Appendix A

No. 18-5810

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 06, 2018
DEBORAH S. HUNT, Clerk

MICHAEL MANCIL BROWN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Michael Mancil Brown, a federal prisoner proceeding pro se, appeals the district court's order denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Brown has filed an application for a certificate of appealability ("COA") and motions for the appointment of counsel.

Brown was sentenced to forty-eight months of imprisonment after being convicted of six counts of wire fraud and six counts of use of interstate commerce for extortion. Brown appealed, and this court affirmed his convictions but vacated his sentence and remanded for resentencing. *United States v. Brown*, 857 F.3d 334, 342 (6th Cir. 2017). On remand, the district court again sentenced Brown to forty-eight months of imprisonment. Instead of filing an appeal, Brown filed a § 2255 motion, arguing that he received ineffective assistance of counsel. The district court denied the § 2255 motion and declined to issue a certificate of appealability.

Brown now moves for a certificate of appealability on his claims that he received ineffective assistance of counsel when his attorney failed to: test DNA evidence or perform a DNA "reverse-look-up"; rebut the claim that an encrypted file password existed only on his computer; present expert testimony regarding automatic postings; and agree to the district court's

offer to declare a mistrial. To the extent that Brown argues that the prosecution engaged in misconduct and that his sentence was improperly enhanced, those claims were not raised in his § 2255 motion and will not be considered by this court for the first time on appeal. *See United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006). Brown also has forfeited review of the issues that he raised in the district court but did not raise in his application for a certificate of appealability. *See* 28 U.S.C. § 2253(c)(3); *Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

A certificate of appealability may be issued "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 petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court's denial is 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).

To prove ineffective assistance of counsel, a petitioner must show that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Generally, prejudice means "a reasonable probability" that "but for such conduct the outcome of the proceedings would have been different." *Williams v. Anderson*, 460 F.3d 789, 800 (6th Cir. 2006).

Reasonable jurists would not debate the district court's rejection of Brown's claim that he received ineffective assistance of counsel when his attorney failed to test DNA evidence or perform a DNA "reverse-look-up." Brown is unable to show that counsel acted unreasonably in

failing to perform DNA tests because it was undisputed that the DNA evidence presented at trial did not identify Brown and because counsel argued the lack of physical evidence meant that the government failed to show that Brown was the perpetrator beyond a reasonable doubt. Additionally, an affidavit written by Brown's trial counsel, Jeffrey S. Frensley, explained that "the decision not to pursue such DNA evidence was strategic in nature" and that it was unnecessary for the defense "to prove who committed these offenses." Brown has thus failed to rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and he is not entitled to a COA on the basis of this claim. *Strickland*, 466 U.S. at 669.

Brown also claims that he received ineffective assistance of counsel when his attorney failed to rebut the government's claim that an encrypted file password existed only on his computer. This password was used at trial to link Brown to the extortion scheme. But Brown is unable to show that he was prejudiced by counsel's failure to raise this argument because Brown testified that the encrypted file password could be found on the internet and that it could have been on his computer as a cached copy. Reasonable jurists could not disagree with the district court's rejection of this claim.

Brown argues that he received ineffective assistance of counsel when his attorney failed to present expert testimony rebutting the government's claim that Brown created an automated program to make Pastebin[1] posts when he was not in his office. Brown testified that Pastebin had software in place that prevented automated posting, and on cross-examination, Special Agent Stephenson acknowledged that the automated program he created for posting on Pastebin would not have worked if his post had triggered the website's spam filter. Because the presentation of expert testimony regarding the fact that Pastebin had software in place that prevented automated postings would have been cumulative, Brown is unable to show that he was prejudiced by his counsel's failure to present expert testimony. *See White v. Mitchell*, 431 F.3d 517, 530 (6th Cir.

[1]The government's brief in the district court explains that Pastebin is "a website that permits users to publish text anonymously."

2005). Accordingly, reasonable jurists could not disagree with the district court's rejection of this claim.

Brown's final claim of ineffective assistance of counsel cites his attorney's failure to accept the district court's offer to declare a mistrial after counsel's closing arguments were terminated prematurely. Despite Brown's assertions to the contrary, the record is silent as to any interruption or offer of a mistrial by the district court during closing arguments. And the district court confirmed in its denial of Brown's § 2255 motion that it made no such offer. Reasonable jurists could not disagree with the district court's rejection of this claim.

Based upon the foregoing, we **DENY** the application for a certificate of appealability and **DENY** the motions for the appointment of counsel as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

UNITED STATES OF AMERICA **PLAINTIFF**

VS. **3:13-CR-00118-01-BRW**
3:18-CV-00479-BRW

MICHAEL MANCIL BROWN **DEFENDANT**

AMENDED ORDER[1]

Pending is Defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (Doc. No. 1). The Prosecution has responded.[2] For the reasons set out below, the Motion is DENIED.

I. BACKGROUND

On May 12, 2016, a jury found Defendant guilty of six counts of wire fraud and six counts of using the Internet with intent to carry on an unlawful activity.[3] In layman's terms, the jury found Defendant guilty of attempting to obtain money from both Mitt Romney, a candidate for President of the United States in the 2012 election, and PricewaterhouseCoopers LLP by threatening to release Mr. Romney's tax returns to the public. Based on a total offense level of 21,[4] and a criminal history category of I, Defendant's guideline range was 37-46 months. He was sentenced to 48 months in prison.

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[1]References to the transcript are from No. 3:13-CR-00118-BRW (M.D. Tenn.) – Doc. Nos. 176-178.

[2]Doc. No. 7.

[3]No. 3:13-CR-00118-BRW (M.D. Tenn.), Doc. No. 147.

[4]Defendant had a base offense level of 7, +10 based on intended loss, +2 for sophisticated means, and +2 for use of mass marketing. Defendant was resentenced on April 6, 2018, because the Court of Appeals for the Sixth Circuit reversed the original calculation that included +2 for obstruction. (No. 3:13-CR-00118-BRW (M.D. Tenn.), Doc. Nos. 175, 184, 192).

In his § 2255 motion, Defendant asserts claims for ineffective assistance of counsel based on (1) a failure to test DNA; (2) no DNA reverse-look-up; (3) a failure to rebut the Prosecution's claim that an encrypted password existed only on his computer; (4) no computer expert testimony regarding automated posting; (5) the failure to present business invoices; (6) not taking mistrial; (7) a failure to compare paper and ink from other printers; (8) not presenting expert pentrap data; and (9) not having ransom notes fingerprinted.[5]

II. DISCUSSION

To prevail on a claim for ineffective assistance of counsel, a petitioner must first show that his counsel's performance fell below an objective standard of reasonableness.[6] Even if a court finds deficient performance of counsel, the petitioner must also establish prejudice, which requires him to demonstrate that, but for his counsel's errors, there is a reasonable probability the result of the proceeding would have been different.[7]

A. DNA, "Reverse Lookup," and Ransom Notes (Claims 1, 2, 9)

Defendant asserts that his lawyer failed to "test DNA evidence against any suspect or witness presented by the governement," which would have shown that he "had no involvement."[8] He also claims that a "reverse lookup" of the DNA would have matched it to the person involved and established that Defendant "had no involvement." Finally, Defendant asserts that his lawyer never "got a comparison of [his] fingerprints and the ransom papers" to prove his innocence.

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[5]Doc. No. 1.

[6]See *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

[7]*Id.* at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the [proceeding's] outcome.").

[8]Doc. No. 1.

In response, the Prosecution provides the affidavit of Defendant's trial lawyer, which notes that the "decision not to pursue such DNA evidence was strategic in nature. It was undisputed that there was no DNA evidence linking Mr. Brown to the offense. Because this was a reasonable doubt case, it was unnecessary (and not a burden imposed upon Mr. Brown) to prove who committed these offenses."[9] The evidence was that, "[f]ingerprint analysis of the extortion letters and flash drives recovered one latent fingerprint which did not result in an identification match."[10] Neither the recovered fingerprint nor DNA analysis of the items matched Defendant. Defendant's lawyer repeatedly argued these points to the jury in an attempt to create reasonable doubt as to his client's guilt. For example, his lawyer argued in closing:

> There's no physical evidence that it was Mr. Brown. There are no fingerprints, there's no DNA. And I do want to remind you about an important aspect of the DNA evidence in this case . . .One thing I want you to pay some close attention to is the fact that there was male DNA on the Republican -- the package delivered to the Republican party headquarters, but it was not Mr. Brown's DNA . . . And I submit to you that this establishes that there was a male whose DNA was found on that evidence. It wasn't Mr. Brown's. Had to belong to somebody. The government didn't want to talk about that though.[11]

Counsel is not deficient when he "make[s] a reasonable decision that makes particular investigations unnecessary."[12] Defendant "has not overcome the presumption that trial counsel's decision was grounded in trial strategy."[13] Additionally, this strategy neither fell below an objective standard of reasonableness, nor was prejudicial.

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[9]Doc. No. 7-1.

[10]Doc. No. 7

[11]Doc. No. 178.

[12]*Jackson v. Bradshaw*, 681 F.3d 753, 760 (6th Cir. 2012).

[13]*Berry v. Palmer*, 518 F. App'x 336, 340 (6th Cir. 2013).

B. Encrypted Password Testimony (Claim 3)

Defendant contends that the "government's claim that [an] encrypted file password only existed on his computer" could have been rebutted if his lawyer would have called an expert. This claim is without merit. In fact, Defendant, at least twice testified that "[t]he 63-character password is on the Internet" and that it could have been on his computer because of a "cached copy."[14] So, Defendant already presented this argument to the jury. There was no need for an expert. Notably, Defendant's former lawyer's affidavit indicates that he asked Defendant to show him where the password was online – presumably to support Defendant's testimony – but Defendant never did.

C. No Expert on Automated Postings (Claim 4)

Defendant argues that his lawyer should have presented expert testimony to "debunk the government's claim that [he] created a program to automate Pastebin posting."[15] However, this was unnecessary based on trial strategy and other testimony. During cross-examination of the Prosecution's agent, Defendant's lawyer elicited testimony that CAPTCHA requires an actual human being to make the post, and that automated posting was not possible.[16] He also attacked the reliability of the agent's video exhibit, which showed how someone could post on Pastebin and avoid CAPTCHA. Defendant also testified that automated postings were not possible with CAPTCHA. Even the Prosecution noted (though the jury was out):

> The argument from the defense was pretty strong that that wasn't automated, it had to be done individually, it had to be done by a person. They spent a lot of time

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[14]Doc. No. 178.

[15]Doc. No. 1.

[16]Doc. No. 177.

> talking about the CAPTCHA and why it had to have been done by a person, not by a robot or not automated.[17]

Finally, in closing, Defendant's lawyer, again, pointed out the problems with the video:

> So they put together this little video showing you how that could happen. But there was a problem with that video. The problem is that the government knew that if they included the link that it would create the CAPTCHA spam protection.
>
> So what do they do? They just conveniently omit the link. We don't need to put that in there. But I had you look at that exhibit, I believe it's Exhibit 22, which is the information about that particular post, and from that you can see it clearly included the link.[18]

Again, Defendant "has not overcome the presumption that trial counsel's decision was grounded in trial strategy."[19]

D. Failed to Present Business Invoices (Claim 5)

Defendant argues that the Prosecution presented his business invoices claiming that they had false dates. He asserts that original invoices could have been presented with his clients' fingerprints and DNA, which would show that the dates and times were accurate. This argument without merit. A client's DNA or fingerprints on a document would not establish the accuracy of the dates.

E. Declined a Mistrial (Claim 6)

Defendant asserts that his lawyer was "cut-off 5 minutes early during final argument" and "did not take mistrial offered by the judge."[20] Defendant's position is contrary to the record, and he cites nothing to support his position. The only interruption during his lawyer's closing was

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[17]Doc. Nos. 177, 178.

[18]Doc. No. 178,

[19]*Berry v. Palmer*, 518 F. App'x at 340.

[20]Doc. No. 1.

when I reminded him that he had two minutes left of his allotted time.[21] Defendant's lawyer was neither cut-off in closing argument nor did he decline a mistrial, because it was not offered.

F. Failed to Compare Paper and Ink from Other Printers (Claim 7)

Defendant asserts that his lawyer should have had his neighbors' printer tested for ink or paper matching, which would have shown that the ransom notes were not printed on their computer (as alleged by the Prosecution). In an attempt to raise reasonable doubt, Defendant's lawyer questioned the Prosecution's agent on this point. He responded:

> A. Ms. Hefner is a home school teacher, and self-admittedly changes out the cartridges quite frequently. Once you change out the cartridges to a printer, which she said had happened multiple times, there's no longer a point for us trying to do analysis of ink comparisons.
>
> * * *
>
> Q. Okay. So in your investigation and review of the printer, you weren't able to determine exactly what documents were printed out on the Hefners' printer, right?
>
> A. That is correct.[22]

Again, counsel is not deficient when he "make[s] a reasonable decision that makes particular investigations unnecessary."[23] Defendant "has not overcome the presumption that trial lawyer's decision was grounded in trial strategy."[24]

G. Did Not Have Expert Present Pentrap Data (Claim 8)

Defendant contends that his lawyer did not have his computer expert present pentrap data which would have shown "whether he was [home] or not." The only testimony on this issue was

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[21]Doc. No. 178.

[22]Doc. No. 177.

[23]*Jackson v. Bradshaw*, 681 F.3d at 760.

[24]*Berry v. Palmer*, 518 F. App'x at 340.

the Prosecution's agent claiming that pen register/trap data showed that Defendant's IP address was connected to the TOR network on September 11, 2012 at 9:00 a.m.[25] As noted above, his lawyer repeatedly attacked the fact that automated postings could not be done, which means Defendant would have had to have been home at the time of the posting, but he was not home, because he was with clients. Defendant does not explain how this evidence would have made a difference, and in light of all the other testimony at trial he cannot establish that the result of the proceeding would have been different.

CONCLUSION

Based on the findings of fact and conclusions of law above, Defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (Doc. No. 1) is DENIED. This case is DISMISSED.

IT IS SO ORDERED this 3rd day of July, 2018.

/s/ Billy Roy Wilson
UNITED STATES DISTRICT JUDGE

[25]Doc. No. 177.

Appendix C

No. 18-5810

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 19, 2019
DEBORAH S. HUNT, Clerk

MICHAEL MANCIL BROWN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: KEITH, KETHLEDGE, and THAPAR, Circuit Judges.

Michael Mancil Brown petitions for rehearing en banc of this court's order entered on December 6, 2018, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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