

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 20-1309

Leonard F. Locke, Jr., also known as Leonard F. Locke, Jr.

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:19-cv-00665-BP)

JUDGMENT

Before GRUENDER, SHEPHERD, and KELLY, 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.

April 21, 2020

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

/s/ Michael E. Gans

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Leonard F. Locke, Jr., also known as Leonard F. Locke, Jr.

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:19-cv-00665-BP)

ORDER

The petition for rehearing by the panel is denied.

July 01, 2020

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

/s/ Michael E. Gans

2255

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

LEONARD F. LOCKE, JR.,)
Movant,)
vs.)
UNITED STATES OF AMERICA,)
Respondent.)
Case No. 19-0665-CV-W-BP-P
Crim. No. 17-00372-01-CR-W-BP

ORDER DENYING MOVANT'S MOTION UNDER 28 U.S.C. § 2255, DENYING A CERTIFICATE OF APPEALABILITY, AND DISMISSING CASE

Movant, who is incarcerated at the FCI Greenville in Greenville, Illinois, pursuant to a conviction and sentence entered in the above-cited criminal case, has filed a *pro se* motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Docs. 1, 8. Respondent has filed suggestions in opposition to Movant's motion. Doc. 9. Movant has filed a reply thereto. Doc. 15. Because this Court finds that the motion, files, and record conclusively show that Movant is not entitled to relief,¹ Movant's motion is denied, a certificate of appealability is denied, and this case is dismissed.

I. Background

On December 6, 2017, an indictment was returned charging Movant with possession with intent to distribute 28 grams or more of cocaine base (“crack”), in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). Crim. Doc. 1.² On April 27, 2018, Movant appeared before this Court and pled guilty pursuant to a plea agreement with the Government. Crim. Docs. 21-23. The plea agreement set forth the following factual basis for the guilty plea:

¹ “A Section 2255 movant is entitled to an evidentiary hearing . . . unless the motion, files, and record conclusively show he is not entitled to relief.” *Roundtree v. United States*, 751 F.3d 923, 925 (8th Cir. 2014) (citation and internal quotation omitted).

² "Crim. Doc." refers to the docket number entries in Movant's criminal case, Case No 17-00372-01-CR-W-BP. "Doc." refers to the docket number entries in Movant's associated civil case, Case No 19-0665-CV-W-BP-P. Page number citations refer to the page numbers assigned by the CM/ECF electronic docketing system.

On August 29, 2017, at approximately 11:15 a.m., Detective Brandon Bray of the Kansas City, Missouri Police Department, was conducting surveillance for a wanted party near Admiral Boulevard and Tracy Avenue, in Kansas City, Missouri. Detective Bray observed Leonard Locke, Jr. (Locke), who he knew from past narcotics investigations, get into the driver's seat of a tan Jeep Cherokee with a Missouri License plate HN3R6J. Detective Bray conducted a computer check of the license plate, which responded as belonging to Locke. A computer check of Locke showed that Locke had an active Riverside, Missouri municipal warrant and had a suspended driving status through the Missouri Department of Revenue.

Detective Bray observed Locke drive away from the location. Detective Troy Schwalm began following Locke while marked police vehicles were responding to the area to conduct a car stop. While following Locke, Detective Schwalm lost sight of Locke due to him driving over a curb, through a parking lot, and then north on Prospect from 8th Street.

Sergeant Benson responded to the area, observed Locke driving the vehicle, and conducted a car stop at 3406 Roberts Avenue. Sergeant Benson knew Locke from past narcotics investigations and knew Locke often keeps narcotics down his pants in an attempt to conceal the narcotics from law enforcement. Upon approaching the driver's window of the vehicle to contact Locke, Sergeant Benson smelled an odor or [sic] marijuana coming from inside the vehicle. After Sergeant Benson advised Locke that he was stopped due to the active Riverside warrant, Sergeant Benson attempted to walk towards the back of Locke's vehicle in order to relay the car stop to dispatch. Sergeant Benson had advised Locke not to remove his hands from the steering wheeling during this time. While Sergeant Benson was relaying the information to dispatch, Locke took his right hand off the steering wheel and moved his hand towards the center console area. Sergeant Benson did not know if Locke was attempting to conceal or retrieve a firearm or contraband, so Sergeant Benson immediately returned to the driver's side of the vehicle where he could observe Locke's hand movements and immediately requested a secondary officer to respond. Upon assisting officers arriving on scene, Locke was escorted from the vehicle and placed under arrest for his warrant.

Sergeant Benson searched the vehicle due to the smell of marijuana coming from inside the vehicle, which revealed a black bag on the passenger seat containing a grey electronic scale and a box of 30 plastic sandwich baggies. While conducting a search incident to arrest of Locke, Sergeant Benson located a bulge through Locke's pants in the buttocks region. Sergeant Benson knew this was not a normal part of Locke's body and that Locke had previously been arrested with narcotics down his pants. Sergeant Benson advised Locke that Locke could retrieve the item or that Sergeant Benson would retrieve it. Locke advised he would retrieve the item and did so. Locke reached down his pants and retrieved a clear plastic baggie containing approximately 57.55 grams of crack cocaine and a clear plastic baggie containing approximately 1.5 grams of marijuana. Both items were field tested and tested positive. The Kansas City Police Crime Laboratory tested the substances and confirmed the defendant possessed 53.51 + 0.08 grams of cocaine in the base form, and 0.5798 ± 0.0008 grams of marijuana.

Locke was arrested and transported to a Kansas City, Missouri Police Department detention facility where he was booked for Possession of a Controlled Substance. Detective Bray interviewed Locke, first advising Locke of his *Miranda* rights prior to questioning. Locke waived his rights and agreed to speak with Detective Bray. Locke admitted to possessing the crack cocaine, that he was going to be paid \$400 to transport the crack cocaine from one person to another, and that he knew the weight was two ounces. Detective Bray confirmed Locke has several prior felony convictions in Jackson County, Missouri. Locke also possessed approximately \$520 in United States currency.

Crim. Doc. 23, pp. 2-3.

In the plea agreement, the Government agreed not to seek the enhanced statutory range of punishment, which allowed Movant to avoid a statutory minimum sentence of 10 years' imprisonment.

Id. at 4; Doc. 9, pp. 3-4. Instead, the parties stipulated to a sentence of 96 months' imprisonment.

Crim. Doc. 23, p. 4. In the plea agreement, Movant asserted that he was satisfied with his defense counsel's assistance and that his plea was voluntary. *Id.* at 12.

At his change-of-plea hearing, Movant confirmed that he understood the charge and that the offense conduct described in the plea agreement was accurate. Crim. Doc. 47, pp. 4-5, 9-10. Movant stated that he was satisfied with defense counsel, he had no concerns with the advice and representation he had received, and counsel had not failed to take any requested actions. *Id.* at 5. Regarding the stop conducted on August 29, 2017, defense counsel provided the following statement:

Mr. Locke also wanted me to clarify one thing in the factual basis, and I don't think this is problematic at all. It states that a computer check showed that he had an active warrant out of Riverside and a suspended driving status. We actually checked that ourselves, and the warrant in Riverside had been taken care of, which also made his driving status -- it was no longer suspended. However, we would not disagree that the police officer would testify that the computer check was still showing that at that time.

Id. at 11-12.

A Presentence Investigation Report ("PSR") was issued on August 8, 2018, which set forth the offense conduct. Crim. Doc. 30, pp. 4-5. The PSR calculated a total offense level of 21, based on the drug quantity under U.S.S.G. § 2D1.1, and the three-level reduction for acceptance of responsibility. *Id.* at 6. The PSR calculated a criminal history category of VI, yielding a statutory range of punishment

of 5 to 40 years and a Sentencing Guidelines range of 77 to 96 months. *Id.* at 17, 23. Movant objected to the criminal history section of the PSR. *Id.* at 26-27.

Movant appeared for sentencing before this Court on September 5, 2018, where this Court accepted the plea agreement and sentenced Movant to 96 months' imprisonment. Crim. Docs. 34, 35, 48. Movant filed a pro se notice of appeal, but later moved to dismiss the appeal, which was granted by the Eighth Circuit. Crim. Docs. 37, 41.

Movant now seeks relief under 28 U.S.C. § 2255. Docs. 1, 8. Additional relevant facts in the record are set forth below in this Court's discussion of Movant's grounds for relief.

II. Standard

Title 28 U.S.C. § 2255 provides that an individual in federal custody may file a motion to vacate, set aside, or correct his or her sentence. A motion under this statute "is not a substitute for a direct appeal and is not the proper way to complain about simple trial errors." *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994) (internal citations omitted). Instead, § 2255 provides a statutory avenue through which to address constitutional or jurisdictional errors and errors of law that "constitute[] a fundamental defect which inherently results in a complete miscarriage of justice." *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

III. Discussion

In his initial § 2255 motion, Movant raises two grounds for relief, wherein he claims that defense counsel was ineffective for (1) failing to challenge the stop and arrest of Movant on the basis that the arrest warrant was invalid; and (2) failing to challenge, and giving "wrong legal advice" regarding, the searches of Movant's person and vehicle. Doc. 1, pp. 3-4, 17-28. In a supplement to his § 2255 motion, Movant raises discrepancies in the police reports submitted by Detective Schwalm and Sergeant Benson and argues that the reports must have been describing two separate events. Doc. 8, pp. 5-11; Doc. 8-1, pp. 2-8. Movant contends that his supplement is "an extension of [Movant's]

Ineffective Assistance of Counsel regarding the Fourth Amendment claims associated with Counsel's failure to effectively investigate [Movant's] Fourth Amendment claims." Doc. 8, p. 12.

Respondent contends that Movant waived his claims and, alternatively, that Movant's claims are without merit. Doc. 9. In reply, Movant argues, *inter alia*, that his claims are cognizable as claims of ineffective assistance of counsel and that Respondent has failed to prove there was an active warrant for his arrest or that the arresting officer smelled marijuana. Doc. 15. Because Movant argues that his grounds for relief are "one allegation of ineffective assistance of counsel . . . presented with two subparts" (Doc. 1, p. 17), and because the same law and much of the same analysis applies to both grounds for relief, this Court will discuss both grounds for relief in tandem.

~~K~~ "A guilty plea waives all defects except those that are jurisdictional." *United States v. Todd*, 521 F.3d 891, 895 (8th Cir. 2008) (internal quotation omitted); *see also Walker v. United States*, 115 F.3d 603, 604 (8th Cir. 1997) ("[A] valid guilty plea forecloses an attack on a conviction unless on the face of the record the court had no power to enter the conviction or impose the sentence.") (internal quotation omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Instead, such a Movant "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in [*McMann v. Richardson*, 397 U.S. 759 (1970)]." *Id.* Statements made by a defendant in court under oath should not be lightly set aside and "constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *see also Ingrassia v. Armontrout*, 902 F.2d 1368, 1370 (8th Cir. 1990) (representations made during the plea hearing "carry a strong degree of verity and pose a formidable barrier in any subsequent collateral proceedings").

“A guilty plea is invalid only if it does not represent a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Easter v. Norris*, 100 F.3d 523, 525 (8th Cir. 1996). Accordingly, “a defendant must have knowledge of the law in relation to the facts.” *Id.* (citation omitted). However, “[t]he rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision.” *U.S. v. Gomez*, 326 F.3d 971, 975 (8th Cir. 2003) (quoting *Brady v. United States*, 397 U.S. 742, 757 (1970)).

To establish that counsel was ineffective, Movant must “show that his ‘trial counsel’s performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient performance prejudiced his defense.’” *Nave v. Delo*, 62 F.3d 1024, 1035 (8th Cir. 1995) (quoting *Lawrence v. Armontrout*, 961 F.2d 113, 115 (8th Cir. 1992)); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, Movant must show that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Both prongs of this test must be established in order to be entitled to § 2255 relief; failure to establish either one of the prongs is fatal to a claim of ineffective assistance of counsel. *Id.* at 697.

Here, Movant fails to establish that his plea is invalid or that counsel was ineffective under the foregoing standard in either of his grounds for relief or supplementary arguments. Initially, the Court notes that Movant, who knew at the time of his change-of-plea hearing that defense counsel had not filed a suppression motion on any of the issues raised in the present proceedings, testified that he was satisfied with defense counsel, had no concerns with the advice and representation he had received, and counsel had not failed to take any requested actions. Crim. Doc. 47, p. 5. Insofar as Movant argues in Ground 1 that defense counsel was ineffective for failing to challenge his stop and arrest on the basis that his arrest warrant was invalid, the record establishes that Movant was aware of the facts surrounding the arrest warrant at the time of the guilty plea. In fact, defense counsel expressly

acknowledged in Movant's change-of-plea hearing that the warrant "had been taken care of" and that Movant's driving status "was no longer suspended." Crim. Doc. 47, pp. 11-12. Nevertheless, defense counsel stated that "we would not disagree that the police officer would testify that the computer check was still showing that at the time." *Id.* at 12.

Movant fails to establish that defense counsel's representation of the expected testimony was unreasonable. In fact, Movant presents Detective Schwalm's police report, wherein Schwalm states that "[a] computer check on Mr. Locke revealed an outstanding Riverside, Missouri municipal warrant for failing to stop at a stop sign and his driving status to be 'Suspended' through Missouri Department of Revenue." *See* Doc. 8-1, p. 3. Therefore, even if defense counsel could have established that the computer check was incorrect, any suppression motion likely would have been denied under the good faith exception to the exclusionary rule, which Movant admits was defense counsel's advice. *See* Doc. 1, pp. 22; *Herring v. United States*, 555 U.S. 135, 147-48 (2009) (the good faith exception applies when an officer reasonably believes there is an outstanding arrest warrant, but that belief is wrong due to a negligent bookkeeping entry by another police employee). Furthermore, Movant's stop also would have been supported by the traffic violation observed by Detective Schwalm, who saw Movant drive over a curb to get around a city bus. Crim. Doc. 23, p. 2; Doc. 8-1, p. 3. Counsel is not ineffective for failing to pursue a motion to suppress that he or she reasonably believes would be futile. *Anderson v. United States*, 762 F.3d 787, 794 (8th Cir. 2014) (citing *United States v. Luke*, 686 F.3d 600, 606 (8th Cir. 2012)).

Insofar as Movant argues in Ground 2 that the searches of his person and car were illegal, the factual basis contained within the plea agreement indicated that, after Detective Schwalm lost sight of Movant, Movant eventually was stopped by Sergeant Benson. Crim. Doc. 23, p. 2. As Sergeant Benson approached the driver's window, he smelled an odor of marijuana coming from inside the vehicle. *Id.* Sergeant Benson searched the vehicle due to the smell of marijuana. *Id.* Movant confirmed at his change-of-plea hearing that the offense conduct described in the plea agreement was

accurate. Crim. Doc. 47, p. 9. These facts are also supported by the police reports submitted by Movant. Doc. 8-1, p. 7. Although Movant raises various inconsistencies between the police reports in his supplement to suggest that the officers were not describing “two separate events” (Doc. 8, p. 11), the reports contain numerous facts, including dates and times, that make it clear that the officers were describing the same event. *See* Doc. 8-1, pp. 2-3, 7-8.

As set forth above, Movant’s stop and arrest likely was supported by the good faith exception, as defense counsel advised. *See* Doc. 1, p. 22. Officers are permitted to search a person following a custodial arrest. *United States v. Robinson*, 414 U.S. 218, 235 (1973). Furthermore, the smell of marijuana coming from a vehicle provides probable cause to search the vehicle and its occupants. *See United States v. Smith*, 789 F.3d 923, 926, 929 (8th Cir. 2015) (holding that a “slight odor of marijuana,” supported by credible testimony of an officer, is “sufficient to establish probable cause to search an automobile and its contents.”). For these reasons, any argument by defense counsel raising the issues in Movant’s motion and supplement would have been without merit, and defense counsel did not give unreasonable advice to Movant under the circumstances. Therefore, Movant fails to establish deficient performance on behalf of defense counsel and fails to establish that he was otherwise prejudiced by defense counsel’s alleged failures.

Ultimately, none of Movant’s arguments or claims establish that either his plea or sentence are invalid or were otherwise the result of ineffective assistance of counsel. Rather, the record before this Court indicates that Movant entered a knowing and voluntary plea and received an appropriate sentence within the statutory range of punishment. For these reasons and in light of the record before this Court, Movant’s § 2255 motion is denied.

IV. Certificate of Appealability

Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, the Court must issue or deny a certificate of appealability when it enters a final order adverse to Movant. A certificate of appealability may be issued “only if [Movant] has made a substantial showing of the denial of a

constitutional right.” 28 U.S.C. § 2253(c)(2). Because Movant has made no such showing, the Court declines to issue a certificate of appealability.

V. Conclusion

For the foregoing reasons, Movant’s motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is denied, a certificate of appealability is denied, and this case is dismissed.

It is so **ORDERED**.

/s/ Beth Phillips

BETH PHILLIPS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated: November 26, 2019.