IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

(Appendix A)

JOSHUA GREGORY RICHARDSON,

Petitioner,

v. CIVIL ACTION NO. 2:18-cv-01503
(Criminal No. 2:17-cr-00148)

UNITED STATES OF AMERICA,

Respondent.

MEMORANDUM OPINION AND ORDER

On December 11, 2018, the Petitioner filed a motion under 28 U.S.C. § 2255 to vacate, set aside or correct sentence (Document 49). By *Standing Order* (Document 50) entered on December 12, 2018, the matter was referred to the Honorable Omar J. Aboulhosn, United States Magistrate Judge, for submission to this Court of proposed findings of fact and recommendation for disposition, pursuant to 28 U.S.C. § 636.

On July 8, 2019, the Magistrate Judge submitted a *Proposed Findings and Recommendation* (PF&R) (Document 58), wherein it is recommended that this Court deny the Petitioner's § 2555 motion and remove this action from the Court's docket. The *Movant's Objection to the Proposed Findings and Recommendations Concerning Petition for Habeas Corpus (28 U.S.C. §2255)* (Document 59) was timely filed on July 22, 2019. For the reasons stated herein, the Court finds that the PF&R should be adopted and the Petitioner's § 2255 motion must be denied.

FACTS

Magistrate Judge Aboulhosn's PF&R sets forth in detail the procedural and factual history surrounding the Petitioner's motion. The Court now incorporates by reference those facts and procedural history, but in order to provide context, the Court provides the following summary.

On February 22, 2018, the Petitioner, Joshua Gregory Richardson, entered a guilty plea to conspiracy to distribute a quantity of methamphetamine in violation of 21 U.S.C. § 846. On July 19, 2018, he was sentenced to a 71-month term of incarceration, the top of his applicable Sentencing Guideline range. He did not file a direct appeal. He now alleges that his counsel was ineffective, rendering his guilty plea involuntary.

According to Mr. Richardson's Presentence Investigation Report (PSR), officers using a Confidential Source (CS) to make a controlled drug purchase from another individual, identified as D.B., observed Mr. Richardson enter D.B.'s residence and exit a few moments later. They followed his vehicle and conducted a traffic stop for failure to maintain control. A K-9 indicated positively for controlled substances in the vehicle, and officers searched the vehicle and Mr. Richardson. They seized $9,883, including $900 of pre-recorded money used during the controlled drug transaction. He pled guilty in municipal court to a lane violation but contends that dash cam video demonstrates that he did not violate any traffic laws.

Officers searched D.B.'s residence, and found quantities of methamphetamine and pills, as well as guns. D.B. stated that she had purchased a total of eight to ten ounces of methamphetamine from Mr. Richardson in several separate transactions. At first, she paid for the drugs in full when she purchased them, but Mr. Richardson later began fronting her drugs, and she owed him about $4,000 at the time of the search of her home. She admitted that she gave Mr. Richardson $3,000 on December 20, 2016, including the money she received during the controlled purchase.

Mr. Richardson signed a plea agreement with a stipulation of facts admitting that he supplied methamphetamine to D.B. and admitting responsibility for 400 to 700 kilograms of marijuana equivalency. The pre-sentence investigation found him responsible for 28.37 grams of "ice" and 56.7 grams of methamphetamine, with a combined total marijuana equivalency of 680.10 kilograms.

The plea agreement also included waivers of appeal and of collateral attack, except as to allegations of ineffective assistance of counsel. During Mr. Richardson's plea hearing, the Court advised him as to those waivers. He also indicated that he understood that he would not be able to call or cross-examine witnesses or move to suppress evidence as a result of his guilty plea. At the time of his plea hearing, he stated that he was satisfied with his counsel and had freely chosen to plead guilty following consultation with his attorney.

Mr. Richardson now contends that his counsel was ineffective because he failed to file a motion to suppress the traffic stop and D.B.'s statement. He argues that D.B. gave inconsistent statements and that her statements constitute hearsay. Absent that evidence, he argues that the case against him would have been dismissed.

STANDARD OF REVIEW

This Court "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). In addition, this Court need not conduct a *de novo* review when a party "makes general and conclusory objections that do not direct the Court to a specific error in the magistrate's proposed findings and

recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). When reviewing portions of the PF&R *de novo,* the Court will consider the fact that Petitioner is acting *pro se*, and his pleadings will be accorded liberal construction. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978).

DISCUSSION

The Magistrate Judge found that the decision not to file a motion to suppress the traffic stop was within the range of permissible tactical decisions his attorney could make. In the PF&R, the Magistrate Judge notes that Mr. Richardson's guilty plea to the lane violation would have made any argument that the stop was not supported by probable cause difficult. In addition, the Magistrate Judge found that the officers had reasonable suspicion to conduct the traffic stop based on Mr. Richardson's brief visit to D.B.'s residence shortly after D.B. sold drugs in a controlled transaction. Similarly, he concluded that a motion to suppress D.B.'s statement would have been without merit, and notes that Mr. Richardson's guilty plea waived trial, and therefore, mooted any potential objections that could have been made during potential testimony by D.B. Finally, in the PFR, the Magistrate Judge concludes that Mr. Richardson's claim of actual innocence is unsupported, given the significant evidence that he committed the offense of conviction, including his own statements during his plea hearing.

Mr. Richardson objects, arguing that failing to seek to suppress evidence obtained as a result of the traffic stop, as well as D.B.'s statements, constitutes deficient performance by his attorney and prejudiced his case. He argues that his attorney should have sought to "quash the indictment based upon [D.B.'s false] grand jury statements." (Obj. at 2.) He contends that his plea was involuntary and unknowing because he was unaware that he could file meritorious

motions to suppress. He requests an evidentiary hearing to further develop the record regarding his claim of actual innocence, which he contends is supported by the lack of drugs found during the search of his vehicle.

A post-conviction claim of ineffective assistance of counsel requires a showing "that counsel's representation fell below an objective standard of reasonableness" and that "any deficiencies in counsel's performance must be prejudicial to the defense." *Strickland v. Washington*, 466 U.S. 668, 688–92 (1984). "Judicial scrutiny of counsel's performance must be highly deferential" and based on the facts known to counsel at the time of the challenged conduct. *Id.* at 689–90. "In the context of guilty pleas," the first prong involves an evaluation of the attorney's competence in advising the client, while the second prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985). "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. "Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

Mr. Richardson claims that his counsel was ineffective because he failed to file motions to suppress (a) statements from a co-conspirator and (b) evidence obtained during a traffic stop. The statements from a co-conspirator would not be subject to a viable pre-trial motion to suppress. The

credibility of a witness may be challenged through cross-examination, and the decision to enter a guilty plea waived the right to cross-examine witnesses in trial.

In this case, the decision by Mr. Richardson's attorney not to file a motion to suppress evidence obtained in the traffic stop falls within the "wide range of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (internal quotation marks omitted). The Supreme Court has framed the issue as whether "no competent attorney would think a motion to suppress would have failed." *Premo v. Moore*, 562 U.S. 115, 124 (2011). As such, the Court is not in the position of essentially resolving a post-judgment motion to suppress. Instead, the Court must consider only whether a competent attorney, evaluating Mr. Richardson's case at the time, could conclude that filing a motion to suppress was unlikely to be beneficial. The dash cam video was not provided in discovery, and Mr. Richardson's attorney did not make an effort to obtain it. When Mr. Richardson's attorney considered the possibility of a motion to suppress, he "learned that not only had [Mr. Richardson] been ticketed, but that [he] pled guilty, [was] found guilty by the Ironton Municipal Court, and that [he] even paid the fine" for the traffic violation. (Pet.'s Ex. F to Mot.) (Document 49 at 29-30.) He concluded that a motion to suppress would lack merit, given Mr. Richardson's guilty plea to the traffic violation that supported the stop, and did no further investigation. That evaluation, particularly when viewed in combination with the other evidence implicating Mr. Richardson and the potential benefits of an early plea, is not evidence of an unreasonable professional or strategic judgment.

Finally, Mr. Richardson argues that he is actually innocent of the conspiracy to distribute methamphetamine to which he pled guilty and requests an evidentiary hearing. Given D.B.'s statements, his brief stop at a residence that was the site of drug transactions, his possession of money used in a controlled buy, and his admissions during his plea, the Court finds that no further

investigation into the claim is warranted. Accordingly, Mr. Richardson's objections must be overruled and his motion pursuant to § 2255 denied.

CONCLUSION

Wherefore, after thorough review and careful consideration, the Court **ORDERS** that the *Movant's Objection to the Proposed Findings and Recommendations Concerning Petition for Habeas Corpus (28 U.S.C. §2255)* (Document 59) be **OVERRULED** and that Magistrate Judge Aboulhosn's *Proposed Findings and Recommendation* (PF&R) (Document 58) be **ADOPTED**. The Court further **ORDERS** that the Petitioner's *Motion to Vacate, Modify, or Otherwise Correct a Federal Sentence in Accord with Habeas Corpus Ad Subjiciendum (Codified as 28 U.S.C. §2255)* (Document 49) be **DENIED** and that this action be **DISMISSED** from the Court's docket.

The Court **DIRECTS** the Clerk to send a certified copy of this Order to Magistrate Judge Aboulhosn, to counsel of record, and to any unrepresented party.

ENTER: November 20, 2019

IRENE C. BERGER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

(Appendix B)

JOSHUA GREGORY RICHARDSON,

Petitioner,

v. CIVIL ACTION NO. 2:18-cv-01503
(Criminal No. 2:17-cr-00148)

UNITED STATES OF AMERICA,

Respondent.

ORDER

Upon remand from the Fourth Circuit Court of Appeals, the Court has carefully considered whether to grant a certificate of appealability in this case. *See* 28 U.S.C. § 2253(c). A certificate will not be granted unless there is "a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). The standard is satisfied only upon a showing that reasonable jurists would find that any assessment of the constitutional claims by this Court is debatable or wrong and that any dispositive procedural ruling is likewise debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683-84 (4th Cir. 2001). Mr. Richardson pled guilty to conspiracy to distribute methamphetamine. Some of the evidence was derived from a traffic stop. He pled guilty and paid the citation as to the traffic stop. His attorney conducted no further investigation into the legality of the stop and did not file a motion to suppress. In denying Mr. Richardson's § 2255 petition, the Court concluded that the attorney did not fall below an objective standard of reasonableness that impacted the outcome of the plea. However, the Court finds that reasonable jurists could disagree as to whether it is objectively

unreasonable for an attorney to rely on a criminal defendant's payment of a traffic citation to decline further investigation into a traffic stop. Accordingly, the Court **ORDERS** that a certificate of appealability be **GRANTED**.

The Court **DIRECTS** the Clerk to send a copy of this Order to the Clerk of the United States Court of Appeals for the Fourth Circuit, to counsel of record and to any unrepresented party.

ENTER: January 30, 2020

IRENE C. BERGER
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF WEST VIRGINIA

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6143

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

(Appendix C)

v.

JOSHUA GREGORY RICHARDSON, a/k/a "L,"

Defendant - Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Irene C. Berger, District Judge. (2:17-cr-00148-1; 2:18-cv-01503)

Submitted: August 25, 2020 Decided: September 8, 2020

Before MOTZ, AGEE, and FLOYD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Joshua Gregory Richardson, Appellant Pro Se. Richard Gregory McVey, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Huntington, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Joshua Gregory Richardson appeals the district court's order accepting the magistrate judge's recommendation and denying relief on Richardson's 28 U.S.C. § 2255 motion and a subsequent order denying Richardson's Fed. R. Civ. P. 59(e) motion to alter or amend the judgment. Richardson contends that his counsel provided ineffective assistance by failing to obtain dash camera footage of a traffic stop and by failing to move to suppress evidence recovered from that stop. The district court granted a certificate of appealability, and we affirm.*

"We review *de novo* a district court's legal conclusions in denying a § 2255 motion," including "any mixed questions of law and fact addressed by the court as to whether the petitioner has established a valid Sixth Amendment ineffective assistance claim." *United States v. Ragin*, 820 F.3d 609, 617 (4th Cir. 2016). "When the district court denies § 2255 relief without an evidentiary hearing, the nature of the court's ruling is akin to a ruling on a motion for summary judgment." *United States v. Poindexter*, 492 F.3d 263, 267 (4th Cir. 2007). Thus, the facts must be considered "in the light most favorable to the § 2255 movant." *Id.*

* The Government argues that Richardson's appeal is untimely. When the United States or its officer or agency is a party in the case, any party must file a notice of appeal within 60 days. Fed. R. App. P. 4(a)(1)(B). If a party files in the district court a motion to alter or amend the judgment under Rule 59(e) within 28 days after entry of the judgment, the time to appeal runs from the entry of the order disposing of the motion. Fed. R. App. P. 4(a)(4)(A)(iv); Fed. R. Civ. P. 59(e). Because Richardson appealed within 60 days of the denial of his Rule 59(e) motion, his appeal is timely.

A federal prisoner bringing a claim of ineffective assistance of counsel bears the burden of "show[ing] that counsel's performance was [constitutionally] deficient" and "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To satisfy the performance prong, the prisoner must demonstrate "that counsel's representation fell below an objective standard of reasonableness" as evaluated "under prevailing professional norms." *Id.* at 688. This standard requires "a court [to] indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted).

To satisfy the prejudice prong, the prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In the context of a guilty plea, the prisoner must establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Moreover, he "must convince the court that such a decision would have been rational under the circumstances." *United States v. Fugit*, 703 F.3d 248, 260 (4th Cir. 2012) (internal quotation marks omitted). "[W]hat matters is whether proceeding to trial would have been objectively reasonable in light of all the facts." *Id.*

We have reviewed the record, including the dash camera footage, and conclude that Richardson failed to demonstrate prejudice resulting from counsel's alleged errors. Specifically, Richardson has not shown a reasonable probability that a suppression motion

would have been successful. Furthermore, even if a suppression motion had been successful, Richardson has not shown that it would have been objectively reasonable for him to proceed to trial considering the Government's other evidence. Accordingly, we affirm the district court's judgment.

Richardson has also filed an emergency motion, in which he raises the threat of the novel coronavirus and the resulting respiratory disease of COVID-19 to inmates at the facility where he is incarcerated. The authority to grant a motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A) resides with the sentencing court. Although the sentencing court has denied similar motions by Richardson, Richardson has not appealed those denials. We therefore deny Richardson's motion.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: November 17, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6143
(2:17-cr-00148-1)
(2:18-cv-01503)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOSHUA GREGORY RICHARDSON, a/k/a "L"

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Motz, Judge Agee, and Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk