of this ground for relief constitutes a reasonable application of *Strickland*. Petitioner agreed to provide Ms. Camacho with the money to purchase the oxycodone pills. In exchange, Ms. Camacho agreed to sell some of the pills to Petitioner. The two met at a local pharmacy, entered together, exited together and sat in Petitioner's car for a few minutes - with police audiotaping and videotaping certain of their words and actions and surveilling them from positions inside and outside the pharmacy. Petitioner drove away, at which point police stopped the car and arrested Petitioner. Police then searched the car and retrieved one hundred oxycodone pills. Against this factual backdrop, the police had probable cause to stop and search Petitioner's car.⁶ Counsel cannot be faulted for failing to make a motion that could not succeed.

Moreover, Petitioner's chain of custody contention is belied by the trial record. Investigator Matthew Scovel testified he searched Petitioner's car; found a bottle of pills; counted them at the scene; recounted them at the Winter Garden Police Department; and then placed the bottle and pills in evidence. (Doc. 18-6 at 51-54). Christine May, a chemist with the Daytona Beach Crime Laboratory, testified that she was provided the pills for testing and they were in her custody from receipt until trial. (Doc. 18-6 at 142-143).

⁶This case is similar to *State v. Gillum*, 428 So.2d 755 (Fla. 2d DCA 1983), where the court found probable cause to stop and search an automobile because police overheard a telephone conversation setting the time and place for illegal drug transaction between defendant and a pharmacist; saw defendant drive to the predetermined location and turn into an alley; saw the pharmacist walk into the alley with a little white bag; and then saw the pharmacist return from the alley without the bag. *See generally State v. Hankerson*, 65 So.3d 502, 506 (Fla. 2011) ("Law enforcement officers have probable cause to conduct a search where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.'") (quoting *State v. Betz*, 815 So.2d 627, 633 (Fla. 2002)).

Counsel cannot be faulted for failing to raise this issue either.

Ground seven is therefore denied.

H. *Ground Eight*

Petitioner contends trial counsel provided ineffective assistance because he failed to object to the State's use of a video during closing. (Doc. 8 at 18). The state court rejected this contention when deciding Petitioner's first motion for post-conviction relief, explaining:

The prosecutor made a video compilation of the evidence entered during the trial. While the video itself was not admitted into evidence, there is no allegation that the video was not an accurate or reasonable reproduction of the items actually in evidence. It was, therefore, properly used as a demonstrative exhibit. No objection would have been sustained. "Counsel cannot be deemed to be ineffective for failing to raise a motion that would have been futile."

(Doc. 18-7 at 107).

The state court's rejection of this ground for relief constitutes a reasonable application of *Strickland*. The trial transcript reflects that counsel objected to the State's use of the video on the ground of improper rebuttal; that the State argued the video, which contained portions of the audio and video tapes previously admitted in evidence, rebutted counsel's argument that the jury could not believe Ms. Camacho and therefore could not convict; that the trial court overruled the objection and allowed the State to use the video for demonstrative purposes; and that the trial court refused to allow the videotape to be taken to the jury room for use during deliberations. (Doc. 18-6 at 211-12, 263-64). Counsel cannot be criticized for failing to convince the trial court to exercise its discretion differently.

Ground eight is therefore denied.

I. Ground Nine

Petitioner contends trial counsel provided ineffective assistance because he failed to propose a jury instruction describing the prescription drug defense and because he did not object to the trial court's limitation on his ability to argue this defense. (Doc. 8 at 19). The trial court rejected this contention when deciding Petitioner's first motion for post-conviction relief, stating:

[T]here was no standard instruction on the prescription defense, so an instruction mirroring the statutory language of Fla. Stat. § 893.13(6)(a) was given. The Defendant does not state what supplemental or alternative instruction should have been requested. Moreover, he was not proceeding under the prescription drug defense; he was proceeding with the defense that the State did not prove its case. At the conclusion of the discussion regarding the prescription defense, the Defendant specifically agreed with counsel's decision not to admit further evidence on his prescription or to proceed on the prescription defense. Counsel instead argued that Camacho was not credible, in accordance with the stated trial strategy. Any limitation on the prescription defense by the Court did not affect the argument. Since the prescription defense was not his theory of defense, he cannot demonstrate that any potential errors in limiting the argument contributed to the verdict.

(Doc. 18-7 at 107-08).

The state court's rejection of this ground for relief constitutes a reasonable application of *Strickland*. Counsel proposed language regarding this defense (Doc. 18-6 at 178-79), which, after discussion with the State, was included in the instructions regarding possession and trafficking. (Doc. 18-6 at 180-81). Counsel acknowledged the tactical difficulties of pressing a prescription drug defense without opening the door to other, potentially adverse evidence:

I'll be candid with the Court. I was hamstrung - the defense I was going to be able to raise as far as the prescription defense was going to be the bottle. If I went down any other path, I was going to totally destroy this case for my client. . . . But my fear was that once I started asking him about prescriptions then there might have been a - there could have been a history of my client filling prescriptions and being around other people filling prescriptions.

(Doc. 18-6 at 189-190). The trial court limited counsel to arguing from the evidence and counsel, in turn, argued only from the evidence. Counsel acted consistently with an objective standard for reasonableness.

Ground nine is therefore denied.

J. *Ground Ten*

Petitioner contends appellate counsel provided ineffective assistance because she failed to challenge the trial court's refusal to instruct the jury on the prescription drug defense. (Doc. 8 at 21). The state court rejected this contention when deciding Petitioner's application for habeas relief, albeit without explanation. (Doc. 18-9 at 93).

Petitioner has not established there was no reasonable basis for the state court to deny relief. The state court presumably reviewed the trial transcript and realized the trial court actually instructed the jury on this defense. Instruction 25.11, titled "Trafficking in Illegal Drugs", and Instruction 25.7, titled "Possession of a Controlled Substance," each included the following language:

It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice.

(Doc. 18-5 at 21, 23). The language in these instructions was taken directly from the statute

establishing the defense. The state court could have reasonably concluded that appellate counsel could not credibly make any argument about the instruction because it accurately described the defense.

Ground ten is therefore denied.

K. *Ground Eleven*

Petitioner contends appellate counsel provided ineffective assistance because she failed to raise the trial court's abuse of discretion in allowing the State to use a video during closing argument that contained (a) portions of the audio and video tapes from the sting operation and (b) Petitioner's subsequent police interview. (Doc. 8 at 23). The state court rejected this contention when deciding Petitioner's application for habeas relief, albeit without explanation. (Doc. 18-9 at 93).

Petitioner has not established there was no reasonable basis for the state court to deny relief. As explained previously, trial counsel objected to the State's use of the video on the ground of improper rebuttal; the State responded that the video rebutted counsel's closing argument that Ms. Camacho could not be believed and therefore the jury could not convict; the trial court overruled the objection and allowed the State to use the video for demonstrative purposes; and the trial court refused to allow the videotape to be taken to the jury room for use during deliberations. (Doc. 18-6 at 211-12, 263-64). The trial court properly exercise its discretion and appellate counsel cannot be faulted for failing to raise the issue on appeal.

Ground eleven is therefore denied.

L. Ground Twelve

Petitioner contends trial counsel provided ineffective assistance by failing to object to the State's use of Ms. Camacho's alleged false testimony. (Doc. 8 at 24). The state court rejected this contention when deciding Petitioner's second motion for post-conviction relief, noting:

Ms. Camacho's credibility issues were clearly known at the time of trial and at the time of filing of the initial motion. In fact, this Court referenced her general lack of credibility in its order denying the previous motion. The Defendant is not alleging newly-discovered impeachment evidence that could not have been discovered before the trial or the filing of his original 3.850 motion. This specific claim of her untruthfulness, therefore, should have been raised in his initial motion . . . and they cannot be raised again in this successive motion.

(Doc. 18-10 at 42). The state court denied relief based on Rule 3.850(h)(2), which prohibits successive motions for post-conviction relief absent good cause. This Court must honor the state court's determination of procedural default under state law given that Petitioner has not established good cause for his failure to raise the issue timely.

Ground twelve is therefore denied.

M. Grounds Thirteen, Fourteen and Fifteen

Petitioner's reply brief identifies three new grounds for relief: (a) F.S.A. § 893.01 is unconstitutional, (b) the charging instrument was defective and (c) the sentence was disproportionate. (Doc. 21 at 25-32). Petitioner did not present these issues to the state court in his direct appeal from the judgment of conviction (Doc. 18-7 at 3), in his petition for a writ of habeas corpus (Doc. 18-9 at 55), or in either of his motions for post-conviction relief (Docs. 18-7 at 47, 18-10 at 2). Petitioner failed to exhaust his state court remedies

with respect to these additional grounds for relief and is therefore precluded from raising them in this Court.⁷

Grounds thirteen, fourteen and fifteen are therefore denied.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for certificate of appealability only when a petitioner makes a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To make such a showing, “the petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Lamarca v. Sec’y Dep’t of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). When a district court dismisses a federal habeas petition on procedural grounds without reaching the underlying constitutional claim, a certificate of appealability should issue only when a petitioner shows “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.*; *Lamarca*, 568 F.3d at 934. However, a prisoner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). Petitioner has not demonstrated that reasonable jurists would find this Court’s assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court’s procedural rulings debatable. Petition

⁷Petitioner admits in his reply brief that he did not raise these issues at the state level (Doc. 21 at 27, 29, 31-32) and his filing does not establish either (a) cause for the default and actual prejudice as a result of an alleged violation of federal law or (b) failure to consider the claim would result in a fundamental miscarriage of justice.

has failed to make a substantial showing of the denial of a constitutional right. Thus, this Court will deny Petitioner a certificate of appealability.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

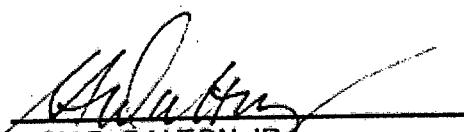
1. The Petition for Writ of Habeas Corpus (Doc. 8) is **DENIED**, and this case is **DISMISSED WITH PREJUDICE**. The Clerk of the Court shall enter judgment accordingly.

2. Petitioner is **DENIED** a Certificate of Appealability.

3. The Clerk of the Court is directed to close this case.

DONE AND ORDERED in Orlando, Florida, this 13th day of March, 2017.




ROY B. DALTON JR.
United States District Judge

Copies to:
OrLP-5 3/13
Daniel Lee White
Counsel of Record

JD

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DANIEL LEE WHITE,

Petitioner,

v.

Case No. 6:15-cv-1560-Orl-37DCI

SECRETARY, FLORIDA DEPARTMENT
OF CORRECTIONS, et al.,

Respondents.

ORDER

This matter is before the Court on Petitioner's Motion for Reconsideration/Rehearing. (Doc. 25.) Petitioner seeks reconsideration of this Court's earlier order denying his petition for a writ of habeas corpus. (Doc. 23.) As set forth more fully below, the motion is denied.

A motion for reconsideration "must demonstrate why the court should reconsider its prior decision and 'set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.'" *Florida Coll. of Osteopathic Med., Inc. v. Dean Witter Reynolds, Inc.*, 12 F. Supp. 2d 1306, 1308 (M.D. Fla. 1998) (quoting *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294, 295 (M.D. Fla. 1993)). As such, a motion for reconsideration "should raise new issues, not merely readdress issues previously litigated." *Id.* For this reason, courts have recognized three grounds justifying reconsideration: "(1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct

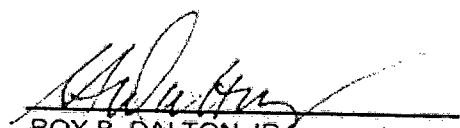
clear error or manifest injustice." *Id.*

Petitioner's motion rehashes his failed prescription drug defense. Petitioner contended at trial – and argues throughout the motion – that the oxycodone pills recovered from his vehicle in connection with a sting operation were actually his pills; that he possessed a valid prescription for them; and that he therefore did not commit any crime. The State's case-in-chief, however, included substantial evidence from which the jury could find to the contrary. The State's evidence included the testimony of the confidential informant and the police officers who orchestrated the sting, operated the audio and video equipment that memorialized certain of the events and/or visually surveilled the events. The State's evidence established that Petitioner agreed to provide the informant with the money to purchase the drugs in exchange for the informant's agreement to sell some of the drugs to him; that the two met at a local pharmacy, entered together, exited together, and sat in Petitioner's car for a few minutes; that Petitioner drove away; and that police then stopped the car, searched the car, and retrieved the drugs. Petitioner's motion does not provide any basis to believe the outcome at trial was incorrect; that the outcome was infected by constitutional error; or that the denial of his petition for a writ of habeas corpus reflected clear error or manifest injustice.

Accordingly, it is hereby ORDERED that Petitioner's Motion for Reconsideration/Rehearing (Doc. 25) is DENIED.

DONE and ORDERED in Orlando, Florida on August 8th 2017.




ROY B. DALTON JR.
United States District Judge

Copies to:
OrLP-5 8/8
Daniel Lee White

**Additional material
from this filing is
available in the
Clerk's Office.**