A P P E N D I X

APPENDIX-A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-1163

George E. Brown, Jr.

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - Cape Girardeau
(1:08-cv-00182-CDP)

JUDGMENT

Before SHEPHERD, WOLLMAN, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

The full $505 appellate and docketing fees are assessed against the appellant. The court remands the collection of those fees to the district court.

April 30, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX-B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

GEORGE E. BROWN,	)	
	)	
Movant,	)	
	)	
vs.	)	Case No. 1:08 CV 182 CDP
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

Movant George Brown has once again filed a motion under Rule 60(b), in this civil case, again seeking to re-litigate his 2006 criminal conviction. Brown represented himself at a jury trial and was convicted of possession with intent to distribute five grams or more of cocaine base. Case No. 1:05CR178. His conviction and sentence were affirmed on appeal. *United States v. Brown*, 499 F.3d 817 (8th Cir. 2007). I denied his motion to vacate his sentence in this case brought under 28 U.S.C. §2255 [ECF # 23] and the Court of Appeals denied a certificate of appealability [ECF # 32]. In the years after that, Brown has filed a number of Rule 60(b) and other motions, which I have denied. [ECF # 37, 44, 54, 57]. The Court of Appeals has repeatedly denied his requests for certificates of appealability. [ECF # 49, 50, 68]. The Supreme Court has repeatedly denied his petitions for certiorari. [ECF # 36, 53]. His motion for writ of coram nobis was filed as a separate suit and denied by another judge. Case No. 1:17CV103 RLW

(Dismissed June 20, 2017). In the meantime he was released from prison and committed a new crime. He was convicted and sentenced in the new case, Case No. 1:15CR63 RLW, and his supervised release was revoked in the original criminal case. The appeals in his criminal cases are numerous, but despite all these filings, he has never obtained any post-conviction or appellate relief. This is because all his filings are patently frivolous. Yet he continues to file them.

I have reviewed the most recent motion, and find it, like the others before it, to be wholly without merit.

Accordingly,

IT IS HEREBY ORDERED that George Brown's latest motion for relief [69] is denied.

IT IS FURTHER ORDERED that this Court will not issue a certificate of appealability as this motion, like the others, is frivolous.

Catherine D Perry

CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 27th day of December, 2018.

APPENDIX-C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-1163

George E. Brown, Jr.

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - Cape Girardeau
(1:08-cv-00182-CDP)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 20, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

The Eighth Circuit Court of Appeals summarized the evidence of the search warrant affidavit as follows:

> To obtain the search warrant, Detective Chris Rataj submitted an affidavit which included the following information: Detective Rataj's qualifications; Brown's criminal history; that Brown was being investigated for distributing crack cocaine; that Connie Franks had told police that she purchased crack several times from Brown at his residence; that a reliable confidential informant (CI) had, in the previous two days, bought crack cocaine and reported that Brown discussed having a handgun; and that Brown was a suspect who had admitted his involvement in a 1984 homicide.499 F.3d at 819.

At his initial appearance, Brown told the Magistrate Judge handling pretrial matters that he wished to represent himself. The Magistrate Judge nevertheless appointed the Federal Public Defender to represent Brown, and told him he could re-raise the request later. Brown did re-raise the request, and the Magistrate Judge ultimately recommended to me that Brown be allowed to represent himself. After a lengthy pretrial hearing, I granted his request. Both the Magistrate Judge and I also considered all *pro se* pretrial filings made by Brown, including those he made while he was still represented by counsel. Brown then represented himself at the two-day jury trial. He cross-examined the government's witnesses (including Detective Rataj and Connie Franks, referred to in the Court of Appeals summary above) and recalled Detective Rataj in his case. Brown did not testify but did make a closing argument.

Brown continued to represent himself at sentencing. The Presentence Report concluded that there was a total offense level of 32 (including as relevant conduct the other cocaine sales Connie Franks testified about at trial). Brown had 32 criminal history points (because he had 10 prior felony convictions and committed this crime within two years of his release from prison), which is more than double the number of criminal history points required to qualify for the maximum criminal history category under the guidelines, Category VI. His sentencing guidelines range was 210 to 262 months. 1 I sentenced him to 240 months, the midpoint of the guidelines range. When the crack cocaine guidelines were amended, I reduced his sentence to 197 months, which was the midpoint of the revised guidelines range. The Court of Appeals appointed counsel after Brown appealed the conviction and original sentence.

Brown's § 2255 motion raises 17 grounds for relief. Although most are claims of ineffective assistance of appellate counsel, he also makes several claims that his initially appointed counsel was ineffective during the pretrial phase of the case.

Brown alleges that the attorney initially appointed to represent him in the trial court was ineffective in the following ways: 2

2. He failed to adequately challenge the search warrant.

3. He failed to seek suppression of Brown's post-arrest statements.

4. He failed to argue that the grand jury was mislead and that there was no probable cause for the indictment (this claim is also raised against appellate counsel).

5. He failed to object to the government's cross-examination of Connie Franks during the suppression hearing as being beyond the scope of direct examination.

6. He failed to argue that the "no-knock" warrant was based on false information.

Brown raises the following claims of ineffective assistance of appellate counsel:

1. Failure to raise on appeal the claim that Brown was denied the right to represent himself during the pretrial proceedings.

4. Failure to raise on appeal the argument that the grand jury was mislead and that the indictment lacked probable cause (this claim is also raised against pretrial counsel).

7. Failure to challenge on appeal the Court's instructing the jury that the search and seizure was legal.

8. Failure to challenge on appeal the court's refusal to base the jury instructions on possession of powder cocaine.

9. Failure to raise a claim that defendant's rights under *Brady v. Maryland* were violated because the government did not provide a copy of Connie Franks' recorded statement until the morning of trial.

10. Failure to argue on appeal that Brown could not have been convicted of the Class A felony of possession with intent to distribute more than

First, Brown cannot show prejudice from any of his pretrial counsel's actions. When I agreed that Brown could represent himself, I agreed to consider all the arguments he had made on his own behalf, and I allowed him to provide further arguments regarding why he believed the Magistrate Judge's Report and Recommendation on the suppression motions should not be adopted. I considered all the evidence and arguments *de novo*, and counsel's performance could not have prejudiced Brown, even if it had been deficient. Brown had the opportunity, acting as his own counsel, to cure any defects that he believed had been caused by his initial counsel's ineffectiveness. Given that he was allowed to represent himself and that he was allowed to revisit all the pretrial matters, he cannot show he was prejudiced by his former counsel's actions.

In Ground 1, Brown argues that appellate counsel was ineffective for failing to raise on appeal the argument that he was improperly denied his right to self-representation in the initial stages of the case. A criminal defendant has the right to waive counsel and conduct his own defense. *See Faretta v. California*, 422 U.S. 806, 819-20, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). A waiver of counsel must be "knowing, voluntary, and intelligent." *Iowa v. Tovar*, 541 U.S. 77, 88, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004); *Page v. Burger*, 406 F.3d 489, 494 (8th Cir. 2005). At the initial appearance, the Magistrate Judge appointed counsel and denied Brown's request to represent himself at that time, but he stated that Brown could raise the request later. Brown did continue to ask to represent himself, and eventually the Magistrate Judge recommended that I allow him to do so. As discussed in more detail above, I allowed Brown to represent himself at trial, and both I and the Magistrate Judge considered all his *pro se* filings as well as all the issues he stated counsel should have raised. Brown was not prejudiced by anything his initial counsel did. Any problems potentially caused by the initial denial of self-representation were cured by Brown's ultimately being allowed to represent himself and his being allowed to raise any arguments he wished. There is no likelihood that the Court of Appeals would have reversed the conviction had appellate counsel raised this meritless argument, and appellate counsel was not ineffective for failing to do so.