AO 245D (Rev. 09/11) Judgment in a Criminal Case for Revocations
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of Kentucky

UNITED STATES OF AMERICA
v.

NEAL SCOTT STONE

Judgment in a Criminal Case
(For Revocation of Probation or Supervised Release)

Case No. 5:15-CR-10-JMH
USM No. 08725-033
Scott C. Cox
Defendant's Attorney

THE DEFENDANT:

☐ admitted guilt to violation of condition(s) _____ of the term of supervision.

☒ was found in violation of condition(s) Standard after denial of guilt.

The defendant is adjudicated guilty of these violations:

Violation Number	Nature of Violation	Violation Ended
1	Violation of Federal, State, or Local Law	1/22/2015

The defendant is sentenced as provided in pages 2 through 2 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has not violated condition(s) _____ and is discharged as to such violation(s) condition.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Last Four Digits of Defendant's Soc. Sec. 5004

Defendant's Year of Birth: 1975

City and State of Defendant's Residence:
Bardstown, KY

April 20, 2015
Date of Imposition of Judgment

Joseph M. Hood
Signature of Judge

Honorable Joseph M. Hood, Senior U.S. District Judge
Name and Title of Judge

April 21, 2015
Date

EXHIBIT A

AO 245D (Rev. 09/11) Judgment in a Criminal Case for Revocations
Sheet 2— Imprisonment

DEFENDANT: NEAL SCOTT STONE
CASE NUMBER: 5:15-CR-10-JMH

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of :

30 months to run concurrently with 5:14-CR-84-JMH-1, with no TSR to follow

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON

UNITED STATES OF AMERICA, Plaintiff, v. NEAL SCOTT STONE, Defendant.	)	Criminal Case No. 14-cr-84-JMH **MEMORANDUM OPINION and ORDER**

***

This matter is before the Court on Neal Scott Stone's ["Stone"] motion to vacate sentence pursuant to 28 U.S.C. § 2255 [DE 142]. Fully briefed [DEs 147 and 150], it is ripe for decision.

In 2014, Stone was indicted on several drug charges involving cocaine and heroin [DE 1]. Count One charged Stone with an attempt to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. *Id.* Count Two charged him with conspiracy to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 846. *Id.* Count Three charged Stone with distribution of heroin, in violation of 21 U.S.C. § 841(a)(1). *Id.* Count Four charged him with possession with intent to distribute heroin, in violation of 21 U.S.C. § 841(a)(1). *Id.* Stone was convicted after a trial by jury, and

EXHIBIT B

this Court sentenced him to 120 months of imprisonment [DEs 84 and 99 382].

Stone appealed his conviction and on January 19, 2017, the Sixth Circuit Court of Appeals affirmed his conviction. *United States v. Stone*, 676 F. App'x 469 (6th Cir. 2017). On June 19, 2017, the Supreme Court denied Stone's petition for certiorari. *Stone v. United States*, 137 S. Ct. 2280 (2017). On June 18, 2018, Stone submitted the instant § 2255 motion to challenge his counsel's effectiveness for failing to raise an entrapment defense to Count One of the Indictment.

In affirming Stone's conviction, the Sixth Circuit recounted the underlying facts:

> Stone moved to suppress evidence that was seized from his residence by police. He argued that the search warrant affidavit failed to establish probable cause that he had engaged in criminal activity and failed to make a connection between his residence and the suspected crime.
>
> The affidavit in support of the search warrant was submitted on May 14, 2014, by Detective Jason Varney of the Berea Police Department.
>
> The affidavit alleged that:
>
> On May 9, 2014, Detective Varney was informed by a cooperating witness ("CW") that the CW could purchase heroin from Nicky Hampton. Hampton was supplied the heroin by a black male who was attending Eastern Kentucky University. The CW then told Detective Danny McGuire that the unknown black male would be arriving at Hampton's residence. Detective McGuire drove to Hampton's residence and observed a black male exit the residence carrying a backpack and then drive away in a Toyota Camry registered to Neal Stone. Detective McGuire followed the vehicle to Eastern Kentucky University, where he lost it in traffic. Detective McGuire later learned that Stone

had an address of 818 Brockton, which is located on the Eastern Kentucky University campus.

After receiving this information on May 9, Berea Police gave the CW money to make a controlled purchase of one gram of heroin from Hampton. A few days later, Berea police conducted another controlled buy. The CW met with Hampton to purchase heroin, and Hampton informed the CW that she was supposed to meet her supplier but could not bring the CW with her to the meeting. The CW was dropped off in the Walmart parking lot. In the meantime, Madison County Sheriff's Detective Jasper White drove to 818 Brockton. Detective White saw Stone leave 818 Brockton and followed him to Richmond Centre, where he lost the car in traffic.

Police also followed Hampton and a white male, later identified as Josh Bogie, to Richmond Centre. Hampton and Bogie stopped at a Culvers Restaurant in Richmond, and Hampton entered the business and exited a short time later and got back in the vehicle with Bogie. They returned to the Walmart parking lot, where they picked up the CW. They then dropped the CW off in a Kohls parking lot.

Police stopped Bogie and Hampton in the Kohls parking lot. Bogie was in possession of a small amount of heroin. No narcotics were found on Hampton, but she claimed that she purchased the heroin found on Bogie from Catherine Leake inside the Culvers bathroom. Hampton and Bogie agreed to cooperate with police by arranging a heroin deal with a man they knew as "Mike." Later that same day, Bogie made a consensually monitored and recorded call to "Mike," whom law enforcement believed to be Stone, to arrange the purchase of two grams of heroin. "Mike" agreed, and the two planned to meet at Walmart. Detective McGuire rode with Bogie and Hampton to Walmart, and Detective White observed Stone and Leake exit 818 Brockton and leave the area in the red Toyota Camry registered to Stone. Detective White followed the vehicle to Richmond Plaza. Stone told Bogie to meet at McDonald's and to have Hampton enter the McDonald's bathroom, where Leake was waiting. Detectives encountered Leake inside McDonald's, and Stone as he sat in his car outside of the restaurant. No drugs were found in Stone's vehicle or in his possession. Leake was arrested and was searched during the booking process, when a small amount of heroin was discovered.

On May 14, 2014, based on the above information, Detective Varney executed a state search warrant for 818 Brockton. During the search, law enforcement located and seized a black backpack which contained Stone's identification, several baggies containing heroin, $520 of police buy money, scales, and syringes.

Later in May 2014, Detective McGuire was informed that Christopher Jordan was attempting to post a $30,000 bond for Leake. Police contacted Jordan, who had acted as a police informant. Police seized the $30,000 bond money and then worked with Jordan to execute a reverse sting. This involved Jordan's providing Stone with a kilogram of cocaine so that Stone could get back the $30,000 that was seized from Jordan when Jordan attempted to post Leake's bond. After Stone sold the cocaine, he was to keep $30,000 and then give the remaining profit to Jordan. Jordan testified that Stone agreed to this transaction, and the two of them discussed the amount of cocaine and the sale price. Jordan said that Stone originally thought that Jordan was lying about being able to get the cocaine and that they also discussed a sale of marijuana in addition to the cocaine. Jordan testified that before the transaction, he told Stone that Stone was to meet him to pick up the cocaine but that Jordan would have to go back to Louisville to get the marijuana. Jordan stated that he told Stone to "come get this and I got to drive back to Louisville to get the weed" because "they don't like weed and coke to travel together because weed kind of stinks and the police dogs can alert, you know, on it pretty easy." Jordan also stated that during the buy, he unzipped the bag he was carrying and showed Stone the two bricks of fake "cocaine" before giving the bag to Stone in exchange for cash.

Stone was arrested in August 2014. His first motion to suppress the results of the May search warrant was denied by the district court. Stone again moved for suppression and for an evidentiary hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), to challenge the results of the search warrant. The district court denied the motion and declined to hold a hearing. Stone proceeded to a jury trial. He filed timely motions for judgment of acquittal, which were both denied. Stone was found guilty on all four counts. He was sentenced to 120 months' imprisonment.

> The issues on appeal are whether the district court properly denied the motion to suppress and whether the district court properly denied Stone's motions for acquittal.

[DE 136](footnotes omitted).

Stone now contends that his counsel was ineffective because they failed to pursue an entrapment defense. In this instance, an entrapment defense would have failed miserably as the above quoted recitation of the facts demonstrates.

In order to prevail on an ineffective assistance of counsel claim, Stone bears the burden of showing that (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's ineffectiveness prejudiced his defense so as to deprive him of his right to a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). A § 2255 petitioner must satisfy both prongs of the Strickland test to demonstrate ineffective assistance of counsel. If the Court determines that petitioner has failed to satisfy one prong, it need not consider the other. Id. at 697. A § 2255 petitioner bears the burden of proving his allegations by a preponderance of the evidence. *Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006).

To warrant reversal of a conviction, "the defendant must show 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. "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

While trial counsel's tactical decisions are not completely immune from Sixth Amendment review, they must be particularly egregious before they will provide a basis for relief. *Martin v. Rose*, 744 F.2d 1245, 1249 (6th Cir. 1984). Decisions that "might be considered sound trial strategy" do not constitute ineffective assistance of counsel.

Furthermore, Stone has not presented any evidence that he ever requested his counsel to argue for entrapment. Rather, the letter Stone attached to his § 2255 motion from Michael Mazzoli, Scott Cox's law partner and additional counsel of record, shows that it was Stone who wanted to put forth the defense that he did not know that he purchased cocaine from the informant [DE 142]. While counsel advised Stone that his intent to purchase marijuana rather than cocaine would not be a complete defense,

counsel indicated that there was some value to raising arguments about Stone's subjective intent [DE 142]. At the end of the government's case, Stone's counsel moved for judgment of acquittal for insufficient evidence, and the issue of whether Stone knew he was purchasing cocaine was litigated by different counsel on appeal [DE 127]. *Stone*, 676 F. App'x at 475-76. Given the facts of the case and Stone's criminal history, an entrapment defense would not have been viable and Stone's counsel was not ineffective for not having raised it.

The evidence shows that Stone was predisposed to possess the cocaine with intent to distribute it. Even if Stone showed up to meet Jordan expecting to receive marijuana, the facts show that Jordan told him that he did not have the marijuana and that the current deal was for cocaine. Nothing suggests that Jordan tried to trick Stone into thinking that the current deal was still about marijuana.

Accordingly,

IT IS ORDERED that Stone's §2255 motion to vacate be, and the same hereby is, **DENIED.**

There being no reason to believe that reasonable jurists would reach another conclusion on these facts, a Certificate of Appealabilty shall not issue.

This the 17th day of October, 2018.

Signed By:

Joseph M. Hood

Senior U.S. District Judge

No. 18-6306

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEAL SCOTT STONE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

AMENDED
ORDER

Neal Scott Stone, a federal prisoner proceeding pro se, appeals a district court judgment denying his motion to vacate his sentence under 28 U.S.C. § 2255. Stone has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

In 2015, a jury convicted Stone for attempting to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841 and 846 (Count 1); conspiring to distribute heroin, in violation of 21 U.S.C. §§ 841 and 846 (Count 2); distributing heroin, in violation of 21 U.S.C. § 841 (Count 3); and possessing with intent to distribute heroin, in violation of 21 U.S.C. § 841 (Count 4). The district court sentenced him to concurrent terms of 120 months of imprisonment. This court affirmed. *United States v. Stone*, 676 F. App'x 469 (6th Cir.), *cert. denied*, 137 S. Ct. 2280 (2017).

In 2018, Stone filed his § 2255 motion, arguing that his trial counsel, Scott C. Cox, was ineffective for failing to present an entrapment defense with respect to Count 1 because the government enticed him to purchase cocaine even though they knew that he had decided to stop

selling drugs following an earlier drug-trafficking arrest. This claim was based on the following sequence of events: Stone acknowledged that he was arrested in May 2014, along with codefendant Catherine Leake, after participating in three separate heroin transactions. Stone advised Leake that he would post her $30,000 bond, and he contacted Christopher Jordan to help him do so. Stone alleged that, unbeknownst to him, Jordan later began working as a confidential informant for the police, who directed Jordan to help them build a case against Stone. Jordan agreed to help Stone and drove him to the Madison County Detention Center to post the bond. Upon arrival, the police seized the $30,000 because the cash was allegedly drug-related. Thereafter, the police instructed Jordan to contact Stone "on numerous occasions" and to attempt to convince Stone to participate in a drug deal. Stone stated that he told Jordan that he did not want to conduct a drug transaction and that he had stopped selling drugs after his arrest in May. Nonetheless, despite being aware of Stone's reluctance, Detective Zachary King allegedly continued to have Jordan contact Stone until Jordan succeeded in persuading Stone to purchase drugs. During the planned drug transaction, Stone alleged that he gave Jordan more than $6000 "in exchange for a bag that actually contained a piece of wood" and that the police immediately arrested him after the exchange. Stone stated that, even though he later told Detective King that the bag contained "weed," he was charged with attempting to possess five hundred grams or more of cocaine.

The government responded, arguing that counsel was not ineffective because the record did not support a viable entrapment defense in that Stone was predisposed to committing the offense, having recently been arrested for three heroin transactions and his having a history of drug-trafficking offenses. The district court denied the § 2255 motion, concluding that Stone failed to establish that counsel was ineffective.

Stone seeks a COA with respect to his claim that counsel was ineffective for failing to present an entrapment defense prior to and during his trial. He continues to argue that the police repeatedly tried to convince him to participate in a drug transaction despite allegedly being aware that he had stopped dealing drugs and that the police and Jordan relied on the financial hardship

caused by the seizure of the $30,000 to pressure Stone into attempting to buy drugs. He maintains that: his prior convictions for selling heroin do not establish that he was predisposed to selling cocaine, his criminal history does not establish that an entrapment defense would have failed, his failure to request counsel to pursue an entrapment defense does not excuse counsel's ineffectiveness, and the district court misinterpreted the letter from his counsel to mean that Stone wanted counsel to pursue a mens rea defense. Finally, Stone argues that the district court erred when it denied his § 2255 motion without first conducting an evidentiary hearing. The government responded, and Stone replied.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When the district court's denial is based 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). Stone has not met this burden.

Stone failed to make a substantial showing that counsel performed deficiently so as to prejudice his defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The district court rejected Stone's argument that counsel was ineffective for failing to assert an entrapment defense. "An entrapment defense has two elements: (1) 'government inducement of the crime, and [(2)] a lack of predisposition on the part of the defendant to engage in the criminal conduct.'" *United States v. Demmler*, 655 F.3d 451, 456 (6th Cir. 2011) (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)). The district court concluded that the record contained substantial evidence that Stone was predisposed to possess cocaine with intent to distribute it, as charged in Count 1. *See United States v. Silva*, 846 F.2d 352, 355 (6th Cir. 1988) (noting that a reluctance to engage in criminal activity, overcome only by repeated government inducement, is the most important factor in determining a lack of predisposition).

Stone met Jordan on July 7, 2014, to purchase what he claims to have believed was marijuana—a mere two months after participating in three separate heroin transactions in May 2014. At trial, Stone's counsel and Officer Zachary King agreed that Jordan and Stone "talked

about marijuana" "quite frequently" and made "an agreement . . . that they were going to do a marijuana deal at some point." R. 126 at 87. The evidence showed that Stone faced tough financial circumstances after being released from prison and that he had a motive to sell drugs —text messages show that he pestered Jordan about getting the $30,000 back so that the two could post bond for Leake. Jordan said Stone's need to post bond arose when he reminded Stone that Leake might sell Stone out if she remained in custody while Stone was out on bond.

Although Stone argues that there was no evidence that he was predisposed to buy cocaine, when he met Jordan to purchase what he believed to be marijuana, Jordan advised him that all he had was cocaine, and Stone completed the transaction anyway. *Stone*, 676 F. App'x at 476. Therefore, despite Stone's insistence that he repeatedly told Jordan that he did not want to "do a drug deal," he had committed recent drug transactions, had conversations with Jordan about marijuana, and had a motive to make money. And raising the entrapment defense would have opened up other parts of Stone's criminal history that might otherwise have been off limits. His counsel's decision not to pursue an entrapment defense did fall outside the wide range of "reasonable professional judgment" we presume he exercised. *Strickland*, 466 U.S. at 690. Reasonable jurists would not debate that conclusion.

Stone correctly notes that his failure to bring the entrapment argument to his attorney's attention would not be a reason to deny him relief on this claim. And he rightly asserts that, at least standing alone, his 2002 conviction for distributing cocaine doesn't indicate his propensity to distribute the cocaine here, even if he was still on supervised release for the earlier conviction. *See Sherman v. United States*, 356 U.S. 369, 375–76 (1958). But Stone's drug deals from just two months before (which make his prior conviction more relevant, though still not dispositive), his extensive discussions with Jordan about a marijuana deal, and his profit motive show predisposition to attempt to commit a drug offense. Whether that drug was cocaine or marijuana, Stone went along with the deal. *Cf. United States v. Dado*, 759 F.3d 550, 570–71 (6th Cir. 2014). His counsel did not, therefore, perform deficiently. Likewise, the district court properly denied the § 2255 motion without conducting an evidentiary hearing because "the motion and the files

and records of the case conclusively show that [Stone] is entitled to no relief." 28 U.S.C. § 2255(b); *see also Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007).

Accordingly, Stone's application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 18-6306

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEAL SCOTT STONE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

In view of the amended order entered on August 16, 2019,

And further considering that the appellant was given an extension until September 20, 2019 to either supplement his original petition or withdraw it, and that counsel for the appellee was given until August 30, 2019, to seek en banc reconsideration,

And further considering that neither party responded by the deadline dates,

It is **ORDERED** that the appellant's petition for rehearing en banc is rendered moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

EXHIBIT D