

FILED

**United States Court of Appeals
Tenth Circuit**

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

October 21, 2020

**Christopher M. Wolpert
Clerk of Court**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUAN GARCIA,

Defendant - Appellant.

No. 20-5071
(D.C. Nos. 4:20-CV-00042-GKF-FHM &
4:17-CR-00021-GKF-1)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **PHILLIPS, MURPHY, and McHUGH**, Circuit Judges.

Juan Garcia, a federal prisoner proceeding pro se,¹ seeks a certificate of appealability (COA) to challenge the district court's order denying his Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. For the following reasons, we deny Garcia's request for a COA and dismiss this matter.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

¹ Because Garcia appears pro se, we liberally construe his pleadings but will not act as his advocate. See *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

BACKGROUND

I. Factual Background

While investigating Antonio Martinez—a suspected drug dealer—Drug Enforcement Administration (DEA) officers learned that a vehicle would be transporting methamphetamine from Oklahoma City to Tulsa on January 26, 2017. After locating the vehicle, a Chevrolet Cruze, Oklahoma police observed the car pull into a Phillips 66 gas station in Oklahoma City. The driver of the Cruze got out of the car and walked over to a parked pickup truck, opened the passenger-side door, and then returned to the Cruze. Police followed as both cars left the gas station and traveled to Tulsa, the truck following the Cruze.

Once the Cruze and the truck arrived in Tulsa, Tulsa police officers stopped each vehicle separately. A drug dog alerted to the Cruze, and officers searched the car; they found a cardboard box containing three pounds of methamphetamine. The officers then arrested the driver, Gustavo Flores, and his passenger. Both men said they had received the drugs from the men in the truck, who were traveling with them to ensure the drug deal was completed.

The same drug dog alerted to the truck at the front passenger-side door where defendant Garcia had been sitting. The officers arrested both Garcia and the driver of the truck, Roberto Dominguez. An officer searched Garcia and found several “wads of cash” totaling nearly \$20,000, a wallet, and a cell phone. App. vol. 1 at 794. Garcia explained he was en route to Tulsa to buy a car with the cash he had.

Because he didn't speak or understand English, the officers didn't interview Dominguez. Federal authorities initially brought charges against Dominguez but later dropped them. Dominguez was eventually deported without ever having been interviewed by law enforcement or Garcia's attorney.

At trial, Flores testified that "Shorty" (Garcia's nickname) gave him the three pounds of methamphetamine found in the Cruze that the Tulsa police ultimately seized. *Id.* at 795. Flores told the jury that Garcia had arranged for them to meet at the Phillips 66 and that, when Flores went to the truck, Garcia pointed to the box containing the drugs and said, "it was there." *Id.* Flores further testified that, beginning in November 2016, Garcia had on several occasions supplied him with drugs to distribute. Trial testimony from Martinez and several text message exchanges supported Flores's testimony.

Garcia testified that he was not involved in drug trafficking. He explained he had gone to Tulsa to buy a Dodge Viper from a man named Bryan Smith. Although the court admitted text messages between Garcia and Smith about the possible sale of the car, Smith didn't testify at the trial.

II. Procedural History

In August 2017, a jury convicted Garcia of participating in a methamphetamine-distribution conspiracy. The district court sentenced him to 170 months' imprisonment. Garcia appealed both his conviction and sentence, but this court affirmed on both grounds.

He then filed the present § 2255 Motion, arguing that he was denied his Sixth Amendment right to effective assistance of counsel. Because the district court concluded that Garcia had failed to establish that any allegedly deficient performance by his counsel prejudiced his defense, it denied the Motion and denied a COA. Garcia now seeks a COA to challenge the denial of his § 2255 Motion.

DISCUSSION

Under 28 U.S.C. § 2253(c)(1)(A), Garcia may appeal the district court's decision only if we issue a COA. To be entitled to a COA, he must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When, as here, the district court rejected the constitutional claims on the merits, "the showing required . . . is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). We conclude the district court correctly decided Garcia's Motion.

Garcia argues that he was denied his Sixth Amendment right to effective assistance of counsel. Specifically, Garcia maintains that his attorney's failure to subpoena and interview Roberto Dominguez and Bryan Smith prejudiced his defense. Because those two witnesses allegedly would have corroborated Garcia's claim that he was travelling to Tulsa to buy a Dodge Viper, Garcia asserts that their combined

testimony would have raised serious doubts in the jurors' minds about his guilt.² We disagree.

The Sixth Amendment guarantees a criminal defendant "the right . . . to have Assistance of Counsel for his defense." U.S. Const. amend. VI. To prevail on a claim for ineffective-assistance-of-counsel, Garcia must satisfy a two-prong test. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* He may do this by showing that, "but for counsel's deficient performance, there is a reasonable probability the result of the proceeding would have been different." *Smith v. Duckworth*, 824 F.3d 1233, 1249 (10th Cir. 2016) (citing *Strickland*, 466 U.S. at 694). Garcia must satisfy both prongs to succeed on his claim, and we may begin with either prong. *Hooks v. Workman*, 689 F.3d 1148, 1186 (10th Cir. 2012). We first consider the "prejudice" prong.

² Garcia also faults his attorney for not adequately "attacking the credibility of Martinez's and Flores' testimony." Opening Br. 3. For example, Garcia argues effective counsel would have highlighted that Martinez and Flores are cousins, they were part of the "Martinez Organization," and that Martinez was the DEA's main target. *Id.* But Garcia raises this argument for the first time on appeal. Finding no reason "to deviate from the general rule that we do not address arguments presented for the first time on appeal," *United States v. Mora*, 293 F.3d 1213, 1216 (10th Cir. 2002) (citation omitted), we decline to consider these arguments.

Garcia's argument is simple: the result of the proceeding would have been different if his attorney had secured Dominguez's and Smith's testimony at trial. They allegedly would have testified that Garcia was traveling to Tulsa to buy a Dodge Viper, corroborating Garcia's version of events. But even accepting that Dominguez and Smith would have testified accordingly,³ Garcia's argument fails for at least two reasons. First, the court allowed Garcia to introduce text messages he exchanged with Smith that supported Garcia's explanation for his trip to Tulsa. So additional testimony supporting his claim would likely have had little impact on the jury. Second, even if the jury believed that part of Garcia's reason for going to Tulsa was to buy the Dodge Viper, it could easily have concluded that the car purchase was *in addition to* Garcia's drug-trafficking plans. Indeed, that's exactly what the government argued to the jury.

Moreover, in considering Garcia's prior appeal, this court determined that "the evidence that Garcia distributed methamphetamine was overwhelming." *United States v. Garcia*, 761 F. App'x 815, 819 (10th Cir. 2019). We cited, among other things, Flores's and Martinez's testimony that Garcia regularly supplied them with methamphetamine to distribute, including the day Garcia was arrested; text messages between Flores and Garcia discussing drug-distribution logistics, one of which contained a picture of drugs; the drug dog's alert to the area of the truck where

³ Garcia included with his § 2255 Motion an affidavit from Dominguez, "verify[ing] that [he] was taking [Garcia] to purchase a vehicle (Dodge Viper) on January 26, 2017 in Tulsa, Oklahoma." App. vol. 1 at 705.

Garcia had been sitting; video surveillance corroborating the witnesses' testimony; and other evidence on Garcia's phone. *See id.*

In sum, additional testimony that Garcia was going to Tulsa to buy a car would have had little impact on jurors. And the incriminating evidence was extensive. We therefore hold that Garcia has failed to show that "but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *Duckworth*, 824 F.3d at 1249 (citing *Strickland*, 466 U.S. at 694). Because Garcia cannot show his attorney's performance prejudiced his defense, we decline to consider whether his counsel performed deficiently.

CONCLUSION

For the foregoing reasons, we conclude reasonable jurists wouldn't find the district court's assessment of the constitutional claims debatable or wrong. Accordingly, we **DENY** Garcia's request for a COA and **DISMISS** this matter.

Entered for the Court

Gregory A. Phillips
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 17-CR-021-GKF

JUAN GARCIA, a/k/a "Shorty,"
ANTONIO SIERRA-MARTINEZ,
JOEL ULLOA-MUNOZ,

Defendants.

ORDER

Defendant has filed a Petition for a Certificate of Appealability [Doc. 234] in connection with the Court's recent Order denying his Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence. But, in that same Order, the Court denied a certificate of appealability because defendant had not "made a substantial showing of the denial of a constitutional right." [Doc. 229, p. 7]. The Court therefore treats Defendant's Petition for a Certificate of Appealability [Doc. 234] as a motion to reconsider, and the motion is denied.

IT IS SO ORDERED this 24th day of July, 2020.


GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN GARCIA,

Defendant.

Case Nos. 17-CR-21-GKF-1
20-CV-42-GKF-FHM

JUDGMENT

Pursuant to the order entered this date, judgment is hereby entered in favor of plaintiff United States of America and against defendant Juan Garcia as to Mr. Garcia's motion filed pursuant to 28 U.S.C. § 2255.

ENTERED this 29th day of June, 2020.


GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JUAN GARCIA,

Defendant.

Case Nos. 17-CR-21-GKF-1
20-CV-42-GKF-FHM

ORDER

Before the court is the Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [Doc. 215] and the Motion to take Deposition of Witness in a Foreign Country [Doc. 225] of defendant Juan Garcia. For the reasons set forth below, both motions are denied.

I. Procedural History

On August 23, 2017, a jury found Juan Garcia guilty of participating in a methamphetamine distribution conspiracy in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(viii). [Doc. 138; *see also* Doc. 93]. This court subsequently entered judgment and sentenced Garcia to a term of 170 months imprisonment. [Doc. 176, pp. 1-2]. Garcia appealed, challenging this court's denial of his motion to dismiss the indictment for the alleged bad faith deportation of Roberto Dominguez prior to trial and his within-guidelines sentence. [See Doc. 203, p. 1]. The Tenth Circuit affirmed on both grounds. [See *id.*, p. 14]. Garcia then sought review by the Supreme Court. [Doc. 207]. The Supreme Court denied Garcia's petition for writ of certiorari. [Doc. 208].

II. Factual Background

The following facts are taken from trial testimony. DEA officers investigating Antonio Martinez, a suspected drug dealer, learned that a vehicle carrying methamphetamine would be traveling from Oklahoma City to Tulsa on January 26, 2017. [Doc. 163, pp. 7-9]. Oklahoma State

Trooper Cole Patterson testified that he provided aerial assistance to the investigation via helicopter that day. [Doc. 161, p. 19]. Patterson observed the vehicle—a green Chevrolet Cruze—pull into a Phillips 66 gas station in Oklahoma City. [*Id.*, pp. 24-25]. “The driver of the Cruze got out of the Cruze and walked over to [a] dark-colored pickup, opened the passenger-side door, and went back and returned to the Cruze.” [*Id.*]. The Cruze then exited the parking lot followed by the dark-colored pick-up. [*Id.*, pp. 25-26]. Patterson observed the Cruze and the truck travel from the gas station to Tulsa, Oklahoma in tandem. [*Id.*, p. 26].

Once the vehicles reached Tulsa, Tulsa Police Department (TPD) officers conducted separate traffic stops of the Cruze and truck. [*Id.*, pp. 33, 36]. Corporal Michael Griffin testified that he and his drug dog assisted first with the stop of the Cruze, then with the stop of the truck. [*Id.*]. The drug dog alerted to the Cruze, and the subsequent search revealed a cardboard box containing three pounds of methamphetamine. [*Id.*, pp. 34, 62]. TPD officers arrested the driver of the Cruze—Gustavo Flores—and the passenger—Joel Ulloa. [*Id.*, pp. 61-62]. Both men made statements indicating they had received the methamphetamine from the truck and that the truck was traveling with them to ensure that the drug deal was completed. [Doc. 162, pp. 43-44; *see also id.*, p. 104].

Corporal Griffin then went to the traffic stop of the truck and deployed the same drug dog. [Doc. 161, p. 36]. The drug dog alerted to the presence of drug odor on the front passenger side door, where defendant Garcia had been sitting. [*Id.*, pp. 37, 93]. TPD Officers arrested Garcia and the driver of the truck, Roberto Dominguez. [*Id.*, p. 64]. Officer Keith Osterdyk testified that a search of Mr. Garcia revealed several “wads of cash” totaling nearly \$20,000, a wallet, and a cell phone on Mr. Garcia’s person. [*Id.* pp. 43, 75]. Garcia told officers he was riding to Tulsa with Dominguez to purchase a vehicle with the cash he was carrying. [*Id.*, p. 91; Doc. 162, p. 188].

Officers did not interview Mr. Dominguez because he did not speak or understand English. [Doc. 162, p. 187]. Charges were ultimately dropped against Mr. Dominguez and he was deported without ever being interviewed by law enforcement. [See Doc. 162, pp. 186-87; see also Doc. 110, pp. 21, 34].

At trial, Flores testified that he received the three pounds of methamphetamine from “Shorty”—a nickname for defendant Garcia. [Doc. 162, pp. 44-45]. Flores explained that Garcia instructed him to go to the Phillips 66 where Garcia would be waiting in a blue truck. [*Id.*, p. 47]. Once at the gas station, Flores approached the truck where he saw Garcia and a man he had never seen before in the driver’s seat. [*Id.*, p. 48]. Garcia pointed to the box containing methamphetamine and said “it was there.” [*Id.*, p. 49]. Flores then grabbed the box, returned to the Cruze, and proceeded to Tulsa to deliver the drugs. [*Id.*]. Flores communicated with the defendant throughout the drive via calls and text messages. [*Id.*, p. 51]. Flores explained that the methamphetamine was “fronted,” meaning Flores and Ulloa would not pay Garcia for the methamphetamine until they successfully delivered it. [*Id.*, p. 50]. Flores expected to receive \$16,000 for the drugs that day, \$3000 of which he would keep with the remainder going to defendant Garcia. [*Id.*, pp. 50-51]. He further testified Garcia supplied him with the drugs he distributed on several occasions beginning in November 2016. [*Id.*, p. 60]. This testimony was supported by several text message conversations and the testimony of Anthony Martinez, who facilitated the drug deals. [See *id.*, pp. 61-86, 121-22].

Mr. Garcia also testified, confirming that he was known as “Shorty” but denying any involvement in drug trafficking. [Doc. 163, pp. 38, 61-62]. Consistent with his statements at the time of his arrest, Garcia testified that he rode to Tulsa with Dominguez to purchase a Dodge Viper from Bryan Smith with cash he had saved. [*Id.*, pp. 42, 48]. Benjamina Ramirez testified that she

and Garcia applied for—and were denied on January 26, 2017—a loan to purchase a Dodge Viper owned by Smith. [*Id.*, pp. 27-29]. The court also admitted text messages between Garcia and Mr. Smith regarding the sale of the Dodge Viper. [*Id.*, p. 82]. However, Mr. Smith did not testify.

III. Motion to Conduct Deposition

As an initial matter, Garcia submits a notarized and translated affidavit of Mr. Dominguez in support of his § 2255 motion. [*See* Doc. 215, pp. 14-22]. Dominguez states that he is “writing this statement on behalf of Juan Garcia to verify that [he] was taking him to purchase a vehicle (Dodge Viper) on January 26, 2017 in Tulsa, Oklahoma.” [Doc. 215, p. 14]. He “would also like to admit that all property (phones, etc.) that was in [his] truck during [the] arrest January 26, 2017 belonged to [him], Roberto Dominguez.” [*Id.*]. Important, though, is what Mr. Dominguez does not say: that Garcia was not involved in drug trafficking. Garcia requests leave to depose Mr. Dominguez in Mexico pursuant to Federal Rule of Criminal Procedure 15 to further develop these facts. [Doc. 225].

“A habeas petitioner . . . is not entitled to discovery as a matter of ordinary course.” *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rule 6(a) of the Rules Governing Section 2255 Proceedings states that “[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law.” “Good cause is established where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief.” *Wallace v. Ward*, 191 F.3d 1235, 1245 (10th Cir. 1999) (internal quotation marks and citation omitted).

To demonstrate he is entitled to relief, Garcia must show a “reasonable probability” that Dominguez’s testimony would have changed the outcome of his trial. *See Strickland v.*

Washington, 466 U.S. 668, 694 (1984). The Tenth Circuit has already noted that, in the face of the compelling evidence against Garcia, “it is highly unlikely that the jury would have rendered a different verdict, even if Dominguez had supported Garcia’s claim that he knew nothing about the drugs and was traveling to Tulsa to purchase a car.” *United States v. Garcia*, 761 F. App’x 815, 819 (10th Cir. 2019). The overwhelming evidence against Garcia compels the same conclusion here: further development of Mr. Dominguez’s testimony would not show “probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Accordingly, Garcia’s discovery motion is denied.

IV. Motion Under § 2255

In his § 2255 motion, Garcia argues his counsel performed deficiently by failing to subpoena and interview (1) Roberto Dominguez prior to his deportation and (2) Bryan Smith. Garcia believes he was prejudiced by this failure because both Mr. Dominguez and Mr. Smith would have corroborated his defense, namely that he was traveling to Tulsa to purchase a car.

The Sixth Amendment guarantees a criminal defendant “the right . . . to have Assistance of Counsel for his defense.” U.S. Const. amend. VI. Under *Strickland v. Washington*, 466 U.S. 668 (1984), defendants must satisfy a two-prong test to prevail on ineffective-assistance-of-counsel claims. “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* He may do this by showing “that, but for counsel’s deficient performance, there is a reasonable probability the result of the proceeding would have been different.” *Smith v. Duckworth*, 824 F.3d 1233, 1249 (10th Cir. 2016) (citing *Strickland*, 466 U.S. at 694).

The court may address performance or prejudice in any order, and failure to meet either prong of the *Strickland* test is lethal to defendant's claim. *Hooks v. Workman*, 689 F.3d 1148, 1186 (10th Cir. 2012). Here, the government argues Garcia's failure to satisfy the second prong is dispositive and, as a result, the court need not address the first. The court agrees.

At trial, Garcia's defense was consistent with his prior statements to law enforcement, supported by the testimony of Benjamina Ramirez, and corroborated with text messages between Garcia and Smith regarding the potential sale of the Dodge Viper. Both Dominguez's and Smith's testimony may have further corroborated Garcia's account; however, it would have done little to undercut the government's strong case against Garcia. Indeed, the government did not dispute that Garcia intended to purchase the Dodge Viper in Tulsa. [See Trial Transcript, Doc. 161, p. 14 (Garcia told law enforcement "that the only reason why he's in Tulsa is to buy a car," however, "the evidence will show that that was not the only reason why he was in Tulsa.")].

Instead, the government argued persuasively to the jury that Garcia participated in a drug conspiracy notwithstanding evidence that Garcia also planned on purchasing a car. Both Flores and Martinez testified in detail that Garcia supplied the three pounds of methamphetamine recovered from the Cruze on January 26, 2017, and that he had supplied smaller quantities to Flores on several occasions beginning in November 2016. Their testimony was supported by text message evidence with and regarding "Shorty," a nickname the defendant admitted to using. While Dominguez's claim to some of the phones at issue may have cast some doubt as to whether the text messages were exchanged with Garcia or Dominguez, it would not undercut the discussion of "Shorty" in the text messages themselves. Moreover, Flores's testimony was further corroborated by the officers' testimony, video footage, and the drug dog's alert to the area of the truck where Garcia had been sitting.

In light of this overwhelming evidence of guilt the court concludes—much like the Tenth Circuit’s decision on appeal applying a similar standard—Garcia fails to “show that there is a reasonable probability that . . . the results of the proceeding would have been different” if Dominguez and Smith would have been interviewed and testified.¹ *See Strickland*, 466 U.S. at 694. Accordingly, his § 2255 motion is denied.

V. Conclusion

WHEREFORE, defendant Juan Garcia’s Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [Doc. 215] and his Motion to take Deposition of Witness in a Foreign Country [Doc. 225] are both denied.

Further, the court denies a certificate of appealability because Mr. Garcia has not “made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also* Rule 11(a), Rules Governing Section 2255 Proceedings.

IT IS SO ORDERED this 29th day of June, 2020.


GREGORY K. GRIZZELL
UNITED STATES DISTRICT JUDGE

¹ Because Garcia’s § 2255 motion and the files and records of this case conclusively compel this result, Mr. Garcia is not entitled to an evidentiary hearing. *See United States v. Kennedy*, 225 F.3d 1187, 1193 (10th Cir. 2000) (“Under 28 U.S.C. § 2255, the district court is required to conduct an evidentiary hearing ‘[u]nless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief.’”).