APPENDIX

App. 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 19-10198-D

BRANDON LEE MOJICA,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Signed 04/03/2019

ORDER:

Appellant's motion for a certificate of appealability is DENIED because he cannot make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2).

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

App. 2

United States District Court
Middle District Of Florida
Orlando Division

Brandon Lee Mojica,
Petitioner
v.
United States of America,
Respondent.

Case No: 6:17-cv-2122-Orl-37TBS

Signed 11/16/2018

ORDER

This cause is before the Court on the Amended Motion to Vacate, Set Aside, or Correct Sentence ("Amended Motion to Vacate," Doc. 10) filed by Petitioner pursuant to 28 U.S.C. § 2255. Petitioner also filed a Memorandum of Law (Doc. 15) in support of the Amended Motion to Vacate. The Government filed a Response in Opposition to the Motion to Vacate ("Response," Doc. 17) in compliance with this Court's instructions and with the Rules Governing Section 2255 Proceedings for the United States District Courts. Petitioner filed a Reply (Doc. 20) to the Response. For the reasons set forth herein, the Amended Motion to Vacate is denied.

I. PROCEDURAL BACKGROUND

A Grand Jury charged Petitioner by Indictment with one count of aiding and abetting armed bank robbery (Count One) and one count of aiding and abetting the brandishing of a firearm during and in relation to a crime of violence (Count Two). (Criminal Case No.

6:16-cr-239-Orl-37TBS, Doc. 16.)1 Petitioner entered into a Plea Agreement (Criminal Case Doc. 49) in which he agreed to enter a guilty plea to Counts One and Two of the Indictment. The Court held a hearing on the plea and ultimately accepted it. (Criminal Case Doc. 79.) The Court then entered a Judgment in a Criminal Case (Criminal Case Doc. 63) in which Petitioner was sentenced to imprisonment for a total term of 120 months. Petitioner did not file a direct appeal.

II. LEGAL STANDARDS

A. Relief Under Section 2255

Section 2255 permits a federal prisoner to bring a collateral challenge by moving the sentencing court to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). "A petitioner is entitled to an evidentiary hearing if he "alleges facts that, if true, would entitle him to relief." *Rosin v. United States*, 786 F.3d 873, 877 (11th Cir. 2015) (citation and quotation omitted). However, "a defendant must support his allegations with at least a proffer of some credible supporting evidence." *United States v. Marsh*, 548 F. Supp. 2d 1295, 1301 (N.D. Fla. 2008). Moreover, the Court "is not required to grant a petitioner an evidentiary hearing if the § 2255 motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Rosin*, 786 F.3d at 877 (citation and quotation omitted).[1]

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[1] Criminal Case No. 6:16-cr-239-Orl-37TBS will be referred to as "Criminal Case."

B. Standard for Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court established a two-part inquiry for ineffective assistance of counsel claims:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. 466 U.S. 668, 687 (1984).

The petitioner bears the burden of proof in establishing both requirements of the *Strickland* test. *See Roberts v. Wainwright*, 666 F.2d 517, 519 n.3 (11th Cir. 1982) ("The burden of proof for showing ineffective assistance of counsel is, and remains, on petitioner throughout a habeas corpus proceeding." (internal citations omitted)). Further, the Court "need not address both [*Strickland*] prongs if the [petitioner] has made an insufficient showing on one." *Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014). Given this exacting burden, "the cases in which habeas petitioners can properly prevail . . . are few and far between." *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995).

"To establish deficient performance, a defendant must show that his counsel's representation fell below an objective standard of reasonableness in light of prevailing professional norms at the time the

representation took place." *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1356 (11th Cir. 2009). In the context of challenging a guilty plea, the petitioner must establish that his counsel's performance was deficient and that a reasonable probability exists that he would not have pleaded guilty but for his counsel's errors. *Strickland*, 466 U.S. at 687; *McCoy v. Wainwright*, 804 F.2d 1196, 1198 (11th Cir. 1986).

Furthermore, "[t]he reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the challenged error and in light of all the circumstances, and the standard of review is highly deferential." *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986); *see also Smith v. Singletary*, 170 F.3d 1051, 1053 (11th Cir. 1999) ("When analyzing ineffective-assistance claims, reviewing courts must indulge a strong presumption that counsel's conduct fell within the wide range of reasonably professional assistance."). As with the instant case, the "presumption of reasonableness is even stronger when we are reviewing the performance of an experienced trial counsel." *Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir. 2006).

To satisfy the prejudice prong, the defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. *Id.* at 693.

III. ANALYSIS

A. Claim One

Petitioner states that that his counsel, Fritz J. Scheller, was ineffective for failing to file a motion to suppress his confession. (Doc. 10 at 4.) Petitioner states that his confession was involuntary because, during the police interrogation, he "twice asked for an attorney" but was told by the interviewers that "innocent people don't need lawyers." (Doc. 15 at 1.) He states that he "then proceeded to provide a confession to his involvement with the robbery after being told by the agents what to say." (Doc. 10 at 4.)

According to Petitioner, he and Scheller discussed in detail the circumstance surrounding his confession, but Scheller never advised him "that moving for suppression of his confession was an option." (*Id.*). He contends that there was a reasonable probability that the Court would have suppressed his confession and that, if his confession had been suppressed, there was "a reasonable probability [he] would have gone to trial." (*Id.*; Doc. 16 at 2-3). Respondents argue that Claim One was waived because Petitioner's plea was knowing and voluntary and because there has been no showing of prejudice. (Doc. 17 at 13-16). In the context of a plea hearing, the United States Supreme Court has stated that "the representations of the defendant . . . at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977). The defendant's representations are presumptively trustworthy and are considered

conclusive absent compelling evidence showing otherwise. Id. After Petitioner swore under penalty of perjury to tell the truth at the plea hearing, he averred that no one was forcing, coercing, or intimidating him to plead guilty and that pleading guilty was what he wanted to do and in his best interest. (Criminal Case Doc. 79 at 30.) The Court discussed the specific rights Petitioner was afforded if he chose to persist with a not guilty plea. (Id. at 7-9). Petitioner stated he was satisfied with Scheller's representation, had no complaints whatsoever with Scheller or his representation, and had spoken with Scheller about the facts and law of his case. (Id. at 9-10, 12, 17, 20, 31- 33.) Petitioner stated that he had read the plea agreement, that he understood its terms, and that he had reviewed the plea agreement with Scheller. (Id. at 17-18.) Petitioner declared that he understood the rights and privileges he was waiving by pleading guilty and proceeded to do so. (Id. at 8-10.) Petitioner pled guilty to both counts and informed the Court that he was pleading guilty because he was guilty. (Id. at 21-22.)

The Government provided a factual basis for Petitioner's plea, and Petitioner agreed with the Government's factual basis. (Id. at 23-30). In fact, Petitioner specifically described his role in the crimes.

THE DEFENDANT: Your Honor, I knew that Ricardo Rodriguez was going to rob the bank. He had run ideas about it to me. And I never stopped him from going with it. And I knew he had a gun, and I knew that he was going to rob the bank with the gun. And I knew that everything was planned out and how everything went down, the way it was.

THE COURT: All right. At the time it's [sic] alleged in the indictment, Mr. Mojica, did you take money from the bank or participate in the taking of money from the bank?

THE DEFENDANT: Yes, sir. THE COURT: And did -- was that a federally insured bank?

THE DEFENDANT: Yes, sir.

THE COURT: And did you do that by using force, violence, or by intimidating people?

THE DEFENDANT: Yes, sir.

THE COURT: And did you assault someone or put somebody's life in jeopardy by using a dangerous weapon while that money was being stolen?

THE DEFENDANT: Yes, sir.

THE COURT: And during the time that that crime was being committed, was a firearm used and brandished--that is, pulled out and displayed -- for purposes of intimidation?

THE DEFENDANT: Yes, sir.

THE COURT: And did you participate in that crime knowing about it in advance?

THE DEFENDANT: Yes, sir.

THE COURT: And did you have advance knowledge that a firearm would be used and that it would be displayed and that it would be used for purposes of intimidating people?

THE DEFENDANT: Yes, sir. (Id. at 29-30.)

The Court determined Petitioner's guilty plea was knowing and voluntary. (Id. at 34.) The Court

accepted Petitioner's plea and adjudged him guilty of the charged offenses. (Id. at 34.)

Although Petitioner states in the Amended Motion to Vacate that Scheller never advised him that filing a motion to suppress "was an option," Petitioner acknowledges he and Scheller discussed "the circumstances surrounding [his] confession." (Doc. 11 at 4.) In fact, Petitioner avers that he "fully explained to Mr. Scheller the facts and circumstances about [his] arrest and interrogation." (Doc. 16 at 2.)

Moreover, Petitioner testified in open court that he was satisfied with Scheller's representation, had no complaints whatsoever about Scheller or his representation, and had discussed the law and facts of his case with Scheller. Petitioner said nothing during the plea hearing to indicate he had concerns about his confession. Petitioner's assertion that Scheller was ineffective during the plea phase is belied by the record before the Court and is without merit.[2]

Additionally, there has been no showing of prejudice. Ricardo Rodriguez, Jr., Petitioner's co-conspirator in the crimes, gave law enforcement a post-Miranda statement confessing to the crimes and setting forth in detail Petitioner's involvement in the crimes.[3]

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[2] In addition, as a result of the Plea Agreement, Petitioner received a three-point reduction at sentencing for acceptance of responsibility, and the Government agreed to recommend the low-end of the advisory Guidelines range.

[3] Rodriguez pled guilty to armed bank robbery and use of a firearm during an in relation to a crime of violence in Case

(Criminal Case Doc. 56 at 6). Rodriguez' confession was set forth in the Offense Conduct section of Petitioner's Presentence Investigation Report ("PSI," Criminal Case Doc. 56) and in the Criminal Complaint (Criminal Case Doc. 1).[4]

Petitioner states that "without the confession, there was little tying [him] to the bank robbery" and that, in the absence of the confession, there was a reasonable probability he would have proceeded to trial. (Doc. 15 at 11.) However, Petitioner's confession was not the only evidence supporting his convictions. Rather, Rodriguez' confession set forth in detail Petitioner's involvement in the crimes. Petitioner and Rodriguez were friends, and Petitioner worked at the bank that was robbed. (Criminal Case Doc. 1 at 1.) Petitioner and Rodriguez had discussed robbing the bank, although Petitioner did not specifically know when Rodriguez would do so. (Id. at 8.) When Rodriguez was arrested, the police found a notebook on his person containing the names of the employees that were scheduled to work on the day of the robbery. (Id. at 6.) According to Rodriguez, Petitioner provided him with that information. (Id. at 8.) Under the

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Number 6:16-cr-238-Orl-37TBS. In his plea agreement, Rodriguez acknowledged Petitioner's involvement in the crimes.

[4] Petitioner submitted a Statement (Doc. 15-2) signed by Rodriguez, which is not notarized or dated. Rodriguez states that he implicated Petitioner in the crimes because the agent interrogating him had told him to do so. (Id. at 2.) The Court finds that this unnotarized statement lacks evidentiary value and notes that Petitioner did not object to the recitation of Rodriguez's confession in the PSI.

circumstances, there has been no showing of prejudice. As a result, Claim One is denied.

B. Claims Two and Three

Petitioner states in Claim Two that

aiding and abetting armed bank robbery no longer constitutes a proper predicate for a § 924(c) violation. This is because aiding and abetting armed bank robbery does not fall within § 924(c)(3)(A), and thus can only remain a qualifying predicate under § 924(c)(3)(B). However, § 924(c)(3)(B) is unconstitutionally vague under the reasoning of *Dimaya* because there is no functional difference between 18 U.S.C. § 16(b), the statutory provision at issue in *Dimaya*, and § 924(c)(3)(B). (Doc. 11 at 5.)

Petitioner states in Claim Three that for aiding and abetting armed bank robbery to qualify as a proper predicate, the crime must constitute a residual clause offense under § 924(c)(3)(B). But § 924(c)(3)(B) is now unconstitutional in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). There is no principled distinction between the residual clause struck down in *Dimaya*, 18 U.S.C. § 16(b), and § 924(c)(3)(B). (Id. at 7.)

However, the Eleventh Circuit Court of Appeals held in *Williams v. United States*, 709 F. App'x 676, 677 (11th Cir. 2018) that "*Johnson*[5] did not invalidate 18 U.S.C. § 924(c)(3)(B), and armed bank robbery is a

[5] *Johnson v. United States*, 135 S. Ct. 2551 (2015).

predicate crime of violence under § 924(c)(3)(A)."[6] As a result, Claims Two and Three are denied.

Allegations not specifically addressed herein are without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. ' 2253(c)(2). To make such a showing "[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); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). However, the petitioner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Petitioner fails to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Petitioner cannot show that jurists of reason would find this Court's procedural rulings debatable. Petitioner fails to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Petitioner a certificate of appealability.

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[6] In *Ovalles v. United States*, 905 F.3d 1231, 1253 (11th Cir. 2018), the Eleventh Circuit Court of Appeals held that § 924(c)(3)(B) was not unconstitutionally vague and that "[t]he question whether a predicate offense constitutes a 'crime of violence' within the meaning of 18 U.S.C. § 924(c)(3)(B) should be determined using a conduct-based approach that accounts for the actual, real-world facts of the crime's commission, rather than a categorical approach."

V. CONCLUSION

Accordingly, it is ORDERED and ADJUDGED as follows:

1. The Amended Motion to Vacate, Set Aside, or Correct Sentence (Doc. 10) is DENIED.

2. This case is DISMISSED with prejudice.

3. Petitioner is DENIED a certificate of appealability.

4. The Clerk of the Court is directed to enter judgment in favor of Respondent and to close this case. A copy of this Order and the judgment shall also be filed in criminal case number.

5. The Clerk of the Court is directed to terminate the section 2255 motion (Criminal Case Doc. 81) filed in criminal case number 6:16-cr-239-Orl-37TBS.

DONE and ORDERED in Orlando, Florida on November 16th, 2018.

Copies furnished to: Counsel of Record
OrlP-2 11/16

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Docket No. 6:16-cr-239

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRANDON LEE MOJICA,

Defendant.

TRANSCRIPT OF CHANGE OF PLEA BEFORE THE HONORABLE ROY B. DALTON, JR. UNITED STATES DISTRICT JUDGE

APPEARANCES:

Counsel for Plaintiff: Emily C.L. Chang

Counsel for Defendant: Fritz J. Scheller

[24-25]

MS. CHANG: If this case were to go to trial, the United States would prove that on or about November 8, 2016, in the Middle District of Florida, the defendant, Brandon Lee Mojica, aiding and abetting Ricardo Rodriguez, Jr., by force and violence and by intimidation, did knowingly take from the presence of another certain money, that is, United States currency, in the approximate amount of $296,600 belonging to and in the care, custody, control, management, and possession of Wells Fargo Bank located at 1530 International Parkway, Lake Mary, Florida, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation.

And in committing said offense, the defendant did assault and put in jeopardy the life of B.M., a bank employee, by the use of a dangerous weapon. That is a .32 caliber pistol.

In addition, on or about November 8, 2016, in the Middle District of Florida, the defendant, aiding and abetting Rodriguez, did knowingly use and carry and brandish a firearm, that is, a .32 caliber pistol manufactured by L.W. Seecamp Company, during and in relation to the armed bank robbery.