

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1384

Larry Allison

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:16-cv-03477-MDH)

JUDGMENT

Before BENTON, KELLY and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

The motions to proceed in forma pauperis and for remand for an evidentiary hearing in district court are denied as moot.

July 17, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

"Appendix A"

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

LARRY ALLISON,)
Movant,)
vs.) Case No. 16-3477-CV-S-MDH-P
UNITED STATES OF AMERICA,) (Crim. No. 14-03013-CR-S-MDH)
Respondent.)

ORDER DENYING RELIEF PURSUANT TO 28 U.S.C. § 2255

Movant pled guilty to sexually exploiting a child in violation of 18 U.S.C. § 2251 (a) and (e), and the Court sentenced him to 204 months' imprisonment. Crim. Doc. 32 (judgment).¹ Movant appealed, and the Court of Appeals affirmed this Court's judgment. *United States v. Allison*, 814 F.3d 952 (8th Cir. 2016). Movant now seeks to vacate his sentence pursuant to 28 U.S.C. § 2255. The Court must grant relief if "the sentence was imposed in violation of the Constitution or laws of the United States." § 2255(a).

In his original filing, Movant enumerated eight grounds for relief:

1. There was no constitutionally mandated oral guilty plea given.
2. The Court never addressed the defendant personally as to his understanding of the charge.
3. The factual basis by the government (the elements of the crime) never substantiated by the defendant nor proven by the government.
4. The finding by the Court that a picture is lascivious is speculation and erroneous.
5. Petitioner was never told of applicable forfeiture.

¹ "Crim. Doc." designates documents filed in Movant's criminal case (14-03013-CR-S-MDH), and "Doc." designates documents filed in this civil case.

6. Ineffective assistance before plea, at plea, at sentencing, and on appeal for not questioning the Rule 11 hearing and the lasciviousness of the picture and sentencing objections.

7. Procedural errors at sentencing by the court and government.

8. Judicial coercion, compelling the petitioner to admit something he did not know, the lasciviousness of a picture.

Doc. 1, pp. 4, 26-27 (motion). In a subsequent filing, Movant added the claim that counsel for Respondent engaged in prosecutorial misconduct by not fully addressing Movant's claims for § 2255 relief. Doc. 15, p. 2 (motion).

"With rare exceptions, § 2255 may not be used to relitigate matters decided on direct appeal [or to litigate matters that could have been presented on direct appeal]." *Sun Bear v. United States*, 644 F.3d 700, 702 (8th Cir. 2011) (citation and footnote omitted). Movant should have presented original grounds 1-5, 7, and 8 on direct appeal. *See Bass v. United States*, 739 F.2d 405, 406 (8th Cir. 1994) ("When a guilty plea is entered by the movant, the focus of the collateral attack [§ 2255 proceeding] must remain limited to the nature of counsel's advice and the voluntariness of the guilty plea.") (citation omitted).

In order for the Court to consider grounds 1-5, 7, and 8, Movant must demonstrate cause for and prejudice from his failure to present the claims on direct appeal (procedural default), or show that he is actually innocent of the crime to which he pled guilty. *Sun Bear*, 644 F.3d at 702, n.3 (citation omitted); *Bousley v. United States*, 523 U.S. 614, 622-24 (1998). Movant has failed to demonstrate cause for and prejudice from his procedural default, *see Doc. 14 (reply)*, and he has failed to show that he is actually innocent of the crime for which he was convicted, *see id; Bousley*, 523 U.S. at 623 ("'actual innocence' means factual innocence, not mere legal insufficiency"). The Court finds that further review of defaulted grounds 1-5, 7, and 8 is not warranted.

In ground 6, Movant claims that he suffered “[i]neffective assistance before plea, at plea, at sentencing, and on appeal for not questioning the Rule 11 [plea] hearing and the lasciviousness of the picture and sentencing objections.” Doc. 1, p. 27.² In order to prevail on these claims, Movant must show that the performance of counsel was both constitutionally deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (*Strickland* standard applies to the performance of plea counsel). Additionally, Movant has the burden of proving his claims. *Kress v. United States*, 411 F.2d 16, 20 (8th Cir. 1969).

As for the performance of plea counsel, having reviewed the transcript of the plea hearing, during which Movant testified that he was satisfied with counsel’s assistance, Crim. Doc. 35, p. 5, the Court finds no deficiency under the *Strickland/Hill* standard. The same is true regarding the performance of counsel at sentencing. See Crim. Doc. 36, pp. 7-10, 15-16 (transcript of sentencing hearing at which counsel zealously argued for a lower sentence). As for the performance of appellate counsel, similarly, the Court discerns no constitutional violation. See *Evitts v. Lucey*, 469 U.S. 387, 395-96 (1985) (*Strickland* standard applies to first appeal as of right); *Nelson v. United States*, 97 F. Supp. 3d 1131, 1162 (W.D. Mo. 2015) (“Ineffective assistance claims cannot be based on counsel’s alleged failure to raise a meritless argument.”) (citation omitted). Movant has failed to show that he suffered ineffective assistance of counsel.

Regarding Movant’s supplemental ground that counsel for Respondent engaged in prosecutorial misconduct by not fully addressing the claims for § 2255 relief, the ground is not cognizable in this case. See § 2255(a) (relief may be granted on a claim that “the sentence was imposed in violation of the Constitution or laws of the United States”).

²Movant did not enumerate other complaints about the performance of counsel; instead, he included them throughout a 38-page narrative. Doc. 1, pp. 12-50 (motion).

The Court has considered Movant's ancillary claims (particularly Movant's claim that the transcript of the plea hearing is "extremely falsified," Doc. 1, p. 12) and finds that none has merit. For the reasons explained above, Movant's motion for relief pursuant to 28 U.S.C. § 2255 is denied, and this case is dismissed. Finally, Court declines to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2) (certificate of appealability may be issued "only if [Movant] has made a substantial showing of the denial of a constitutional right"). The Clerk of the Court shall enter judgment accordingly.

So ORDERED.

/s/ Douglas Harpool
DOUGLAS HARPOOL
UNITED STATES DISTRICT JUDGE

Dated: January 16, 2018.

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United States of America

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ORDER

The petition for rehearing by the panel is denied.

September 17, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

"Appendix C"

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