FILED
United States Court of Appeal
Tenth Circuit

April 19, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SHAWN J. GIESWEIN,

Defendant - Appellant.

No. 18-6220
(D.C. Nos. 5:18-CV-00468-F
and 5:07-CR-00120-F-1)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **PHILLIPS**, and **EID**, Circuit Judges.

Shawn Gieswein, a *pro se* federal prisoner,[1] seeks a certificate of appealability (COA) to challenge the district court's denial of his 28 U.S.C. § 2255 motion. For the reasons below, we deny Gieswein a COA.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] We liberally construe the briefs of *pro se* litigants. *Toevs v. Reid*, 685 F.3d 903, 911 (10th Cir. 2012).

BACKGROUND

In 2007, Gieswein was convicted in federal court of two crimes: witness tampering and felon in possession of a firearm. After concluding that Gieswein qualified as an armed career criminal under 18 U.S.C. § 924(e), the district court sentenced him to 240 months' imprisonment. In 2016, our court granted Gieswein permission to file a second or successive motion to vacate in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See In re Gieswein*, No. 16-6038 (April 27, 2016). The government conceded that under *Johnson* Gieswein no longer qualified as an armed career criminal.

This led to the district court resentencing Gieswein without the armed career criminal designation. Even so, the district court sentenced him to the same term—240 months' imprisonment. *United States v. Gieswein*, No. CIV-16-531-F, 2016 WL 11200222 (W.D. Okla. July 25, 2016).

In response, Gieswein filed a direct appeal, and in 2018 we affirmed the new sentence. *See United States v. Gieswein*, 887 F.3d 1054 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 279 (Oct. 1, 2018). Though we agreed with Gieswein that the district court had "erred in applying a circumstance-specific approach to determine that his prior conviction for lewd molestation in Oklahoma state court qualified as a 'forcible sex offense' and thus a 'crime of violence' under the Sentencing Guidelines," we deemed the error harmless because the record showed that even without this error, the district court would have imposed the same 240-month sentence. *Id.* at 1056.

Then Gieswein filed a § 2255 motion to vacate his sentence, arguing that his trial and appellate counsel had furnished him ineffective assistance during the second sentencing proceeding. The district court denied the motion and denied the application for a COA. From us, Gieswein now seeks a COA to review this decision. To obtain a COA, Gieswein must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253. To do so, he "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).

DISCUSSION

Gieswein argues that both his trial counsel and appellate counsel provided ineffective assistance concerning his resentencing. Proving ineffective assistance of counsel requires a two-part showing. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, Gieswein must prove that the counsel's performance was "deficient"—that is, the representation "fell below an objective standard of reasonableness." *Id.* at 688. Second, he must establish "prejudice"—that is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

In his motion, Gieswein raises four arguments supporting his *Strickland* claims: (1) that his resentencing attorneys failed to challenge his witness-tampering conviction; (2) that they failed to challenge his felon-in-possession conviction; (3) that they failed to argue that his prior state court conviction for destruction

of property by explosive device was not a crime of violence under the guidelines, which if successful would have lowered his guidelines range; and (4) that they failed to challenge several errors by the resentencing court—specifically, certain statements made by the court, the court's decision to run his sentences consecutively, and the court's balancing of the § 3553(a) sentencing factors—and failed to raise nationwide sentencing disparities.

Except for the sentencing-disparities argument, the district court considered and soundly rejected all of these arguments. Because we agree with the district court's assessment of the claims, we need not restate the reasoning here. *See Chivers v. Reaves*, 750 F. App'x 769, 770 (10th Cir. 2019) ("When a district court accurately takes the measure of a case and articulates a cogent rationale, we see no useful purpose for a reviewing court to write at length."). And because we agree that reasonable jurists could not debate the correctness of the district court's ruling, we deny Gieswein a COA. *See Slack*, 529 U.S. at 484. As for Gieswein's argument that his attorneys should have raised the issue of disparities in national sentencing, neither his petition nor his brief on appeal provides any support that his counsels' efforts fell below an "objective standard of reasonableness." *Strickland*, 466 U.S. at 687–88; *see also United States v. Cook*, 45 F.3d 388, 394 (10th Cir. 1995) ("The Sixth Amendment does not require an attorney to raise every nonfrivolous issue on appeal."). We therefore find that he has failed to meet his burden to prove ineffectiveness on this basis. *See Strickland*, 466 U.S. at 687–88.

Finally, Gieswein has submitted a supplementary brief raising additional grounds for relief. We generally decline to consider arguments not raised in the § 2255 petition. *See United States v. Rodriguez*, 768 F.3d 1270, 1272 (10th Cir. 2014). And even if we were to consider them, these claims have no merit.[2]

CONCLUSION

We deny Gieswein's application for a COA and dismiss this appeal. His motion to proceed in forma pauperis is granted.

Entered for the Court

Gregory A. Phillips
Circuit Judge

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[2] First, Gieswein seeks to undermine his felon-in-possession conviction by directing us to cases he says apply the strict scrutiny standard of review in cases involving the Second Amendment. Appellant Suppl. Br. at 1–4. But, for starters, Gieswein's attorneys could not challenge the underlying conviction during resentencing. Gieswein's conviction became final long ago, *see* 28 U.S.C. § 2255(f) (allowing § 2255 motions no later than one-year after the conviction), and a *Johnson* resentencing does not open the door to challenge his conviction. Any challenge brought by Gieswein's counsel would have been untimely under the Federal Rules of Criminal Procedure. *See* Fed. R. Crim. P. 33(b).

Second, citing Third Circuit cases, Gieswein alleges a Speedy Trial violation, though he admits that he "did not raise this issue in [his] § 2255 petition" because "he did not discover this violation until further research." Appellant Suppl. Br. at 5. Here again, for the same reasons stated above, Gieswein's counsel at resentencing could not challenge his underlying conviction during his *Johnson* resentencing. Because reasonable jurists could not debate these points, his application fails on these points too. *See Slack*, 529 U.S. at 484.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	Case Nos. CR-07-120-F
	)	CIV-18-468-F
SHAWN J. GIESWEIN,	)	
	)	
Defendant.	)	

ORDER

Before the court is defendant, Shawn J. Gieswein's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody and Supplementary Brief. Doc. Nos. 271 and 272. Plaintiff, United States of America, has responded and defendant has replied. Upon due consideration of the parties' submissions, the court makes its determination.

I.

Defendant was convicted of possessing a firearm after conviction of a felony, 18 U.S.C. § 922(g)(1), and witness tampering, 18 U.S.C. § 1512(b)(1). A presentence investigation report, prepared by the Probation Office, determined that defendant had three prior convictions qualifying as violent felonies under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Based on a total offense level of 33 and a criminal history category of IV, defendant's recommended guideline range was 188 to 235 months imprisonment. Plaintiff moved for upward variance based upon defendant's lengthy criminal record. At a sentencing hearing held on May 6, 2008, the court adopted the recommended guideline range. The court,

however, concluded that an upward variance was appropriate[1] and sentenced defendant to imprisonment for 240 months. The sentence consisted of terms of 240 months for the firearm conviction and 120 months for the witness tampering, with the terms to be served concurrently. Judgment was entered on May 7, 2008.

On September 4, 2009, the Tenth Circuit affirmed defendant's convictions on direct appeal. The Tenth Circuit rejected defendant's arguments that the felon-in-possession statute violated the Second Amendment and exceeded Congress' power under the Commerce Clause and that both of his convictions should be reversed because of a violation of the Interstate Agreement on Detainers. Defendant filed a petition for writ of certiorari, which the Supreme Court denied on March 2, 2010. Thereafter, on January 6, 2011, defendant filed a motion under 28 U.S.C. § 2255 challenging various aspects of his convictions and sentence. Defendant's motion included ineffective assistance of counsel claims. The court denied the § 2255 motion and denied defendant a certificate of appealability. Defendant appealed the ruling. The Tenth Circuit granted a certificate of appealability as to two of the three claims for which defendant sought review. On September 4, 2012, the Tenth Circuit, however, affirmed the court's decision that the claims were procedurally barred. Defendant filed a petition for writ of certiorari, which the Supreme Court denied on January 14, 2013.

Subsequently, on September 8, 2015, defendant filed another motion under § 2255 based upon the Supreme Court's decision in Johnson v. United States, 135

[1] The court concluded "the guidelines simply do not give sufficient effect to the depth and the breadth, the persistence and the depravity and the harmfulness of the criminal conduct of this defendant." Transcript of Sentencing Proceedings, May 6, 2008, p. 38. In particular, the court found that "the need for the sentence to protect the public from further crimes;" "the history and characteristics of the defendant;" "the continuing danger the defendant represents to society;" and "th[e] defendant's misconduct while detained, specifically, the witness-tampering conviction," all militated in favor of a sentence in excess of the guideline range. *Id.*

S.Ct. 2551 (2015). The court dismissed the motion for lack of subject matter jurisdiction because defendant had not obtained authorization from the Tenth Circuit to file the motion as required by 28 U.S.C. §2244(b)(3)(A). On February 8, 2016, defendant applied to the Tenth Circuit for authorization to file a second or successive § 2255 motion. The Tenth Circuit granted the motion on April 27, 2016 and defendant filed his second or successive § 2255 motion on May 20, 2016.

In response to defendant's second or successive § 2255 motion, plaintiff conceded that based upon the Supreme Court's ruling in Johnson, defendant did not have three predicate convictions necessary to trigger application of the ACCA and requested the court to resentence defendant. On July 25, 2016, the court granted defendant's second or successive § 2255 motion and vacated its May 7, 2008 judgment. As part of its decision, the court ruled that defendant would be "resentenced *de novo*." Doc. no. 211, p. 4. Thus, the court appointed counsel for resentencing and advised the parties that defendant's resentencing would be set after preparation by the Probation Office of a revised presentence investigation report.

A revised presentence investigation report was prepared by the Probation Office. Changes were referenced in a Second Addendum. The statutory term of imprisonment for both the firearm conviction and the witness tampering conviction was up to 10 years. The Probation Office calculated defendant's advisory guideline range to be 92 to 115 months, based upon a total offense level of 26 and a criminal history category of IV. After receiving objections, the Probation Office issued a Third Addendum. Defendant filed objections and a sentencing memorandum. The Probation Office issued a Fourth Addendum. Plaintiff filed its sentencing memorandum and therein also requested the court to exercise its discretion to vary upward to the statutory maximums for both counts and order the sentences to be served consecutively.

A sentencing hearing was held on December 14, 2016. The court adopted, as its factual findings, the factual portions of the revised presentence investigation report, including the advisory guideline range of 92 to 115 months. The court found the advisory guideline range fell "far short of reflecting the extent to which [defendant] is a menace to society" and announced its intention to depart upward "very substantially." Doc. no. 249, p. 12, ll. 12-14. It stated that defendant's criminal history was "remarkable not only for the seriousness of the defendant's criminal conduct but for, if you will, the diversity of it." *Id.* at ll. 15-17. Citing "incapacitation" as the predominant motivating factor under 18 U.S.C. § 3553(a), the court varied upward to the statutory maximum of 240 months. Id., p. 15, ll. 4-7. The court stated: "That is a very substantial upward variance. I frankly don't know what statutory maximum would be so high that I would not go there, but 240 months is not it." *Id.* at ll. 18-20. Thus, the court sentenced defendant to a term of imprisonment of 240 months, consisting of 120 months of imprisonment on each count, with the terms to be served consecutively to one another. An amended judgment was entered on December 16, 2016.

Defendant filed a notice of appeal on December 21, 2016. Two days later, defendant filed a motion in this court to reconsider the sentence for procedural error and change of venue. The Tenth Circuit abated defendant's appeal until the court disposed of defendant's post-judgment motion. On February 10, 2017, the court entered an order dismissing defendant's motion for lack of jurisdiction.

The Tenth Circuit affirmed defendant's sentence on April 16, 2018. In its decision, the Tenth Circuit concluded that the court's guidelines calculation on resentencing rested in part on the erroneous conclusion that defendant's lewd molestation conviction was a "forcible sex offense" and thus a "crime of violence" under the guidelines. U.S.S.G. §2K2.1(a)(2), §4B1.2(a)(2) and application note 1. The Tenth Circuit concluded that absent the court's error, defendant's advisory

guideline range would have been 63 to 78 months rather than 92 to 115 months. However, the Tenth Circuit found that a resentencing was not required because the court's error was harmless. The Tenth Circuit concluded that given the court's detailed explication of its reasons for applying the statutory maximum, the record clearly showed defendant's sentence of 240 months was based upon factors independent of the sentencing guidelines. Further, the Tenth Circuit determined defendant's 240 months' imprisonment was substantively reasonable.

Shortly thereafter, on May 11, 2018, defendant filed the instant § 2255 motion and supplementary brief. The court entered an order directing plaintiff to respond to the motion and supplementary brief on August 9, 2018 and defendant to reply by August 30, 2018. After the court entered its order, the Tenth Circuit appointed counsel to represent defendant with respect to the preparation and filing of a petition for writ of certiorari. Plaintiff filed its response to defendant's § 2255 motion and supplementary brief on July 20, 2018. Subsequently, on July 27, 2018, defendant filed a petition for writ of certiorari and the petition was placed on the Supreme Court's docket on August 9, 2018. This court was notified of the certiorari petition on August 10, 2018. Defendant then filed his reply to plaintiff's response to his § 2255 filings on August 20, 2018. The Supreme Court denied defendant's petition for writ of certiorari on October 1, 2018.

Because the Supreme Court has entered its ruling with respect to defendant's direct appeal, the court proceeds with a ruling on defendant's § 2255 motion and supplementary brief. [2]

[2] "Absent extraordinary circumstances, the orderly administration of criminal justice precludes a district court from considering a § 2255 motion while review of the direct appeal is still pending." United States v. Cook, 997 F.2d 1312, 1319 (10th Cir. 1993).

II.

Defendant seeks § 2255 relief based upon four ineffective assistance of counsel claims. First, defendant claims that his sentencing and appellate counsel were ineffective because they failed to challenge his witness tampering conviction. Defendant asserts that plaintiff could not prove a "nexus" between his actions and an official proceeding. Second, defendant claims that his sentencing and appellate counsel were ineffective because they failed to challenge his felon-in-possession conviction. Defendant asserts that the court's jury instruction regarding constructive possession did not contain an intent-to-exercise-control element and plaintiff could not prove that he had the intent to take power and control over the subject firearm. Third, defendant claims that his sentencing and appellate counsel were ineffective because counsel failed to argue that his prior state court conviction for destruction of property by explosive device was not a crime of violence for purposes of the sentencing guidelines. Fourth, defendant claims his sentencing and appellate counsel were ineffective because they failed to challenge erroneous statements made by the court at resentencing, the court's decision to run his sentences consecutively and the court's balancing of the sentencing factors.

III.

Initially, plaintiff argues that defendant's claims attacking his original convictions (first and second ineffective assistance of counsel claims) are unauthorized second or successive § 2255 claims and should be dismissed for lack of jurisdiction. For its argument, plaintiff relies upon a New Mexico District Court case, United States v. Wiseman, Case No. 16-cv-700-JAP/KRS, No. 96-cr-72-JAP, 2018 WL 1026373 (10th Cir. Feb. 21, 2018). In Wiseman, the district court, based upon the Tenth Circuit's ruling in Prendergast v. Clements, 699 F.3d 1182 (10th Cir. 2012), concluded that defendant's § 2255 motion, which challenged his underlying 18 U.S.C. § 924(c)(1) convictions rather than his new sentence, was an unauthorized

second or successive § 2255 motion. Instead of dismissing the motion for lack of jurisdiction, the district court transferred it to the Tenth Circuit for authorization pursuant to 28 U.S.C. § 1631.

At the Tenth Circuit, defendant, represented by counsel, moved to remand the § 2255 motion to the district court. In re: Wiseman, Tenth Circuit Case No. 18-2028. He also moved for authorization to file a second or successive § 2255 motion. *Id.* The Tenth Circuit granted the motion to remand. *See, id.*, Order filed April 14, 2018. The Tenth Circuit found that the district court's amended judgment and corrected amended judgment qualified as "a new judgment" under Magwood v. Patterson, 561 U.S. 320, 341-42 (2010). *Id.* Because defendant had not filed a § 2255 motion since the entry of the amended judgments, the Tenth Circuit found he could pursue a §2255 motion challenging the corrected amended judgment without being subject to the restrictions on second-or-successive § 2255 motions. *Id.* The Tenth Circuit also denied defendant's alternative motion for authorization as unnecessary.[3] *Id.*

Based upon the Tenth Circuit's disposition of the Wiseman case,[4] the court concludes that defendant's § 2255 motion challenging the court's amended judgment is not a second or successive § 2255 and the court has jurisdiction to consider it.

IV.

Plaintiff also argues that defendant's challenges to his original convictions (first and second ineffective assistance of counsel claims) are barred because they are untimely filed and are procedurally defaulted. Section 2255(f) imposes a one-year time limit on claims asserted in a § 2255 motion. 28 U.S.C. § 2255(f).

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[3] The Tenth Circuit expressed no opinion on any other argument raised in the matter, including the timeliness of defendant's claims or whether they were procedurally defaulted.

[4] *See also*, United States v. Harris, 593 Fed. Appx. 750 (10th Cir. 2014) (unpublished decision cited as persuasive under 10th Cir. R. 32.1(A)), addressing merits of ineffective assistance claims in a second § 2255 motion filed after resentencing.

Also, Section 2255 motions cannot be used to test the legality of matters which should have been raised on direct appeal. United States v. Warner, 23 F.3d 287, 291 (10th Cir. 1994). And a § 2255 motion cannot raise issues that have been previously considered and disposed of on direct appeal, absent an intervening change in the law. *Id.*

Upon review, the court concludes that the ineffective assistance claims are not time-barred or procedurally-barred. It appears to the court that plaintiff is challenging the effectiveness of his counsel at resentencing and the effectiveness of his appellate counsel in the appellate proceedings resulting from the resentencing. He is claiming that they were ineffective in failing to challenge the witness tampering conviction and the felon-in-possession conviction. These claims, in the court's view, are timely as they are filed within one year of the amended judgment. Moreover, they are not procedurally barred because ineffective assistance of counsel claims should be brought in the first instance in a timely motion under § 2255. Massaro v. United States, 538 U.S. 500, 504 (2003).

V.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court laid out the framework for ineffective assistance of counsel claims. Under it, defendant must show (1) counsel's performance was deficient, meaning it "fell below an objective standard of reasonableness," *id.* at 687-88, and (2) the deficient performance prejudiced the defendant's defense, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. If the defendant fails to make a sufficient showing at either step of the analysis, the court must deny the alleged ineffective assistance of counsel claim. *Id.* at 697.

VI.

With respect to the first and second ineffective assistance of counsel claims, the court concludes that defendant cannot demonstrate that his counsel at the resentencing performed deficiently by failing to challenge the witness tampering conviction and the felon-in-possession conviction. As pointed out by plaintiff, there is no procedurally valid mechanism under the Federal Criminal Rules of Procedure for defendant's counsel to have challenged his convictions at the resentencing. Any challenge brought by defendant pursuant to Rule 29(b), Fed. R. Crim. P., or Fed. R. Crim. P. 33(b) would have been untimely.

The court also concludes that defendant cannot demonstrate that his appellate counsel performed deficiently by failing to challenge the convictions. "The Sixth Amendment does not require an attorney to raise every nonfrivolous issue on appeal." U.S. v. Cook, 45 F.3d 388, 394 (10th Cir. 1995). "[The] process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." U.S. v. Challoner, 583 F.3d 745, 749 (10th Cir. 2009) (quotations omitted). "Nevertheless, the omission of a 'dead-bang winner' by counsel is deficient performance which may result in prejudice to a defendant." *Id.* (citing Cook, 45 F.3d at 395). A "dead-bang winner" is "an issue which was obvious from the trial record *and* one which would have resulted in a reversal on appeal." Challoner, 583 F.3d 745 (emphasis in original).

The court concludes that neither of defendant's arguments with respect to his convictions are dead-bang winners. The alleged issues were not obvious from the trial record. As demonstrated by plaintiff, there was evidence sufficient to support both convictions. Further, neither issue would have resulted in a reversal on appeal.

VII.

For his third ineffective assistance of counsel claim, plaintiff alleges that sentencing counsel and appellate counsel were ineffective in failing to argue that his prior conviction for destruction of property by explosive device was not a "crime of violence" under the sentencing guidelines.[5] The court notes, however, that his counsel at resentencing objected to the prior conviction qualifying as a crime of violence. Thus, defendant cannot demonstrate that his counsel at resentencing performed deficiently. As to appellate counsel, the court is not convinced that defendant's argument is a "dead-bang winner." Defendant has not cited a decision adopting his position that his prior conviction for violation of Okla. Stat tit. 21, §1767(a)(1) (destruction of property by explosive device) does not categorically qualify as a "crime of violence" under the enumerated offense clause of the guidelines, §4B1.2(a)(2). The cases relied upon by defendant, United States v. O'Connor, 874 F.3d 1147 (10th Cir. 2017) and United States v. Salas, 889 F.3d 681 (10th Cir. 2018), are distinguishable from the case at bar. The court "cannot say that it was objectively unreasonable for [ ] appellate counsel to omit the issue in favor of what [appellate counsel] considered stronger arguments." Challoner, 583 F.3d at 750 and quoting United States v. Magleby, 420 F.3d 1136, 1145 (10th Cir. 2005) ("Whatever the merits of [defendant's] . . . contention, it was not so obvious at the time of his direct appeal that counsel's failure to raise it was unreasonable. No decisions had yet adopted his view."). Thus, the court concludes that defendant's third claim of ineffective assistance of counsel claim fails as defendant cannot demonstrate the first prong of the Strickland test.

[5] Defendant sought to raise the issue in a *pro se* petition for rehearing. *See*, Tenth Circuit Case No. 16-6366. The Tenth Circuit denied the petition.

VIII.

As to the fourth ineffective assistance of claim concerning alleged sentencing errors, the court also finds that defendant cannot establish that his counsel performed deficiently.

Initially, plaintiff argues that his counsel should have objected to two statements made by the court in explaining its decision to impose the same 240-month sentence it did at the original sentencing. The two statements are:

"It was true then and it is even more true now with the additional assault case . . . ."

* * * *

"I frankly don't know what statutory maximum would be so high that I would not go there, but 240 months is not it."

Doc. no. 249, pp. 14-15.

With respect to the first statement, plaintiff posits that the record shows that the court knew about the assault at the time of his original sentencing but used the assault at the resentencing to justify the variance from the recommended guideline range. The record, however, does not establish that the court knew about the assault at the time of the original sentence. Moreover, the court did not consider the assault in reaching the original sentence. Defendant's counsel at sentencing therefore was not deficient in failing to challenge the court's statement concerning the assault.

As to the second statement, plaintiff posits that the court's statement was erroneous because the court could have sentenced defendant under the ACCA to life in prison at the original sentencing. Instead, the court chose 240 months, which defendant points out was only a five-month variance from the advisory guideline range. While the court did not impose the maximum life sentence in the original sentencing, the court's statement, based upon the circumstances existing at the

resentencing, is not erroneous. Therefore, defendant's counsel was not deficient in failing to challenge the court's statement.

Next, plaintiff claims that his counsel was ineffective in failing to object to the court's imposition of consecutive sentences contrary to the provisions of the sentencing guidelines. According to plaintiff, U.S.S.G., §5G1.2(c) required the court to run his sentences concurrently because his total punishment, 92 to 115 months, was below the statutory maximum of 120 months. Plaintiff contends that the court failed to consider § 5G1.2(c) in its decision. However, the court concludes that counsel was not deficient in failing object to the court's imposition of the consecutive sentences. As the Tenth Circuit explained in United States v. Lymon, 905 F.3d 1149, 2018 WL 4701430, at *2 (10th Cir., Oct. 2, 2018):

> We reject defendant's first argument, that U.S.S.G. § 5G1.2 'required' the district court to run his sentences concurrently . . . Although the court must consider the guidelines when fashioning an appropriate sentence, the guidelines do not control whether sentences run concurrently or consecutively. Notwithstanding the guidelines' recommendation that [defendant's] sentences run concurrently, then, the district court still had discretion under 18 U.S.C. § 3584 to impose consecutive sentences instead.

Under Lymon, the court had discretion to impose consecutive sentences under § 3584. Despite defendant's arguments to the contrary, the court was aware of the guideline range of 92-115 months and was certainly aware of §5G1.2(c) when it sentenced defendant. The court, however, made the decision to impose consecutive sentences. The court cannot conclude that counsel performed deficiently in not challenging the court's discretionary decision.

Lastly, plaintiff alleges that counsel erred in not objecting to the court giving excessive weight to his criminal history and giving no weight to the guidelines. However, "[t]he district court need not afford equal weight to each of the [§ 3553(a)]

factors." United States v. Sanchez-Leon, 764 F.3d 1248, 1267 (2014). Moreover, the Tenth Circuit rejected defendant's argument on direct appeal. United States v. Gieswein, 887 F.3d 1054, 1064 (10th Cir. 2018) ("Gieswein argues the district court gave too little weight to the Guidelines . . . At the resentencing hearing, the district court gave careful consideration to the Guidelines, but concluded that other § 3553(a) factors—promoting respect for the law, affording adequate deterrence, and protecting the public from further crimes—required upward variance.") Consequently, the court concludes that sentencing counsel was not deficient in not objecting to the court's reasoning for imposing the 240-months sentence.

In his reply brief, defendant claims that his counsel should have objected to the court resentencing defendant *de novo* rather than correcting the original sentence. The court, however, finds the claim waived since it was raised for the first time in his reply brief. United States v. Lee Vang Lor, 706 F.3d 1252, 1256 (10th Cir. 2013); United States v. VanDeMerwe, 527 Fed.Appx. 745, 749 (10th Cir. 2013) (unpublished decision cited as persuasive under 10th Cir. R. 32.1(A)). Even if the argument were not waived, the court finds counsel was not deficient in failing to object to resentencing *de novo*. *See*, United States v. Moore, 83 F.3d 1231, 1235 (10th Cir. 1996) ("[W]here the district court itself ordered the vacation [of sentence], it has the discretion to determine the scope of resentencing. Because it has this discretionary power, the district court necessarily has the jurisdiction to order *de novo* resentencing on any or all issues.")

The court concludes that defendant has likewise failed to show that his appellate counsel rendered ineffective assistance by failing to raise the purported sentencing errors. For the reasons discussed above, the alleged omitted issues are without merit. Thus, the failure of appellate counsel to raise the issues does not constitute ineffective assistance of counsel. Cook, 45 F.3d at 393.

IX.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate of appealability 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). To satisfy this standard, the movant 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). Upon review, the court finds that defendant cannot satisfy this standard. The court therefore denies a certificate of appealability.

X.

Accordingly, defendant, Shawn J. Gieswein's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (doc. no. 271), is **DENIED**. A certificate of appealability is also **DENIED**.

IT IS SO ORDERED this 8th day of November, 2018.

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STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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