

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jan 02, 2019

DEBORAH S. HUNT, Clerk

LONDON ETTIONE DUNBAR,

)

Petitioner-Appellant,

)

v.

O R D E R

UNITED STATES OF AMERICA,

)

Respondent-Appellee.

)

London Ettione Dunbar, a federal prisoner proceeding pro se, appeals a district court judgment denying his motion to vacate his sentence under 28 U.S.C. § 2255. Dunbar has filed an application for a certificate of appealability (“COA”). *See* Fed. R. App. P. 22(b).

In 2016, Dunbar pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). As part of his written plea agreement, Dunbar acknowledged that the statutory mandatory minimum sentence was fifteen years of imprisonment, under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. § 924(e), because he had at least three prior convictions for “serious drug offenses.” The district court sentenced Dunbar to 180 months of imprisonment. Dunbar did not appeal.

In 2017, Dunbar filed a pro se § 2255 motion, arguing that he no longer qualified for an ACCA sentence based, in part, on a prior conviction for possession of marijuana which carried a maximum sentence of only two years’ imprisonment. The government responded, arguing that Dunbar had procedurally defaulted his claim by not raising it on direct appeal. Nonetheless, the government argued that the claim lacked merit because the marijuana conviction was not deemed to be a serious drug offense. Instead, Dunbar’s sentence was enhanced based on four convictions

EX A

for delivery/manufacture of cocaine, in violation of Michigan Compiled Laws § 333.7401, and for possession with intent to deliver cocaine and heroin. In his reply, Dunbar argued that Michigan's sentencing scheme had changed by the time he was sentenced for his current federal offense, and that the statutory sentence for the relevant prior offenses had been lowered to not more than ten years. The district court denied the § 2255 motion, concluding that, even if Dunbar's claim were not procedurally defaulted, the claim lacked merit because the Michigan statute under which Dunbar was convicted still carried a maximum punishment of not more than twenty years' imprisonment.

Dunbar seeks a COA, reasserting his claim that his prior convictions no longer qualify as predicate offenses for purposes of the ACCA because Michigan's sentencing scheme reduced the punishment for those offenses to less than ten years' imprisonment. He contends that the district court erred when it "substituted" other prior offenses as predicate ACCA offenses. He maintains that the district court should have conducted an evidentiary hearing to determine whether the "substitute" prior convictions qualified as ACCA predicate offenses.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the district court's denial is based on the merits, "[t]he 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). Dunbar has not met this burden.

Reasonable jurists would not debate the district court's conclusion that Dunbar qualified as an armed career criminal. The ACCA provides that a person who violates 18 U.S.C. § 922(g) and has three previous convictions by any court for a violent felony or a serious drug offense, or both, committed on occasions different from one another, shall be fined and imprisoned not less than fifteen years. 18 U.S.C. § 924(e)(1). "Serious drug offenses" are defined as drug offenses for which the maximum punishment is a term of imprisonment of ten years or more. 18 U.S.C. § 924(e)(2)(A)(ii). Dunbar was convicted under Michigan Compiled Laws § 333.7401(2)(a)(iv), which provides for imprisonment of up to twenty years. Dunbar now relies on Michigan

Compiled Laws § 333.7408(a) to support his argument that the maximum sentence for his prior Michigan drug offenses is less than ten years. But section 333.7408 provides only that criminal penalties for Michigan drug offenses are “in addition to, and not in lieu of,” civil or administrative penalties. As the district court noted, the statute under which he was convicted continues to provide for a sentence of up to twenty years’ imprisonment.

Despite Dunbar’s argument to the contrary, the district court properly denied the § 2255 motion without conducting an evidentiary hearing because “the motion and the files and records of the case conclusively show that [Dunbar] is entitled to no relief.” 28 U.S.C. § 2255(b); *see also Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007).

Accordingly, Dunbar’s application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

Case No. 1:16-cr-17

v.

HON. JANET T. NEFF

LONDON ETTIONE DUNBAR,

Defendant-Movant.

OPINION AND ORDER

This matter is before the Court on Defendant's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct the sentence imposed upon him (ECF No. 46). Defendant has also filed a Motion to Appoint Counsel (ECF No. 48). For the reasons that follow, the Court denies Defendant's motions and issues this Opinion and Order. The Court will also issue a Judgment in this § 2255 proceeding. *See Gillis v. United States*, 729 F.3d 641, 643 (6th Cir. 2013) (requiring a separate judgment in habeas proceedings).

I. BACKGROUND

Defendant was charged in a January 27, 2016 Indictment with being a felon in possession of a firearm (Count 1), distribution of heroin (Counts 2–4) and distribution of methamphetamine (Counts 5–8) (ECF No. 1). On June 2, 2016, he signed a plea agreement, agreeing to plead guilty to Count 1 and consenting to the forfeiture of the firearm and ammunition listed in the Forfeiture Allegation of the Indictment (ECF No. 21 at PageID.41). Defendant indicated that he understood the penalty under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), to wit: "Because Defendant has three or more prior convictions for 'serious drug offenses,' as defined in 18 U.S.C.

Here, Defendant moves to vacate his sentence as improperly enhanced under the ACCA. Defendant points out that the prescribed statutory penalty range for the offense of Felon in Possession, 18 U.S.C. § 924(a)(2), is “from zero to ten (10) years imprisonment,” although he concedes that “§ 924e requires an enhanced term of [sic] from 15 years to life imprisonment, where a defendant has three (3) or more prior violent offenses, or 3 or more serious drug offenses, or any combination of 3 of same” (ECF No. 47 at PageID.202). According to Defendant, he was improperly adjudicated as an ACCA offender “based in pertinent part on a prior felony drug conviction in violation of MICH. COMP. LAWS § 333.7408(a)” (*id.* at PageID.203). Defendant asserts that that conviction “may not serve as an ACCA predicate” and that he is “not an ACCA Offender and must be sentenced de novo to a term allowed under § 924(a)(2)” (*id.*).

Even assuming arguendo that Defendant’s claim is not procedurally defaulted, the claim lacks merit for the reasons set forth in the government’s response. As set forth in the government’s exhibits to its response, the Presentence Report in this case, and Defendant’s stipulation in his plea agreement, he qualified as an armed career criminal based on at least five separate convictions for serious drug offenses (ECF No. 50 at PageID.216). Specifically, in October 2010, Defendant pleaded guilty to four counts of delivery/manufacture of cocaine in violation of MICH. COMP. LAWS § 333.7401(2)(a)(iv) (*id.*). The offense conduct for each conviction occurred on a different date, and each conviction is punishable by up to 20 years in prison (*id.*). Additionally, in July 2015, Defendant was convicted of one count of possession with intent to deliver cocaine and one count of possession with intent to deliver heroin (*id.*), which together constitute an additional prior serious drug offense for purposes of 18 U.S.C. § 924(e)(2)(A)(ii) (*id.*).

Defendant asserts in his reply that while “at first blush, movant is a qualified ACCA offender,” Michigan’s sentencing scheme has changed, and “the maximum punishment for a

IV. CONCLUSION

For the foregoing reasons, this Court denies Defendant's § 2255 motion, denies his motion to appoint counsel, and denies a certificate of appealability as to the issue asserted. Accordingly:

IT IS HEREBY ORDERED that Defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (ECF No. 46) is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion to Appoint Counsel (ECF No. 48) is DENIED.

IT IS FURTHER ORDERED that a certificate of appealability pursuant to 28 U.S.C. § 2253(c) is DENIED.

Dated: September 24, 2018

/s/ Janet T. Neff

JANET T. NEFF
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

Case No. 1:16-cr-17

v.

HON. JANET T. NEFF

LONDON ETTIONE DUNBAR,

Defendant-Movant.

JUDGMENT

In accordance with the Opinion and Order entered this date:

IT IS HEREBY ORDERED that Judgment is entered against Defendant and in favor of Plaintiff in this § 2255 proceeding.

Dated: September 24, 2018

/s/ Janet T. Neff

JANET T. NEFF
United States District Judge

Certified as a True Copy
By *[Signature]* Deputy Clerk
U. S. District Court
Western Dist. of Michigan
Date SEP 24 2018

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