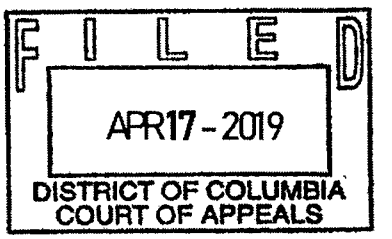
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 17-CO-700

RONNIE L. PAYNE, APPELLANT,

v.

UNITED STATES, APPELLEE.



Appeal from the Superior Court
of the District of Columbia
(FEL-4062-92)

(Hon. Florence Pan, Trial Judge)

(Submitted October 12, 2018 Decided April 17, 2019)

Before THOMPSON and EASTERLY, *Associate Judges*, and RUIZ, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: After a jury trial, appellant Ronnie Payne was convicted of two counts of first-degree premeditated murder, two counts of assault with intent to kill while armed, one count of carrying a pistol without a license, and one count of possession of a firearm during a crime of violence, all in connection with a shooting incident that took place on March 12, 1992, near Breeze's Metro Club on Bladensburg Road, N.E.[1] Appellant appeals from the Superior Court's denial without a hearing of his motion pursuant to D.C. Code § 23-110, in which he argued *inter alia* that his trial counsel provided ineffective assistance by failing to object to the government's publication to the jury of a photo array of mug shots

[1] This court twice affirmed appellant's convictions on direct appeal, once in 1997, *see Payne v. United States*, 697 A.2d 1229 (D.C. 1997), and the second time after the United States Court of Appeals for the District of Columbia Circuit held that, upon a *habeas* petition, appellant was entitled to a new direct appeal because of the constitutional ineffectiveness of his original appellate counsel, *see Payne v. United States*, 154 A.3d 602 (D.C. 2017).

(from which an eyewitness, Woodfork, selected appellant's photograph as a photograph of one of the men who shot into a car and killed the two front-seat passengers, *see* 697 A.2d at 1231). The Superior Court determined that a hearing was not warranted because appellant testified at trial and acknowledged that he had a criminal history, an acknowledgment that the court reasoned made the admission of appellant's mug shot "essentially cumulative" evidence and "greatly reduced [its] prejudicial impact." Appellant contends that the Superior Court judge erroneously exercised her discretion in concluding that a hearing was unnecessary without having considered whether appellant would have testified had the mug shot evidence not been admitted. For the reasons set out below, we affirm the Superior Court's ruling.

I.

"When a defendant in a § 23-110 motion raises a claim of ineffective assistance of counsel, there is a presumption that the trial court should conduct a hearing." *Lane v. United States*, 737 A.2d 541, 548 (D.C. 1999). However, "[d]espite th[at] presumption, a hearing is not required in every case, and we review a trial court's decision not to hold one only for abuse of discretion." *Id.* A hearing is deemed unnecessary when the motion contains only "(1) vague and conclusory allegations, (2) palpably incredible claims, or (3) allegations that would merit no relief even if true." *Dobson v. United States*, 711 A.2d 78, 83 (D.C. 1998); *see also* D.C. Code § 23-110(c) ("Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing" on the motion.).

II.

In this case, appellant asserts that a hearing on his § 23-110 motion was required to resolve the factual issue of whether appellant would have testified — thereby enabling the prosecutor to elicit on cross-examination testimony about appellant's criminal record — if his counsel had (successfully) objected to the publication of his mug shot. Appellant suggests that such an objection would likely have been sustained in light of this court's case law recognizing "the serious prejudice [that can ensue] from admission of . . . 'mug shots'" because of a mug

shot's "inherent implication of criminal activity." *Williams v. United States*, 382 A.2d 1, 5, 7 (D.C. 1978) (applying "three prerequisites to a ruling that the introduction of 'mug shot' type photographs does not result in reversible error": the government's "demonstrable need to introduce the photographs," the absence of any implication in the photographs themselves that the defendant has a prior criminal record, and a "manner of introduction . . . that . . . does not draw particular attention to the source or implications of the photographs").

We can assume for the sake of argument that appellant's trial counsel was deficient in failing to object to admission of his mug shot.[2] However, "[i]n order to prevail when bringing a claim of ineffective assistance of counsel, appellant must show [not only] that his trial attorney's performance fell below an objective standard of reasonableness [but also] that there is a reasonable probability that the error affected the outcome of the trial to his prejudice." *Brown v. United States*, 181 A.3d 164, 166 (D.C. 2018) (internal quotation marks omitted). The Superior Court judge concluded that appellant could not meet the second prong of that so-called *Strickland* test; specifically, the court found, appellant "fail[ed] to demonstrate that he was prejudiced by counsel's failure to object to admission of the mug shots because [as the trial transcript shows] defendant himself testified about his criminal record at trial."[3] The court determined that there was, for that

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[2] The government has not argued that the photograph of appellant used in the identification process and published to the jury was not a mug shot or would not have been recognized as a mug shot. The government also does not argue that it had a demonstrable need to show the jury the mug shot.

Nevertheless, the matter of whether appellant's trial counsel was deficient in not objecting to admission of the mug shots is not entirely clear. Appellant's trial counsel withdrew a motion "to redact [writing on] the back of" the mug shot photograph, apparently because he had agreed with counsel for appellant's co-defendant that there would be strategic value in cross-examining Officer Sitek about the writing. During cross-examination, co-defendant's counsel impeached the officer by establishing that, contrary to the officer's testimony, the witness (Christine Terry) did not, during her videotaped interview, utter the phrase that was written on the back of the photograph.

[3] The prosecutor elicited that appellant had been convicted of a list of crimes including weapons and drug charges, robbery, theft, and criminal conspiracy. None of appellant's prior convictions was for murder.

reason, "no reasonable probability that the jury would have reached a different result if the mug shots had been excluded." The court found it "clear from the pleadings" that appellant's claim failed the second prong of the *Strickland* test and thus that there was "no need to hold a hearing" on appellant's § 23-110 motion.

Appellant is correct that the Superior Court judge did not (or at least did not explicitly) consider whether appellant would have testified if his counsel had successfully objected to the publication of his mug shot. That is a matter that the court might have resolved through a hearing; but, as the government points out, appellant did not assert in the trial court that he would not have testified if his mug shot had not been introduced. In other words, he did not apprise the trial court of the factual issue he now contends warranted a hearing. Moreover, nothing in appellant's testimony on direct examination would have suggested to the court that appellant made the decision to testify because his mug shot had been admitted into evidence. For example, during direct examination, defense counsel did not question appellant about his criminal history so as to give appellant an opportunity to explain the circumstances and (possibly) paint himself in a better light.[4] In addition, the testimony that appellant gave on direct examination was a claim that another man, Preston Coe, whom appellant saw with a gun at the scene of the shooting and heard say, "I'm getting ready to air this car out," was the actual shooter. Appellant's testimony was exculpatory testimony that only appellant among all the other trial witnesses would be both positioned to give and certain to give.[5] That fact suggests that appellant would have testified whether or not the mug shots were admitted. For all the foregoing reasons, we cannot conclude that the Superior Court erroneously exercised its discretion in not holding a hearing on appellant's motion.

Appellant is correct that this court has recognized the need for a "less stringent view" of a prisoner's pro se pleading, and thus has deemed a pro se § 23-110 motion as "sufficient to raise the issue" of whether an appellant would have taken an action prejudicial to his defense had his trial counsel not been deficient in a certain respect, even though the issue was "not in the precise form that an

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[4] Appellant's testimony about his criminal history was made only upon cross-examination.

[5] Appellant's co-defendant Garris gave similar testimony when he took the witness stand after appellant had testified, but, at the time appellant testified, appellant could not have been sure Garris would do so.

attorney might present." *Upshur v. United States*, 742 A.2d 887, 895–96 (D.C. 1999). Here, however, the problem is not "form"; rather, appellant's motion contains no argument or language that we can construe as raising the claim that he would not have testified but for his counsel's failure to object to admission of his mug shot, or to seek an "appropriate curative instruction." In describing the claimed result of counsel's omission, appellant asserted only that he "would not have been found guilty" if the mug shot had not been introduced.[6]

Wherefore, the order denying appellant's § 23-110 motion without a hearing is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

Copies to e-served:

Honorable Florence Pan

Director, Criminal Division

Dennis M. Hart, Esquire

Elizabeth Trosman, Esquire
Assistant US Attorney

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[6] Finally, appellant seeks to reserve the right to challenge the Superior Court's denial of his § 23-110 motion on the second basis the Superior Court cited: this court's holding that it was not reasonably likely that the trial court's unobjected-to erroneous reasonable doubt instruction caused the jury to apply the law in a way that lowered or eliminated the government's burden of proof. We agree with the government that "appellant's certiorari petition effectively reserves this claim[.]" Accordingly, we need not address it further.

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION - FELONY BRANCH

UNITED STATES OF AMERICA	:	Criminal Number: 1992 FEL 4062
v.	:	Judge: Florence Y. Pan
RONNIE PAYNE	:	Closed Case

ORDER

This matter comes before the Court upon consideration of defendant's Motion for a New Trial ("Def. Mot."), alleging ineffective assistance of counsel, filed on January 26, 2015; the Government's Response to Defendant's *Pro Se* Motion ("Gov't Resp."), filed on April 24, 2017; and defendant's Response to the Government's Opposition ("Def. Resp."), filed on May 9, 2017. Defendant's motion was filed on January 26, 2015, and was held in abeyance pending the resolution of an appeal before the District of Columbia Court of Appeals. The Court of Appeals issued its opinion resolving the appellate issue on February 23, 2017. The Court has considered the motions submitted by the parties, as well as the record and the relevant law. For the following reasons, defendant's motion is denied.

PROCEDURAL HISTORY

START ☆ Following a jury trial before the Honorable George W. Mitchell, defendant was convicted on February 23, 1993, of two counts of first-degree premeditated murder, two counts of assault with intent to kill while armed, one count of carrying a pistol without a license, and one count of possession of a firearm during a crime of violence. *See* Gov't Resp. at 1-2.[1] Defendant was

[1] Due to the age of this case, the Court is unable to access certain documents and court records, including the Judgment and Commitment Order, the trial transcript, and defendant's previous motions and petitions. The Court, therefore, relies largely on representations of the record made by the parties, or discussions of the record by other courts that have issued related opinions.