Attachment F

FILED
United States Court of Appeals
Tenth Circuit

August 1, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ROMON LAMONT DOBBINS,

Petitioner - Appellant,

v.

JOE M. ALLBAUGH,

Respondent - Appellee.

No. 18-6055
(D.C. No. 5:17-CV-00521-M)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **BACHARACH**, **MURPHY**, and **MORITZ**, Circuit Judges.

Appellant, Romon Lamont Dobbins, an Oklahoma state prisoner proceeding *pro se* and *in forma pauperis*, seeks a certificate of appealability ("COA") from this court so he can appeal the district court's denial of his 28 U.S.C. § 2254 habeas petition. *See* 28 U.S.C. § 2253(c)(1)(A) (providing no appeal may be taken from a final order disposing of a § 2254 petition unless the petitioner first obtains a COA). In 2014, Dobbins was convicted in Oklahoma state court of drug trafficking and possession of a controlled dangerous substance with intent to distribute. His convictions were affirmed by the Oklahoma Court of Criminal Appeals ("OCCA") on February 8, 2016. His state application for post-conviction

relief was denied by the state trial court and the denial was affirmed by the OCCA.

Dobbins filed the instant § 2254 federal habeas petition on February 7, 2018, raising the following two claims: (1) ineffective assistance of trial counsel for failing to challenge the sufficiency of the affidavit supporting the search warrant that led to his arrest and (2) ineffective assistance of appellate counsel for failing to argue trial counsel's ineffective assistance. Dobbins's petition was referred to a magistrate judge who prepared a written Report and Recommendation (R&R). The R&R reviewed Dobbins's ineffective assistance claims de novo based on its conclusion the OCCA had not fully addressed them because Dobbins modified his arguments on appeal. *See* 28 U.S.C. § 2254(b)(2) (providing federal court can deny unexhausted habeas claims on the merits). The R&R recommended denying relief on the claims, concluding Dobbins had not met his burden under *Strickland v. Washington*, 466 U.S. 668 (1984). After considering Dobbins's written objections to the R&R, the district court adopted the findings and conclusions in the R&R and denied Dobbins's habeas petition.

To be entitled to a COA, Dobbins must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make the requisite showing, he must demonstrate "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different

manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quotations omitted). In evaluating whether Dobbins has satisfied his burden, this court undertakes "a preliminary, though not definitive, consideration of the [legal] framework" applicable to each of his claims. *Id.* at 338. Although Dobbins need not demonstrate his appeal will succeed to be entitled to a COA, he must "prove something more than the absence of frivolity or the existence of mere good faith." *Id.* (quotations omitted).

This court has reviewed Dobbins's application for a COA and appellate brief,[1] the R&R, the district court's order, and the entire record on appeal pursuant to the framework set out by the Supreme Court in *Miller-El* and concludes that Dobbins is not entitled to a COA. The district court's resolution of Dobbins's claims is not reasonably subject to debate and the claims are not adequate to deserve further proceedings.

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[1]In his appellate brief, Dobbins raises an additional claim that was not included in his § 2254 petition, challenging the sufficiency of the evidence presented at trial. This court does not consider issues raised for the first time on appeal. *Rhine v. Boone*, 182 F.3d 1153, 1154 (10th Cir. 1999).

Because Dobbins has not "made a substantial showing of the denial of a constitutional right," he is not entitled to a COA. 28 U.S.C. § 2253(c)(2). This court **denies** Dobbins's request for a COA and **dismisses** this appeal.

ENTERED FOR THE COURT

Michael R. Murphy
Circuit Judge

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

ROMON LAMONT DOBBINS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. CIV-17-521-M
	)	
JOE M. ALLBAUGH,	)	
	)	
Respondent.	)	

ORDER

On October 25, 2017, United States Magistrate Judge Shon T. Erwin issued a Report and Recommendation in this action brought pursuant to 28 U.S.C. § 2254, seeking a writ of habeas corpus. The Magistrate Judge recommended that petitioner's Petition for Writ of Habeas Corpus be denied. The parties were advised of their right to object to the Report and Recommendation by November 13, 2017. On November 9, 2017, petitioner filed his objection.

Having carefully reviewed this matter de novo, the Court:

(1) ADOPTS the Report and Recommendation [docket no. 19] issued by the Magistrate Judge on October 25, 2017, and

(2) DENIES petitioner's Petition for Writ of Habeas Corpus.

IT IS SO ORDERED this 15th day of March, 2018.

Vicki Miles-LaGrange

VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE

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

ROMON LAMONT DOBBINS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. CIV-17-521-M
	)	
JOE M. ALLBAUGH,	)	
	)	
Respondent.	)	

JUDGMENT

Having denied petitioner's petition for a writ of habeas corpus in a separate order entered this date, the Court hereby enters judgment in favor of respondent, Joe M. Allbaugh, and against petitioner, Romon Lamont Dobbins.

ENTERED at Oklahoma City, Oklahoma this 15th day of March, 2018.

Vicki Miles-LaGrange

VICKI MILES-LaGRANGE
UNITED STATES DISTRICT JUDGE

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

ROMON LAMONT DOBBINS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. CIV-17-521-M**
	)	
JOE M. ALLBAUGH,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner Romon Lamont Dobbins, a state prisoner appearing *pro se*, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his state court conviction. (ECF No. 1). Respondent has filed his Response to Petition for Writ of Habeas Corpus. (ECF No. 15). For the reasons set forth below, it is recommended that the Petition be **DENIED**.

I. BACKGROUND

On July 4, 2013, Oklahoma City Police Department Sergeants Harmon and Porter utilized a confidential informant (CI) to engage in a "controlled" purchase of cocaine base from an individual known as "Monster" in Room 219 of an Executive Inn in Oklahoma City. (ECF No. 15-8:2). Prior to the purchase, the two officers searched the CI to ensure he had no money or contraband on his person. (ECF No. 15-8:2). The officers then provided the CI with more than $5.00 in evidence funds and instructed the CI to make the purchase. (ECF No. 15-8:2). The CI entered Room 219 and came out less than five minutes later with more than 0.1 gram of cocaine base which he had purchased inside the room. (ECF No. 15-8:2). A second search of the CI releveled no additional money or

contraband. (ECF No. 15-8:2). The CI informed Sergeant Porter that the motel manager was aware of drug activity on the premises and has been known to warn drug dealers about law enforcement activity at the motel. (ECF No. 15-8:2).

Sergeant Harmon presented all of the forgoing factual information in an affidavit for a search warrant for Room 219 seeking drugs, drug paraphernalia, and any and all property or items which would establish the identity of the person or persons in control of the room. (ECF No. 15-8). Also contained in search warrant affidavit was a statement from Sergeant Harmon regarding the veracity of the CI. (ECF No. 15-8:2). According to Sergeant Harmon, the CI:

- Has proven to be knowledgeable about drug activity in northeast Oklahoma City in the past,
- Has provided information which Sergeant Harmon was able to corroborate through law enforcement records as well as his own training and experience,
- Has worked with the Oklahoma City Police Department for over seven years, being part of "several controlled purchases,"
- Has provided information which led to several convictions against charged defendants, and the recovery of more than 140 grams of methamphetamine, 275 grams of cocaine base, 725 grams of cocaine HCl, 13 firearms, and $12,000.00 in currency.

(ECF No. 15-8:2). On July 5, 2013, Sergeant Harmon executed the search warrant and obtained evidence which ultimately led to Petitioner's arrest. Jury Trial Transcript of Proceedings had on the 3rd and 4th days of November, 2014 Before the Honorable Cindy H. Truong District Judge, *State of Oklahoma v. Dobbins*, Case No. CF-2013-4053 (Okla. Co. Nov. 3 & 4, 2014) Vol. I at 73 at 16-21 (Trial TR. Vol. I).

On November 4, 2014, a jury in the District Court of Oklahoma County convicted Petitioner of drug trafficking and possession of a controlled dangerous substance with intent to distribute. (ECF No. 1:1). On February 8, 2016, the Oklahoma Court of Criminal Appeals (OCCA) affirmed the conviction. (ECF No. 15-3.). On November 7, 2016, Petitioner filed an Application for Post-Conviction relief in the district court. (ECF No. 15-4). In that application, Petitioner alleged: (1) ineffective assistance of trial counsel for failure to challenge the sufficiency of search warrant which led to his arrest and (2) ineffective assistance of appellate counsel for failure to assert trial counsel's error on appeal. (ECF No. 15-4). Specifically, Mr. Dobbins argued his trial attorney should have challenged:

- the veracity of the CI who provided information in the affidavit for the search warrant and
- the information contained in the search warrant affidavit as failing to establish probable cause for the arrest.

(ECF No. 15-4:6-7). The district court concluded that Mr. Dobbins' allegations of trial counsel's ineffectiveness was procedurally barred; but the court also denied both grounds on the merits, stating:

> The affidavit in support of the search warrant contained sufficient information—including information concerning the veracity of the confidential informant—for a reviewing court to have a substantial basis to believe that probable cause existed that drugs, drug paraphernalia, an/or drug proceeds would be found in the particular motel room. Under these circumstances a motion to suppress gained as a result of the search would have been properly denied.
>
> It follows, therefore, that any claim of ineffective assistance of trial counsel predicated on counsel's failure to seeks suppression of the evidence and any claim of ineffective assistance of appellate counsel for failing to

> challenge the efficacy of trial counsel on this basis do not meet the stringent standard of *Strickland v. Washington*, 466 U.S. 668, 687-88 [ ] (1984).

(ECF No. 15-5:3-4) (internal citations omitted).

Petitioner appealed the district court's ruling, failing to address the district court's findings, but instead, expanding on his argument, speculating that had trial counsel pursued information about the CI, counsel might have revealed that the CI was not reliable, was deriving benefits from the police for buying drugs, could not identify Petitioner, or did not make the drug purchase in the manner described in the affidavit. (ECF No. 15-6). The Oklahoma Court of Criminal Appeals affirmed the district court, stating: "[Petitioner's] speculative assertions by Petitioner outlined above, concerning what trial counsel might have discovered about the confidential informant, do not constitute *Strickland's* required proof of a 'reasonable probability' of a different outcome." (ECF No. 15-7:4).

On May 4, 2017, Mr. Dobbins filed the instant action, seeking habeas relief on two grounds:

- Ineffective assistance of trial counsel for failing to challenge the sufficiency of the search warrant affidavit, including the credibility of the CI and the information contained in the affidavit and
- Ineffective assistance of appellate counsel for failure to assert trial counsel's ineffectiveness on direct appeal.

(ECF No. 1:5, 6).

II. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") governs this Court's power to grant habeas corpus relief. Under the AEDPA, the standard of review

applicable to each claim depends upon how that claim was resolved by the state courts. *Alverson v. Workman,* 595 F.3d 1142, 1146 (10th Cir. 2010) (citing *Snow v. Sirmons,* 474 F.3d 693, 696 (10th Cir. 2007)). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

For claims adjudicated on the merits, "this [C]ourt may grant . . . habeas [relief] only if the [OCCA's] decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States' or 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Hanson v. Sherrod*, 797 F.3d 810, 8214 (10th Cir. 2015) (citation omitted)). "It is the petitioner's burden to make this showing and it is a burden intentionally designed to be 'difficult to meet.'" *Owens v. Trammell*, 792 F.3d 1234, 1242 (10th Cir. 2015) (citation omitted). The deference embodied in § 2254(d) "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington,* at 102-03 (citation omitted).

This Court first determines "whether the petitioner's claim is based on clearly established federal law, focusing exclusively on Supreme Court decisions." *Hanson v. Sherrod*, 797 F.3d at 824. "A legal principle is 'clearly established' within the meaning of this provision only when it is embodied in a holding of [the United States Supreme Court.]" *Thaler v. Haynes*, 559 U.S. 43, 47 (2010). If clearly established federal law exists, this

Court then considers whether the state court decision was contrary to or an unreasonable application of clearly established federal law. *See Owens,* 792 F.3d at 1242.

"A state court's decision is 'contrary to' clearly established federal law 'if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts.'" *Id.* (citations omitted). Notably, "[i]t is not enough that the state court decided an issue contrary to a lower federal court's conception of how the rule should be applied; the state court decision must be 'diametrically different' and 'mutually opposed' to the Supreme Court decision itself." *Id.* (citation omitted).

The "'unreasonable application' prong requires [the petitioner to prove] that the state court 'identified the correct governing legal principle from Supreme Court decisions but unreasonably applied that principle to the facts of the prisoner's case.'" *Id.* (citations and internal brackets omitted). On this point, "the relevant inquiry is not whether the state court's application of federal law was *incorrect*, but whether it was 'objectively unreasonable.'" *Id.* (citations omitted, emphasis in original). So, to qualify for habeas relief on this prong, a petitioner must show "there was no reasonable basis for the state court's determination." *Id.* at 1242-43 (citation omitted). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007).

In sum, "[u]nder § 2254(d), a habeas court must determine what arguments or theories supported . . . the state court's decision; and then it must ask whether it is

possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Harrington,* 562 U.S. at 101–02. Relief is warranted only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Id.* at 102.

Finally, a federal habeas court must "accept a state-court [factual] finding unless it was based on 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015). In other words, when the state appellate court makes a factual finding, the Court presumes the determination to be correct; a petition can only rebut this presumption with clear and convincing evidence. *See id.* at 2199-22; *see also* 28 U.S.C. § 2254(e)(1).

If the state appellate court has not addressed the merits of a claim, the Court exercises its independent judgment. *See Littlejohn v. Trammell*, 704 F.3d 817, 825 (10th Cir. 2013) ("For federal habeas claims not adjudicated on the merits in state-court proceedings, we exercise our 'independent judgment[.]'" (citation omitted)). But "[a]*ny* state-court findings of fact *that bear upon the claim* are entitled to a presumption of correctness rebuttable only by 'clear and convincing evidence.'" *Hooks v. Workman*, 689 F.3d 1148, 1164 (10th Cir. 2012) (emphasis added) (quoting 28 U.S.C. § 2254(e)(1) (1996)).

III. GROUND ONE

In Ground One, Petitioner alleges that his trial counsel was ineffective for failing to challenge the sufficiency of the search warrant which led to his arrest and ultimate

conviction. (ECF No. 1:5). Specifically, Mr. Dobbins alleges that his trial attorney should have challenged: (1) the veracity of the CI and (2) the information contained in the search warrant "because neither the drugs Sold to the confidential nor the marked money that was used in the Transaction was not Found on petitioner nor was it Admitted into evidence nor contained in Discovery nor any photograph." (ECF No. 1:5). The state district court addressed these issues, but the OCCA did not, as Petitioner modified his argument on appeal, instead speculating that if counsel had pursued the issue of the CI's reliability, it might have revealed that the CI was not reliable, was deriving benefits from the police for buying drugs, could not identify Petitioner, or did not make the drug purchase in the manner described in the affidavit. (ECF No. 15-6). Because the OCCA did not directly address the precise issues raised in the state district court, which mirror those Mr. Dobbins raises in his habeas petition, the Court should review the habeas claims *de novo*.

A. Standard for Ineffective Assistance of Counsel

To be entitled to habeas relief on his claim of ineffective assistance of counsel, Petitioner must demonstrate that the OCCA's adjudication of this claim was an unreasonable application of *Strickland.* Under *Strickland,* a defendant must show that his counsel's performance was deficient and that the deficient performance was prejudicial. *Strickland,* 466 U.S. at 687; *Osborn v. Shillinger,* 997 F.2d 1324, 1328 (10th Cir. 1993). A defendant can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. *Strickland,* 466 U.S. at 687–88. There is a "strong presumption that counsel's conduct falls within the

range of' reasonable professional assistance." *Id.* at 688. In making this determination, a court must "judge . . . [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. To establish the second prong, a defendant must show that this deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *see also Sallahdin v. Gibson,* 275 F.3d 1211, 1235 (10th Cir. 2002).

A federal habeas court may intercede only if the petitioner can overcome the "doubly deferential" hurdle resulting from application of the standards imposed by § 2254(d) and *Strickland. Cullen v. Pinholster,* 563 U.S. 170, 190 (2011). If Petitioner is unable to show either "deficient performance" or "sufficient prejudice," his claim of ineffective assistance fails. *Strickland,* 466 U.S. at 700. Thus, it is not always necessary to address both *Strickland* prongs.

B. No Ineffective Assistance of Trial Counsel

Petitioner asserts that his trial counsel was ineffective for failing to challenge the affidavit used to procure the search warrant. Specifically, Petitioner first contends that probable cause was lacking because the affidavit "Failed to contain Information establishing the credibility of the Confidential Informant." (ECF No. 1:5). In the affidavit

for search warrant, Sergeant Harmon cited information obtained from the CI—that being that the CI had told Sergeant Harmon about a suspect known as "Monster" who sold various illegal drugs from Room 219 of the Executive Inn. (ECF No. 15-8:2). The affidavit also contained information establishing that police officials had worked with the CI previously and he had proven to be trustworthy and reliable. *See supra*; ECF No. 15-8:2. Not only did the affidavit contain information to substantiate the credibility of the informant, but the information the CI provided regarding the suspect was verified through *additional investigation* which involved Sergeants Porter and Harmon arranging the "controlled buy."

Mr. Dobbins fails to state why he believed the CI to be unreliable, but instead only argues that probable cause was lacking because neither the money used to buy the drugs, nor the drugs themselves were found on petitioner at the time of his arrest, nor were photographs of the same entered into evidence at trial. (ECF Nos. 1:5; 18:1-4).

"When there is sufficient independent corroboration of an informant's information, there is no need to establish the veracity of the informant." *United States v. Artez,* 389 F.3d 1106, 1111 (10th Cir. 2004). Additionally, according to the United States Supreme Court, "[t]he task of the [judge issuing the search warrant] is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238–39 (1983).

Here, according to the affidavit for the search warrant, the CI provided Sergeant Harmon information regarding drug activity at Room 219. (ECF No. 15-8:2). Armed with that information, Sergeant Porter, Sergeant Harmon, and the CI conducted a further investigation, arranging a "controlled buy" of drugs from the individual in Room 219. (ECF No. 15-8). Thus, the record demonstrates that the search warrant was not issued solely on information provided by the CI, rather the information was sufficiently corroborated through independent information gained by police officials. Additionally, the affidavit contained information regarding the reliability of the CI through over seven years of working with the Oklahoma City Police Department in similar cases. (ECF No. 15-8:2).

Based on the totality of these circumstances, the trial court would have likely denied a motion to suppress the search warrant if one had been filed by Petitioner's attorney. As a result, on *de novo* review, this Court should find trial counsel had not acted unreasonably in failing to challenge the sufficiency of the search warrant on a basis that the CI was not credible. *See United States v. Danhauer,* 229 F.3d 1002, 1006 (10th Cir. 2000) ("When there is sufficient independent corroboration of an informant's information, there is no need to establish the veracity of the informant."); *Acker v. Dinwiddie*, No. 10-CV-114-GKF-FHM, 2013 WL 607856, at *5-7 (N.D. Okla. Feb. 19, 2013) (denying habeas relief for trial counsel's failure to challenge the sufficiency of a search warrant based on the alleged untruthfulness of a CI, when the CI's information was independently corroborated); *Vaughn v. Dinwiddie*, No. CIV-06-202-RAW, 2007 WL 4383532, at *5 (E.D. Okla. Dec. 11, 2007) ("where there was other information in the affidavit which showed to the magistrate that the officer/affiant had reason to believe the informant to be

reliable[,] . . . disclosure of the identity of the confidential informant to determine whether he was reliable or credible was not necessary.").

Mr. Dobbins also argues that the search warrant affidavit was insufficient because there was no evidence of the drugs or the money used in the controlled buy, either on the Petitioner when he was arrested or entered photographically at trial. (ECF Nos. 1:5, 18:1-4). But again, the question is whether, "given all the circumstances set forth in the affidavit . . . , there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238–39 (1983). And a court reviewing the alleged omission of information must ask whether, assuming the judge who had issued the warrant had been apprised of the omitted information, the judge still "would have found probable cause to issue the search warrant." *United States v. Kennedy,* 131 F.3d at 1371, 1377 (10th Cir. 1997).

In the instant case, the information that Petitioner challenges as lacking in the affidavit for the search warrant concerns evidence that would not have been included in the search warrant because the evidence concerns facts subsequent to the arrest. According to Petitioner, "probable cause was lacking because neither the drugs Sold to the confidential informant nor The marked money that was used in the Transaction was not on petitioner nor was it Admitted into evidence nor contained in Discovery nor any photograph." (ECF No. 1:5). As stated, this information would not have been included in the affidavit for search warrant. Instead, the search warrant affidavit included:

- Evidence of suspected drug activity taking place at Room 219 of the Executive Inn, given by a CI whom Oklahoma City Police officials had successfully worked with in other drug cases for over seven years, and

- Evidence concerning a controlled buy of drugs at Room 219, utilizing the same CI who was given money to make the purchase, who had no money or contraband on him prior to making the buy, and who returned after being in Room 219 less than five minutes, with more than 0.1 gram of cocaine base.

(ECF No. 15-8).

Given these circumstances, Petitioner's counsel would have likely failed if he had challenged the affidavit for the search warrant based on the information contained, or allegedly omitted, in the document. Thus, counsel's failure challenge the search warrant for failing to contain evidence relating to a lack of money or drugs found on Petitioner subsequent to his arrest was reasonable and did not violate *Strickland*. Accordingly, the Court should find that habeas relief is not warranted for Petitioner's claims that his trial counsel had been ineffective in failing to challenge the sufficiency of the search warrant—either on the basis that the CI was not credible or that the search warrant affidavit contained insufficient information.[1]

IV. GROUND TWO

In Ground Two, Mr. Dobbins argues that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. (ECF No. 1:6). But this claim must fail because Mr. Dobbins' has failed to establish that he is entitled to habeas relief on the grounds that his trial counsel had been ineffective. *See Snow v. Sirmons*, 474 F.3d 693, 733 (10th Cir. 2007) ("Having disposed of all of [petitioner's] [ineffective

[1] Petitioner's arguments: (1) that neither the drugs nor the money used in the controlled buy were found on his person at the time of arrest, and (2) that evidence of the same was not introduced at trial suggests a challenge to the sufficiency of the evidence to support the conviction. But Mr. Dobbins has not asserted such a claim, and has limited his habeas petition to argue that his trial attorney was ineffective in failing to challenge the sufficiency of the affidavit supporting the search warrant. *See* ECF No. 1.

assistance of trial counsel] claims on the merits, there remains nothing for us to review in regard to his ineffective assistance of appellate counsel argument."); *Hawkins v. Hannigan,* 185 F.3d 1146, 1152 (10th Cir. 1999) (rejecting petitioner's challenge to ineffective assistance of appellate counsel for failing to raise an issue on direct appeal when the court concludes that the omitted issue was meritless).

V. PETITIONER'S MOTIONS FOR COUNSEL AND EVIDENTIARY HEARING

Mr. Dobbins has requested appointment of counsel and an evidentiary hearing. (ECF Nos. 1:13; 18:1). If the forgoing recommendation is adopted, Petitioner's motions should be denied. *See Lasiter v. Thomas,* 89 F.3d 699, 703 (10th Cir. 1996) (a district court does not err in refusing to hold an evidentiary hearing on the voluntariness of a plea when the habeas petitioner's allegations are contradicted by his statements during the plea colloquy); *Swazo v. Wyo. Dep't of Corr. State Penitentiary Warden*, 23 F.3d 332, 333-34 (10th Cir. 1994) (holding that a federal habeas court must appoint counsel to represent a petitioner only when the court determines that an evidentiary hearing is required); *Anderson v. Att'y Gen. of Kan.,* 425 F.3d 853, 861 (10th Cir. 2005) (upholding a refusal to appoint counsel where a habeas petitioner's claims were meritless).

VI. RECOMMENDATION

It is recommended that Mr. Dobbins' Petition for Writ of Habeas Corpus be **DENIED**.

VII. NOTICE OF RIGHT TO OBJECT

The parties are advised of their right to file an objection to this Report and Recommendation with the Clerk of this Court by **November 13, 2017**, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The parties are further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

VIII. STATUS OF REFERRAL

This Report and Recommendation terminates the referral by the District Judge in this matter.

ENTERED on October 25, 2017.

Shon T. Erwin

SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE

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