No. 18-2194

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 09, 2019
DEBORAH S. HUNT, Clerk

BOBBY W. FERGUSON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: SILER, ROGERS, and LARSEN, Circuit Judges.

Bobby W. Ferguson petitions for rehearing en banc of this court's order entered on July 19, 2019, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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ORDER

Bobby W. Ferguson, a pro se federal prisoner, appeals a district court judgment denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Ferguson has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

In 2012, a fourth superseding indictment was issued against Ferguson, who was a Detroit contractor, and former Detroit Mayor Kwame Kilpatrick for their participation in a scheme designed to force Detroit-area contractors to include Ferguson's companies on their bids for various city contracts, even when Ferguson's companies were not the most qualified sub-contractor and sometimes did not intend to perform any actual work. In 2013, following a six-week trial, a jury convicted Ferguson of RICO conspiracy, in violation of 18 U.S.C. § 1962(d) (Count 1); interference and attempted interference with commerce by extortion, in violation of 18 U.S.C. § 1951 (Counts 2-5, 7-9); and bribery concerning programs receiving federal funds, in violation of 18 U.S.C. § 666(a) (Count 17). The district court sentenced him to a total of 252 months of imprisonment. This court affirmed. *United States v. Kilpatrick*, 798 F.3d 365 (6th Cir. 2015).

In 2016, Ferguson filed a § 2255 motion, arguing that: (1) counsel provided ineffective assistance; (2) the prosecutor engaged in numerous instances of misconduct during the trial and

closing argument; (3) the district court provided inadequate jury instructions; (4) the government failed to present sufficient evidence to support its theory of the case and his convictions; and (5) his sentence was improper and violated Federal Rule of Criminal Procedure 32. The government responded, arguing in part that Ferguson had procedurally defaulted most of his claims by not raising them on direct appeal. In his reply brief, Ferguson argued that his claims were not procedurally defaulted because he raised each claim under the rubric of ineffective assistance of counsel.

The district court denied Ferguson's § 2255 motion. In doing so, the district court concluded that: (1) Ferguson had procedurally defaulted his claims that the district court's jury instructions were inadequate, the prosecutor engaged in misconduct, there was insufficient evidence to support his convictions, and his sentence was improperly calculated under the guidelines (construed as a challenge to an enhancement for obstruction of justice), and alternatively, that these claims lacked merit; and (2) Ferguson failed to establish that trial counsel rendered ineffective assistance, such as with respect to his claim that counsel should have challenged the district court's alleged improper reliance on a $9,654,533 fraud-loss figure to calculate his applicable guidelines range.

Ferguson moved for reconsideration under Federal Rule of Civil Procedure 59(e), arguing that the district court had improperly construed his "jury-instruction" claims as substantive claims because he asserted them as challenges to trial counsel's alleged failure to properly challenge the instructions. He also argued that the district court improperly construed his argument that the court erred when it relied on a $9,654,533 fraud-loss figure as a claim that *trial* counsel rendered ineffective assistance because that claim was in fact directed at appellate counsel's failure to raise the underlying issue on direct appeal. Ferguson further requested leave to amend his § 2255 motion in order to clarify that his claims were asserted under the rubric of ineffective assistance of counsel. The district court denied the motion for reconsideration, but construed the "jury-instruction" and "fraud-loss figure" claims as Ferguson claimed to have intended and rejected those claims as meritless. The district court did not rule on Ferguson's request to amend his § 2255

motion. Ferguson filed a motion for "clarification" of the district court's order, seeking a ruling that the district court had in fact granted his motion for reconsideration, "reopened" the § 2255 proceeding, and then denied his claims on the merits. The district court denied the motion for clarification.

Ferguson seeks a COA with respect to all the claims asserted in his § 2255 motion. He maintains that the district court erred when it concluded that he had procedurally defaulted his claims because the court erroneously construed them as substantive claims, rather than claims challenging counsel's allegedly deficient performance. Ferguson also argues that the district court erred when it failed to rule on his request to amend his § 2255 motion. Last, he contends that the court should have conducted an evidentiary hearing before denying his § 2255 motion.

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). To satisfy this standard, the petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court's denial is 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). When the district court's denial is based on a procedural ruling, the petitioner must demonstrate that "jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Procedural Default

Reasonable jurists would not debate the district court's procedural ruling that Ferguson defaulted his prosecutorial-misconduct and insufficiency-of-the-evidence claims by not raising them on direct appeal. Generally, if a defendant fails to assert a claim on direct appeal, it is procedurally defaulted. *Regalado v. United States*, 334 F.3d 520, 528 (6th Cir. 2003). A procedurally defaulted claim "may be raised in habeas only if the defendant can first demonstrate

either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Bousley v. United States*, 523 U.S. 614, 622 (1998) (quoting *Murray v. Carrier*, 477 U.S. 478, 485, 496 (1986)).

Ferguson failed to allege or demonstrate cause for not raising these claims on direct appeal. Although Ferguson continues to argue that appellate counsel was ineffective for failing to challenge the district court's reliance on the fraud-loss figure on direct appeal, he does *not* argue that appellate counsel should have raised the above defaulted issues on direct appeal. In addition, contrary to Ferguson's contention that he asserted these claims in the district court as ineffective-assistance claims based on trial counsel's alleged failure to challenge the sufficiency of the evidence, a review of the § 2255 motion reflects that he did *not* assert that trial counsel was ineffective in this regard. Even were we to assume that he did assert that trial counsel should have raised a sufficiency challenge, the record reflects that counsel was not ineffective—counsel filed a 46-page motion for judgment of acquittal, and the trial court denied that motion and those of Ferguson's co-defendants in a 42-page order that thoroughly discussed the trial evidence. Moreover, while Ferguson expressly challenged the district court's alleged misapprehension of his "jury-instruction" claims as substantive claims, his motion for reconsideration conspicuously failed to challenge the district court's construction of his prosecutorial-misconduct and insufficiency-of-the-evidence claims. Under these circumstances, reasonable jurists would not debate the district court's determination that these claims constituted substantive claims, or its ruling that Ferguson procedurally defaulted them by not raising them on direct appeal and failed to show cause and prejudice to excuse his default.

Ferguson's argument concerning the district court's initial determination that he procedurally defaulted his "jury-instruction" claims does not deserve encouragement to proceed further because the court recharacterized those claims as Ferguson requested in his motion for reconsideration before denying them on the merits for the reasons discussed more thoroughly below.

Motion to Amend

Ferguson's argument that the district court erred when it failed to rule on his motion to amend his § 2255 motion does not deserve encouragement to proceed further. In such circumstances, "a party may amend its pleading only with the opposing party's written consent or the court's leave," which should be "freely give[n] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). Ferguson requested leave to amend "if the court decides to grant relief in this [Rule 59(e)] matter," and he now argues that the district court actually granted his Rule 59(e) motion and should have permitted him to amend his § 2255 motion. But the district court did *not* grant his Rule 59(e) motion. Furthermore, the district court recharacterized the claims that Ferguson identified and then denied them on the merits, so there was no need for Ferguson to amend his § 2255 motion. Ferguson did not argue that the district court mischaracterized his remaining claims, and for the reasons expressed above, he has failed to make a substantial showing that he intended to raise all his claims as ineffective-assistance claims. Under these circumstances, a COA with respect to the district court's failure to rule on Ferguson's request to amend his § 2255 motion is not warranted.

Ineffective Assistance of Counsel

The district court concluded that Ferguson failed to establish that his trial counsel's performance was deficient or that any deficient performance prejudiced his defense, *see Strickland v. Washington*, 466 U.S. 668, 687-89 (1984), or that appellate counsel was ineffective for failing to challenge the court's allegedly erroneous reliance on the fraud-loss figure to calculate his guidelines range on direct appeal, *see Caver v. Straub*, 349 F.3d 340, 348 (6th Cir. 2003). For the reasons stated by the district court and explained more thoroughly below, Ferguson has not made a substantial showing that trial or appellate counsel were ineffective.

A. Trial Counsel

1. Case Agent Testimony

The district court rejected Ferguson's argument that trial counsel was ineffective for failing to challenge the accuracy of testimony provided by EPA Special Agent Carol Paszkiewicz and

FBI Special Agent Robert Beeckman, and for stipulating that the agents could clarify nicknames and abbreviations based on various text messages. In rejecting these claims, the district court concluded that counsel *did* object to the extensive testimony provided by these case agents, as this court determined on direct appeal. *See Kilpatrick*, 798 F.3d at 377-78. In addition, the district court determined that Ferguson failed to specify any alleged inaccuracy in the case agents' interpretation of the relevant text messages.

2. Hearsay Testimony

The district court rejected Ferguson's argument that trial counsel was ineffective for failing to explain the basis and importance of his hearsay objections to the jury. Ferguson argued that counsel should have challenged the testimony of witnesses who stated that they were fearful of not including Ferguson on their bids based on statements made by individuals who did not testify at trial. But the district court determined that counsel *did* raise objections to such testimony, noted that it had overruled counsel's objections, and that it had provided limiting instructions to the jury. In addition, the district court concluded that Ferguson failed to establish that additional limiting instructions were warranted in order to distinguish between hearsay and non-hearsay testimony. Finally, the district court noted that this court rejected Ferguson's challenge to the introduction of allegedly hearsay testimony on direct appeal. *Kilpatrick*, 798 F.3d at 385-87. Rather than challenge whether counsel actually raised such objections, Ferguson continues to argue that the witnesses should not have been allowed to provide what he characterizes as inadmissible hearsay testimony.

3. Accuracy of Government Exhibit LS3-36

The district court rejected Ferguson's argument that counsel failed to adequately object to the accuracy of government exhibit LS3-36, which ranks the bid proposals received for an eastside water main contract. Ferguson argued that the chart falsely represented that his company, Ferguson Enterprises, Inc. ("FEI"), was a subcontractor associated with the bid submitted by Lakeshore Engineering Services ("Lakeshore"). Again, the district court determined that counsel *did* object to the accuracy of the chart by arguing that the placement of FEI next to Lakeshore

incorrectly implied that FEI was part of the Lakeshore bid, and that E&T Trucking ("E&T") was the correct subcontractor that was part of the Lakeshore bid. In any event, the district court concluded that Ferguson benefitted from the Lakeshore bid because evidence submitted at trial established that Ferguson introduced Lakeshore to E&T, Ferguson was affiliated with E&T, Lakeshore misrepresented FEI's work experience as that of E&T, and Ferguson received more than $4 million in payment from Lakeshore. The district court therefore concluded that, even if exhibit LS3-36 contained inaccuracies, Ferguson could not establish that the outcome of the trial would have been different.

4. Failure to Object to Statements Made During Closing Argument

The district court rejected Ferguson's argument that trial counsel was ineffective for failing to object to various statements that the prosecutor made during closing argument suggesting that Ferguson was (i) awarded contracts even when his bids were higher than other bids, (ii) included on other companies' bids because they feared losing contracts if they did not include him, (iii) paid for projects on which he did no work, and (iv) covertly sharing ill-gained profits with city officials by making contributions to a civic fund.

The district court concluded that counsel *did* object to such statements and that counsel challenged the government's theory by arguing that Ferguson was awarded projects based on Detroit's preference for true minority-owned, Detroit-based companies, and that he accepted jobs no other company wanted and completed them on time and within budget. In addition, counsel challenged the government's theories by explaining that: Detroit-based companies could legitimately win contracts despite higher bids because of the "equalization credits" granted to them; Ferguson merely mentored E&T and was not an owner of that company; Ferguson had received legitimate settlement payments for contract disputes that the government improperly characterized as payments on contracts for which no work was done; and Ferguson did not make any improper payments to the Mayor, despite the government's claim that Ferguson did so by contributing $75,000 to a civic fund, because Ferguson could have made any such illicit payments directly to the Mayor rather than making a contribution to a civic fund. Finally, even if the

prosecutor made improper comments during closing argument, the district court noted that it had instructed the jury that "[t]he lawyers' statements and arguments are not evidence." *See Hamblin v. Mitchell*, 354 F.3d 482, 495 (6th Cir. 2003).

5. Confrontation Clause

The district court rejected Ferguson's argument that counsel was ineffective for failing to enforce his right to confront witnesses against him because counsel did not adequately challenge the testimony of Kathleen McCann, Bernard Parker, and Thomas Hardiman, who were allowed to testify about what others had told them concerning various contracts involved in this case. He maintained that counsel should have called Dennis Oszust, Scott Penrod, Ron Hausmann, and Angelo D'Alessandro—the individuals who allegedly made statements to the testifying witnesses—as witnesses because they were available to testify. The district court rejected this claim, noting that the Confrontation Clause prohibits admission of out-of-court *testimonial* statements by a non-testifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Ohio v. Clark*, 135 S. Ct. 2173, 2179 (2015); *Davis v. Washington*, 547 U.S. 813, 821 (2006). However, the Confrontation Clause does not apply to non-testimonial statements. *See Whorton v. Bockting*, 549 U.S. 406, 420 (2007). "[T]he most important instances in which the [Confrontation] Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." *Michigan v. Bryant*, 562 U.S. 344, 358 (2011).

In concluding that counsel was not ineffective with regard to McCann's, Parker's, and Hardiman's testimony, the district court noted that counsel objected to much of their testimony, vigorously cross-examined them, and challenged their credibility. In addition, the district court concluded that the challenged out-of-court statements attributed to Oszust, Penrod, Hausmann, and D'Alessandro were *not* testimonial because Ferguson failed to establish that the primary purpose of those individuals' conversations with the testifying witnesses was to gather evidence for Ferguson's prosecution. Therefore, the Confrontation Clause did not prohibit the government from introducing the statements, and counsel was not ineffective with respect to their admission.

6. Jury Instructions

First, Ferguson argued that counsel should have challenged the district court's instruction concerning the government's theory of extortion via fear of "economic harm/loss." He maintained that the district court did not provide instructions that sufficiently differentiated between extortion and bribery. In rejecting this claim, the district court determined that it distinguished extortion by providing the following instruction, which excluded bribery:

> Extortion through use of fear of economic harm is the obtaining of money or property from another person with that person's consent when the consent is brought about through the wrongful use of fear of economic harm to the person or his business unless the person turns over the money or property.

The district court also noted that its instruction was based on the Seventh Circuit Pattern Criminal Jury Instruction for extortion offenses in violation of 18 U.S.C. § 1951. Ferguson fails to make a substantial showing that there was a sufficient basis upon which counsel could have challenged this instruction.

Ferguson also argued that counsel should have challenged the district court's instruction concerning the meaning of "corrupt intent" with respect to bribery in violation of 18 U.S.C. § 666(a)(1)(B). In reviewing its instruction, the court noted that it was based on the Seventh Circuit Pattern Criminal Jury Instruction for bribery offenses in violation of § 666(a)(1)(B) and the Modern Federal Jury Instructions–Criminal 27-A-9 (2011). In addition, the district court concluded that in order to establish a violation of § 666, it is enough for the government to show that a public official '"corruptly' accepts (or gives, or conspires to give) something of value 'intending to be influenced or rewarded in connection with'" some transaction involving property or services. *United States v. Abbey*, 560 F.3d 513, 521 (6th Cir. 2009) (quoting 18 U.S.C. § 666). Ferguson's arguments fail to make a substantial showing that there was a sufficient basis upon which counsel could have challenged this instruction.

Finally, Ferguson argued that counsel should have challenged the district court's failure to adequately instruct the jury regarding what constitutes an "official act" in connection with his convictions. He argued that his convictions are invalid in light of the Supreme Court's opinion in

McDonnell v. United States, 136 S. Ct. 2355 (2016), which narrowed the definition of an "official act" in 18 U.S.C. § 201(a)(3). In rejecting this claim, the district court reviewed its instruction and concluded that, even though it did not define "official act," Ferguson's convictions were supported by the jury verdict form because the jury determined that Ferguson's extortion convictions rested on a theory of wrongful fear of economic harm (either exclusively or in addition to also resting on a color-of-official-right theory). The district court concluded that *McDonnell* did not apply with respect to Ferguson's bribery conviction because § 666 does not include the term "official act." Ferguson's arguments that the lack of any "quid pro quo" renders his extortion and bribery convictions invalid are insufficient to make a substantial showing that there was a basis upon which counsel could have challenged the district court's instructions.

B. Appellate Counsel

The district court rejected Ferguson's claim that appellate counsel was ineffective for failing to challenge the court's allegedly improper reliance on the $9,654,533 fraud-loss figure as a starting point for calculating his guidelines range. He argued that the district court's calculation improperly relied, in part, on restitution owed to the City and DWSD, which this court determined was improper when it vacated his co-conspirator's sentence, because "restitution 'must be based on the victim's loss rather than the offender's gain.'" *See Kilpatrick*, 798 F.3d at 388 (quoting *United States v. George*, 403 F.3d 470, 474 (7th Cir. 2005)). In rejecting this claim, the district court first noted that this holding was inapplicable to Ferguson's sentence because the calculation of Ferguson's guidelines range for the extortion offenses did not depend on any restitution owed to the city or DWSD. Rather, Ferguson's offense level was based on USSG § 2C1.1(b)(2), which, in relevant part, requires a defendant's offense level be enhanced based on "the value of anything obtained or to be obtained by a public official or others acting with a public official." *Id.* In calculating the total amount of the fraud loss pursuant to USSG § 2B1.1(b)(1), the district court's starting point was the $9,654,533 figure that the probation department calculated using a conservative approach that attributed a ten percent figure to each contract. Then, the district court excluded contracts that were not separately and independently found by the jury and arrived at a

figure of $6,284,000. That figure warranted an 18-level enhancement and resulted in a guidelines range of 292 to 365 months of imprisonment. The district court varied downward, however, imposing a below-guidelines sentence of 252 months. Therefore, the district court concluded that appellate counsel was not ineffective because the issue that Ferguson wished to raise on direct appeal lacked merit.

Evidentiary Hearing

Finally, despite Ferguson's argument to the contrary, 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 [Ferguson] 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, Ferguson's application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk