

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APR 6 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 17-17338

Plaintiff-Appellee,

D.C. Nos. 3:17-cv-00006-HDM
3:13-cr-00053-HDM

v.

District of Nevada,
Reno

LESTER ROGER DECKER,

ORDER

Defendant-Appellant.

Before: CLIFTON and CHRISTEN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 2) is denied because appellant has not shown that “jurists of reason would find it debatable whether the [section 2255 motion] 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.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

1 2 3 4 5 6 7 8 9 10

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

15 UNITED STATES OF AMERICA,) 3:13-cr-00053-HDM-WGC
16 Plaintiff,) 3:17-cv-00006-HDM
17 vs.) ORDER
18 LESTER ROGER DECKER,)
19 Defendant.)
20

Defendant Lester Roger Decker ("Decker") has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (ECF No. 163). The government has responded (ECF No. 167), and Decker has replied (ECF No. 173). On September 5, 2017, pursuant to court order, the government submitted the affidavits and declarations of Decker's prior attorneys Julie Cavanaugh-Bill, John Neil Stephenson, and Karena K. Dunn. (ECF No. 175). Decker has responded (ECF No. 177).

1 On April 15, 2013, a criminal complaint was filed alleging
2 that Decker had violated 18 U.S.C. §§ 2241(a), 1151 and 1153 by
3 using force to engage in a sexual act with an unwilling victim.
4 (ECF No. 1). Decker made his initial appearance with retained
5 counsel John Neil Stephenson the following day. (ECF No. 2). At
6 the time, Stephenson was employed by Cavanaugh-Bill Law Offices
7 with Julie Cavanaugh-Bill, who also appeared on Decker's behalf.
8 (See ECF No. 7). On May 1, 2013, the grand jury returned an
9 indictment charging Decker with engaging in and attempting to
10 engage in aggravated sexual abuse in violation of 18 U.S.C. §§
11 2241(a), 1151 and 1153. (ECF No. 13).

12 On June 7, 2013, the government offered Decker a plea
13 agreement that would have allowed Decker to plead guilty to abusive
14 sexual contact in violation of 18 U.S.C. § 2244(a). (ECF No. 175-1
15 (Cavanaugh-Bill Aff. Ex. A); ECF No. 175-2 (Stephenson Decl. ¶ 4 &
16 Ex. 1)). Stephenson emailed the proposed agreement to Decker's
17 wife, describing it as a "very, very good plea bargain deal" and
18 thereafter met with Decker to discuss it. (ECF No. 175-2
19 (Stephenson Decl. ¶ 5)). Decker rejected the plea. (ECF No. 177).

20 In July 2013, Stephenson left Cavanaugh-Bill's law firm and
21 was removed from the case. (ECF No. 30; ECF No. 175-2 (Stephenson
22 Decl. ¶ 7)). A few days later, attorney Martin Wiener entered an
23 appearance on Decker's behalf as co-counsel with Cavanaugh-Bill.
24 (ECF No. 31). Sometime later, Cavanaugh-Bill and Wiener presented
25 Decker with a plea offer substantially similar to the one he had
26 already rejected. (ECF No. 177). In mid-August 2013, Decker
27 decided to accept the offer, and a change of plea hearing was
28 scheduled for September 25, 2013. (ECF No. 39; ECF No. 175-1

1 (Cavanaugh-Bill Aff. ¶ 6)). Shortly before the hearing, however,
2 Decker decided he did not want to plead and told Cavanaugh-Bill and
3 Wiener that he no longer wanted them representing him and that he
4 would be retaining Stephenson as counsel. (ECF No. 175-1
5 (Cavanaugh-Bill Aff. ¶ 6)). Cavanaugh-Bill and Wiener filed
6 motions to withdraw, which the court approved, and on September 19,
7 2013, Stephenson re-appeared on Decker's behalf. (ECF Nos. 43, 48,
8 51, 52 & 55). On September 25, 2013, Karena K. Dunn also entered
9 an appearance on Decker's behalf. (ECF No. 57). Pursuant to
10 defense counsel's request, trial was continued to December 16,
11 2013. (ECF Nos. 55 & 58).

12 On November 18, 2013, Decker filed a motion to suppress
13 statements he made to agents William Coochyouma and David Elkington
14 on April 16, 2013, allegedly in violation of *Miranda*. (ECF No.
15 62). Specifically, Decker admitted to striking and engaging in
16 sexual contact with the victim. (ECF No. 123 (Tr. Evid. Hr'g 30-
17 31); ECF No. 68-1). At an evidentiary hearing on November 26,
18 2013, Decker testified that before he made these admissions the
19 agents had told him his statements would be "off the record." (ECF
20 No. 123 (Tr. Evid. Hr'g 19)). Although the agents denied telling
21 Decker his statements would be "off the record," Elkington admitted
22 that after Decker invoked his right to an attorney, Elkington
23 asked: "Before we go, do you have anything you want to talk about?"
24 (*Id.* at 8; ECF No. 97 at 11, 17-18)). Decker's incriminatory
25 statements then followed. Finding Elkington's question the
26 functional equivalent of interrogation, the court granted Decker's
27 motion and precluded the government's use of Decker's statements
28 during its case in chief. (ECF No. 96). The court noted, however,

1 that it was not ruling as to whether the statements could come in
2 for other purposes during trial. (ECF No. 151 (Trial Tr. 2-6)).

3 On December 11, 2013, the government submitted proposed jury
4 instructions, which included separate instructions for aggravated
5 sexual abuse and attempted aggravated sexual abuse. (ECF No. 88).

6 Trial commenced on December 16, 2013. On December 17, 2013,
7 the court discussed with counsel, in Decker's presence, how to
8 instruct the jury with respect to the attempt charge and what type
9 of verdict forms to use. (ECF No. 152 (Trial Tr. 354-58)). The
10 next morning, counsel advised the court that Decker did not wish to
11 testify, and the court canvassed Decker about that decision. (ECF
12 No. 153 (Trial Tr. 432-34)). Decker also filed a motion for
13 judgment of acquittal on the attempt charge, arguing that the
14 evidence was insufficient to support such a conviction. (See ECF
15 No. 104). The court denied the motion before instructing the jury.
16 (See ECF No. 105). On December 19, 2013, the jury found Decker
17 guilty of attempted aggravated sexual abuse but not guilty of
18 aggravated sexual abuse. (See ECF Nos. 114-17).

19 Following trial, counsel filed a second motion for acquittal
20 on the attempt conviction, which the court denied. (ECF Nos. 119 &
21 122). In a motion for reconsideration of the court's order,
22 counsel represented that they were not reasonably on notice of the
23 attempt charge before trial. (See ECF No. 130 at 2-3). In fact,
24 counsel asserted in the motion that it was not clear Decker "would
25 be prosecuted on the attempt charge until the very end of trial."
26 (*Id.* at 7).

27 Prior to sentencing, the government moved for a two-level
28 enhancement for obstruction of justice, arguing that Decker lied at

1 the November 26, 2013, evidentiary hearing when, among other
2 things, he testified that the agents told him his statements would
3 be "off the record." (ECF No. 125). Defense counsel opposed the
4 government's motion, arguing that the court had not found Decker
5 had perjured himself. (ECF No. 126). At sentencing on March 19,
6 2014, the court found that Decker testified falsely when he said
7 that the agents told him the conversation would be "off the record"
8 and concluded the two-level obstruction enhancement should
9 therefore apply. (ECF No. 150 (Sent. Tr. 27-32)). The court
10 accordingly sentenced Decker to a period of 190 months. Judgment
11 of conviction was entered on March 21, 2014. (ECF No. 144).

12 Decker appealed the conviction, and the Ninth Circuit
13 affirmed. (ECF Nos. 146 & 157). Decker then filed a petition for
14 writ of certiorari, which the Supreme Court denied on January 11,
15 2016. (ECF Nos. 161 & 162). On January 3, 2017, Decker filed the
16 instant verified petition to vacate, set aside, or correct sentence
17 pursuant to 28 U.S.C. § 2255. (ECF Nos. 163 & 164).

18 Pursuant to § 2255, a federal inmate may move to vacate, set
19 aside, or correct his sentence if: (1) the sentence was imposed in
20 violation of the Constitution or laws of the United States; (2) the
21 court was without jurisdiction to impose the sentence; (3) the
22 sentence was in excess of the maximum authorized by law; or (4) the
23 sentence is otherwise subject to collateral attack. *Id.* § 2255.
24 Decker advances six grounds for relief in his petition, all of
25 which allege ineffective assistance of counsel.

26 Ineffective assistance of counsel is a cognizable claim under
27 § 2255. *Baumann v. United States*, 692 F.2d 565, 581 (9th Cir.
28 1982). In order to prevail on a such a claim, the defendant must

1 meet a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687
2 (1984). First, the defendant must show that his counsel's
3 performance fell below an objective standard of reasonableness.
4 *Id.* at 687-88. "Review of counsel's performance is highly
5 deferential and there is a strong presumption that counsel's
6 conduct fell within the wide range of reasonable representation."
7 *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253 (9th Cir.
8 1986). Second, the defendant must show that the deficient
9 performance prejudiced his defense. *Strickland*, 466 U.S. at 687.
10 This requires showing that "there is a reasonable probability that,
11 but for counsel's unprofessional errors, the result of the
12 proceeding would have been different. A reasonable probability is
13 a probability sufficient to undermine confidence in the outcome."
14 *Id.* at 694.

15 **I. Ground One**

16 In his first ground for relief, Decker asserts that Cavanaugh-
17 Bill had represented one of the government's trial witnesses -
18 Cecilia Baldazo - in an unrelated case. Decker asserts that this
19 conflict prevented Cavanaugh-Bill and Stephenson from vigorously
20 defending Decker by pursuing evidence to impeach Baldazo and
21 prevented Stephenson from effectively representing Decker at trial
22 because Stephenson could not cross-examine Baldazo.

23 "Effective assistance of counsel 'includes a right to
24 conflict-free counsel.'" *United States v. Baker*, 256 F.3d 855,
25 859-60 (9th Cir. 2001), *amended* 2001 WL 474147 (9th Cir. 2001).
26 "To establish a Sixth Amendment violation of defendant's right to
27 the effective assistance of counsel based on an attorney's conflict
28 of interest, 'a defendant must show: (1) his attorney actively

1 represented conflicting interests, and (2) an actual conflict of
2 interest affected his attorney's performance.'" *Quintero v. United*
3 *States*, 33 F.3d 1133, 1135 (9th Cir. 1994). A defendant may waive
4 this right. *Holloway v. Arkansas*, 435 U.S. 475, 483 n.5 (1978).

5 First, Decker identifies no impeachment evidence that should
6 have been uncovered beyond the fact that Baldazo had been fired
7 from previous employment for untruthfulness. The record is clear
8 that this information was known to Decker's attorneys before
9 Baldazo was called to the stand. (ECF No. 151 (Trial Tr. 51)).
10 More importantly, however, Decker has not demonstrated that there
11 was a need to impeach Baldazo. The government did not call Baldazo
12 - defense counsel did. (See ECF No. 153 (Trial Tr. 472-77)). And
13 substantively, the only information defense counsel elicited from
14 Baldazo was information that counsel wanted before the jury to cast
15 doubt on the victim's testimony. (See ECF No. 154 (Trial Tr.
16 631)). Decker therefore has not established and cannot establish
17 prejudice.

18 Second, the conflict was disclosed to the court in Decker's
19 presence at trial, and the parties explained that to cure the
20 conflict, co-counsel Dunn would cross-examine Baldazo. (ECF No.
21 151 (Trial Tr. 49-54)). After the court and the parties discussed
22 the issue, Decker indicated that he was aware of the conflict and
23 the proposed procedure for handling it and that he had no
24 objection. (*Id.* at 54). Decker therefore knowingly and
25 voluntarily waived his right to conflict-free counsel. Even if
26 Decker was not advised of the conflict in advance, as he claims
27 (see ECF No. 177), and even if that renders his waiver involuntary
28 or unknowing, Decker's claim is still without merit. Decker has not

1 established any prejudice from the alleged conflict. Accordingly,
2 Decker is not entitled to relief on ground one of his motion.

3 **II. Ground Two**

4 In his second ground for relief, Decker asserts that
5 Cavanaugh-Bill and Wiener were ineffective because they did not
6 tell him he could have entered an *Alford* plea, which would have
7 allowed him to plead guilty while maintaining his innocence.
8 Decker asserts that he would have entered an *Alford* plea instead of
9 going to trial.

10 Cavanaugh-Bill believes that during negotiations she asked the
11 government about the availability of an *Alford* or "no-contest" plea
12 and was told that the U.S. Attorney's Office in this district does
13 not accept such pleas. (ECF No. 175-1 (Cavanaugh-Bill Aff. ¶ 5)).
14 The government and Stephenson corroborate that the U.S. Attorney's
15 in this district rarely, if ever, allows *Alford* pleas. Decker has
16 offered no evidence to contradict these representations and no
17 evidence to rebut the government's assertion that it would not have
18 allowed Decker to enter an *Alford* plea in this case. Although
19 Decker argues that had counsel approached the government requesting
20 an *Alford* plea or discussed *Alford* pleas with Decker, "counsel may
21 have been able to get the government to agree to accept a plea in
22 which Decker did not have to admit his guilt," there is no evidence
23 or reasonable probability that discussions about an *Alford* plea
24 would have changed the results of negotiations in this case.
25 Because *Alford* pleas are so rarely allowed by the government in
26 this district it did not fall below the reasonable standard of
27 representation for counsel to fail to discuss this option with
28 Decker. Likewise, because such pleas are rarely allowed and would

1 not have been allowed in this case, Decker cannot show prejudice.
2 Accordingly, Decker is not entitled to relief on ground two of his
3 motion.

4 **III. Ground Three**

5 In his third ground for relief, Decker asserts that Stephenson
6 was ineffective because he expressed a desire to take the case to
7 trial and never discussed the perils of doing so with Decker.¹
8 Stephenson avers that when the government offered Decker the plea
9 deal, Stephenson conveyed the deal to Decker, through his wife, and
10 described it as a "very, very good plea bargain deal." (ECF No.
11 175-2 (Stephenson Decl. 2)). Stephenson further states that when
12 Decker re-retained him in September 2013, Decker was "adamant that
13 he would not take the aforesaid plea offer under any
14 circumstances."² (*Id.* at 3). Stephenson further states that he
15 "spoke, in person, with Mr. Decker for countless hours about the
16 nature of the charges against him, and the potential risks/rewards
17 of going to trial." (*Id.*) Decker knew all of this when he decided
18 to reject the plea offer and asked Stephenson to take him to trial.
19 (*Id.*)

20 Even in his response to his former attorneys' affidavits,
21

22 ¹ Decker also argues Stephenson was ineffective for failing to advise
23 him that he could enter an *Alford* plea. For the reasons discussed *supra* §
24 II, Decker has not established ineffective assistance of counsel on these
grounds.

25 ² Stephenson also states that Decker said that if "he pled to a felony
26 sex offense, he would lose his high-paying job with a prestigious mining
27 company, would not be eligible for meaningful employment in the future, and
28 his wife would leave him. Such a result was unacceptable in Mr. Decker's
mind and tantamount to a life sentence." (*Id.* at 3). However, Decker
denies telling Stephenson any of this. The court need not and therefore
does not rely on these disputed statements in addressing Decker's third
ground for relief.

1 Decker does not deny that Stephenson discussed the perils of trial
2 with him and that it was Decker, not Stephenson, who was insistent
3 that the case proceed to trial. Accordingly, Decker has not shown
4 that Stephenson's performance was deficient in this respect or that
5 Decker pleaded guilty due to Stephenson's alleged deficient advice.
6 Decker is therefore not entitled to relief on his third ground.

7 **IV. Ground Four**

8 In his fourth ground for relief, Decker asserts that
9 Stephenson and Dunn did not tell him he could be found guilty of
10 attempted aggravated sexual abuse and so he believed he could be
11 found guilty only of aggravated sexual abuse. Decker chose not to
12 testify at trial but asserts that if he had known he could be found
13 guilty of attempted aggravated sexual abuse, he would have
14 testified. Decker posits that if he had done so, there is a
15 reasonable probability that the outcome of the proceedings would
16 have been different.

17 For two reasons, Decker cannot show prejudice. First, even
18 assuming counsel did not discuss the possibility of an attempt
19 conviction until the "eve of trial" (ECF No. 177), Decker knew it
20 was a possibility before he made his decision not to testify. (See
21 ECF No. 152 (Trial Tr. 354-58); ECF No. 153 (Trial Tr. 432-34)).
22 Decker's assertion that he would have testified had he known he
23 could be convicted of attempt is therefore not credible. Second,
24 even if Decker had testified, there is no reasonable probability
25 that the outcome of the proceedings would have been any different.
26 Decker had told agents Elkington and Coochyouma that he struck the
27 victim and engaged in sexual contact with her. (ECF No. 123 (Tr.
28 Evid. Hr'g 30-31); ECF No. 68-1). These statements - which had

1 been suppressed for the government's case-in-chief would likely
2 have been admitted had Decker testified. Therefore, the jury would
3 have heard Decker's admission that he had sexual contact with the
4 victim. Decker has failed to show that he is entitled to relief on
5 ground four of his motion.

6 **V. Ground Five**

7 In his fifth ground for relief, Decker asserts Stephenson and
8 Dunn were ineffective for failing to take "any steps to correct the
9 record as to the true meaning of" the statements he made at his
10 suppression hearing which the court found to be false and failing
11 to "establish that Mr. Decker did not testify falsely." (ECF No.
12 163 (Mot. 7)). Decker asserts that if counsel had taken steps to
13 correct the record, he would not have received the two-level
14 enhancement for obstruction of justice.

15 Decker's counsel did object to the enhancement at sentencing.
16 Decker does not explain what the "true meaning" of his statements
17 was or how any other steps by counsel would have changed the
18 court's conclusion that Decker had testified falsely on the stand.
19 Moreover, Decker concedes in his reply that he cannot show
20 prejudice on this count and therefore is not entitled to relief.

21 Decker has failed to establish that his counsel's performance
22 in this regard fell below a reasonable standard of representation
23 and has not shown any prejudice. Accordingly, Decker is not
24 entitled to relief on ground five of his motion.

25 **VI. Ground Six**

26 In his sixth ground for relief, Decker asserts that his
27 appellate counsel was ineffective for failing to argue that trial
28 should have been continued when, three days prior to trial, the

1 government provided new discovery to defense counsel.

2 Decker cannot show prejudice. The newly produced evidence was
3 related primarily to the chain of custody of some evidence in the
4 case. (See ECF No. 175-2 (Stephenson Decl. ¶ 16)). The court
5 granted the parties a brief continuance before opening arguments so
6 counsel could review the new evidence. (*Id.*) Decker has not shown
7 that this time was insufficient or that counsel's attention to the
8 issue detracted from their preparation of his case in other
9 respects. In fact, Stephenson states that he does not believe
10 Decker suffered any prejudice as a result of the discovery issue.
11 (*Id.*) Moreover, the court's decision to grant or deny a
12 continuance is reviewed under an abuse of discretion standard.
13 *United States v. Garrett*, 179 F.3d 1143, 1144-45 (9th Cir. 1999).
14 It is therefore extremely unlikely this argument would have
15 prevailed on appeal. Appellate counsel's failure to raise this
16 argument therefore did not amount to ineffective assistance. See
17 *Sexton v. Cozner*, 679 F.3d 1150, 1157 (9th Cir. 2012).
18 Accordingly, Decker is not entitled to relief on ground six of his
19 motion.

20 **Evidentiary Hearing**

21 The court finds that "the motion and the files and records of
22 the case conclusively show that [Decker] is entitled to no relief."
23 See U.S.C. § 2255(b). The court therefore denies Decker's request
24 for an evidentiary hearing.

25 **Certificate of Appealability**

26 In order to proceed with an appeal, Decker must receive a
27 certificate of appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App.
28 P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951

1 (9th Cir. 2006); see also *United States v. Mikels*, 236 F.3d 550,
2 551-52 (9th Cir. 2001). Generally, a defendant must make "a
3 substantial showing of the denial of a constitutional right" to
4 warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2);
5 *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). "The petitioner
6 must demonstrate that reasonable jurists would find the district
7 court's assessment of the constitutional claims debatable or
8 wrong." *Allen*, 435 F.3d at 951 (quoting *Slack*, 529 U.S. at 484).
9 In order to meet this threshold inquiry, the defendant has the
10 burden of demonstrating that the issues are debatable among jurists
11 of reason; that a court could resolve the issues differently; or
12 that the questions are adequate to deserve encouragement to proceed
13 further. *Id.* The court has considered the issues raised by Decker
14 with respect to whether they satisfy the standard for issuance of a
15 certificate of appealability and determines that none meets that
16 standard. The court therefore denies Decker a certificate of
17 appealability.

18 **Conclusion**

19 Accordingly, Decker's motion for relief under 28 U.S.C. § 2255
20 (ECF No. 163) is hereby DENIED. The court further denies a
21 certificate of appealability.

22 IT IS SO ORDERED.

23 DATED: This 26th day of October, 2017.

24 
25 UNITED STATES DISTRICT JUDGE

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