No. 20-1968

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 01, 2020
DEBORAH S. HUNT, Clerk

DANNY R. PENNEBAKER,

Petitioner-Appellant,

v.

RANDEE REWERTS, Warden,

Respondent-Appellee.

ORDER

Before: MOORE, ROGERS, and GRIFFIN, Circuit Judges.

"Every federal appellate court has a special obligation to satisfy itself . . . of its own jurisdiction . . . ." *Alston v. Advanced Brands & Import. Co.*, 494 F.3d 562, 564 (6th Cir. 2007) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998)). Generally, in a civil case where neither the United States, a United States agency, nor a United States officer or employee is a party, a notice of appeal must be filed within thirty days after the judgment or order appealed from is entered. 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A).

On July 27, 2020, the district court entered its judgment dismissing Danny R. Pennebaker's petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Any notice of appeal from the judgment was due to be filed on or before August 26, 2020. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A), 26(a). Pennebaker's notice of appeal was not filed in the district court until September 22, 2020.

We entered an order directing Pennebaker to show cause why his appeal should not be dismissed on the basis of a late notice of appeal. In response, he states that he did not receive the district court's judgment until September 8, 2020.

APPENDIX A

Both 28 U.S.C. § 2107(c) and Federal Rule of Appellate Procedure 4(a)(6) allow an appellant to move to reopen the time to file an appeal if the appellant did not receive timely notice of the entry of the order or judgment from which he appeals. The district court may reopen the time to file an appeal if the following conditions are satisfied: (1) the appellant did not receive notice of the entry of judgment within 21 days after its entry, (2) the appellant files a motion for extended time within 180 days after the judgment or order is entered or within 14 days after receiving notice, whichever is earlier, and (3) no party would be prejudiced by an extension of time. 28 U.S.C. § 2107(c); Fed. R. App. P. 4(a)(6). This "option[] for extending the time to file an appeal require[s] a 'motion' in which the losing party asks the district court for more time." *Martin v. Sullivan*, 876 F.3d 235, 237 (6th Cir. 2017) (per curiam).

Pennebaker did not file a motion asking the district court to reopen the time to appeal. He filed a motion for reconsideration that was docketed in the district court on September 22, 2020, but that motion did not request relief under § 2107(c) and Rule 4(a)(6). Moreover, we are "without power to construe a notice of appeal as a motion to reopen the time to file an appeal." *Id.* Likewise, we are without power to construe Pennebaker's response to our show-cause order as a motion to reopen the time to file an appeal. *See id.* at 236-38.

For the reasons set forth above, we DISMISS the appeal for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 20-1968

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 20, 2021
DEBORAH S. HUNT, Clerk

DANNY R. PENNEBAKER,

Petitioner-Appellant,

v.

RANDEE REWERTS, Warden,

Respondent-Appellee.

ORDER

Before: MOORE, ROGERS, and GRIFFIN, Circuit Judges.

Danny Pennebaker has filed a petition for rehearing of this court's December 1, 2020, order dismissing his appeal on the basis of a late notice of appeal.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any relevant point of law or fact when it entered the decision. *See* Fed. R. App. P. 40(a). Although Pennebaker filed in the district court a motion to reopen the time to appeal, that motion was itself untimely and thus cannot support the requested relief. The motion to reopen time to appeal mailed on 10/20/2020 and filed on 10/21/2020 was late.

The petition for rehearing is DENIED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX C

13-4717-FC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Danny R. Pennebaker,

Petitioner,

v.

Randee Rewerts,[1] Warden,

Respondent.

Case No. 17-12196

Hon. Judith E. Levy
United States District Judge

Mag. J. David R. Grand

/

OPINION AND ORDER DISMISSING THE PETITION FOR A WRIT OF HABEAS CORPUS [1], DENYING A CERTIFICATE OF APPEALABILITY, AND DENYING LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL

Petitioner Danny R. Pennebaker, a prisoner currently held at the Carson City Correctional Facility, in Carson City, Michigan, challenges his convictions for felonious assault and assault with intent to rob while armed. He seeks habeas corpus relief on the ground that his trial counsel was constitutionally ineffective for conceding guilt on the felonious assault charges, after Petitioner had asserted his innocence.

[1] The proper respondent for a state prisoner seeking habeas relief pursuant to 28 U.S.C. § 2254 is the state officer having custody of the petitioner. *See* Rule 2(a) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. The Court orders the case caption amended to reflect the name of the warden of Carson City Correctional Facility, Randee Rewerts.

APPENDIX B

Because the Michigan Court of Appeals' decision denying this claim was not contrary to nor an unreasonable application of Supreme Court precedent, the petition for habeas corpus is denied. The Court also denies a certificate of appealability and leave to proceed *in forma pauperis* on appeal.

I. Background

Petitioner was convicted at a jury trial in Jackson County, Michigan, of two counts of assault with intent to rob while armed (AWIRA), Mich. Comp. Laws § 750.89, and two counts of felonious assault (assault with a dangerous weapon), Mich. Comp. Laws § 750.82. Following a direct appeal by right and a remand for resentencing, he was sentenced as a fourth habitual offender to eleven to twenty years for the AWIRA convictions and six to fifteen years for the felonious assault convictions. The Michigan Court of Appeals described the circumstances of the offense as follows:

> On June 30, 2013, defendant stopped the two victims on their way to Taco Bell. Defendant asked the two victims for a cigarette and also asked them to purchase a taco for him. Thereafter, defendant rode off on his bicycle, but then he returned and told the two victims that they looked like they were "up to no good." Defendant subsequently pulled out a knife, which caused the two victims to run to the Taco Bell.

> Police arrived at the Taco Bell shortly thereafter. One of the victims had a cut on his arm. At some point, the police found defendant, and the two victims identified defendant on scene as the perpetrator.

People v. Pennebaker, No. 322117, 2015 WL 6439047, at *1 (Mich. Ct. App. Oct. 22, 2015) (unpublished) (per curiam).

Petitioner raised four issues in his first direct appeal: ineffective assistance of trial counsel for admitting Petitioner's guilt without his consent, jail credit error, and two arguments regarding improper scoring of two offense variables (used in sentencing guideline calculations). The state court affirmed Petitioner's convictions but remanded for resentencing over one of the offense variable errors. *Pennebaker*, 2015 WL 6439047, at *1, *3. Petitioner raised only the question of ineffective assistance in his application for leave to appeal to the Michigan Supreme Court. That court affirmed the court of appeals decision in a standard form order. *People v. Pennebaker*, 499 Mich. 916 (2016).

Following resentencing, Petitioner again appealed by right, arguing that the judge considered inaccurate information in his Presentence Investigation Report (PSIR). The court of appeals again affirmed. *People v. Pennebaker*, No. 335371, 2018 WL 521900, at *1 (Mich. Ct. App. Jan.

23, 2018). Petitioner did not seek leave to appeal that decision in the Michigan Supreme Court.

Petitioner also filed a motion for relief from judgment at the trial court, which was denied. The state court of appeals denied leave to appeal, as did the state supreme court "because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. Pennebaker*, No. 349589 (Mich. Ct. App. Oct. 14, 2019) (unpublished); *lv. den.*, 937 N.W.2d 683 (Mich. 2020). The state supreme court also denied Petitioner's motion to expand the record. *Id.*

Petitioner filed this petition on June 29, 2017. As he notes in numerous pleadings (*see, e.g.*, ECF No. 7, PageID.62–63; ECF No. 12, PageID.98), he raises a single claim of error, that by admitting Petitioner's guilt to the felonious assault counts without obtaining his consent on the record for that admission, trial counsel was constitutionally ineffective in violation of Petitioner's Sixth Amendment rights.

II. Legal Standard

A habeas petition brought by a prisoner in state custody is governed by the heightened standard of review set forth in the Anti-Terrorism and

Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254. To obtain relief, habeas petitioners who raise claims previously adjudicated by state courts must "show that the relevant state-court 'decision' (1) 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' or (2) 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.'" *Wilson v. Sellers*, 138 S. Ct. 1188, 1191 (2018) (quoting 28 U.S.C. § 2254(d)).

For the purposes of habeas review, "clearly established Federal law" is based solely on Supreme Court precedent. *Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam) (citing 28 U.S.C. § 2254(d)(1)). "State-court decisions are measured against this Court's precedents as of 'the time the state court renders its decision.'" *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71–72, (2003)). "[C]ircuit precedent does not constitute 'clearly established Federal law as determined by the Supreme Court'" and thus cannot provide the basis for federal habeas relief. *Parker v. Matthews*, 567 U.S. 37, 48–49 (2012).

The focus of the AEDPA standard "is not whether a federal court believes the state court's determination was incorrect but whether that

determination was unreasonable–a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "AEDPA thus imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal citations and quotation marks omitted).

Ultimately, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Additionally, a state court's factual determinations are presumed correct on federal habeas review, 28 U.S.C. § 2254(e)(1), and review is "limited to the record that was before the state court." *Cullen*, 563 U.S. 170 at 181. A petitioner may rebut the presumption of correctness with clear and convincing evidence. § 2254(e)(1); *Warren v. Smith*, 161 F.3d 358, 360–61 (6th Cir. 1998). "[A] decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light

of the evidence presented in the state-court proceeding." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (citations omitted).

III. Analysis

Petitioner's sole claim of error is that trial counsel's defense was objectively unreasonable, because counsel conceded guilt to the felonious assault charges without obtaining consent from Petitioner on the record. Petitioner argues that his rejection of a plea offer before his July 2013 preliminary examination, which required him to plead guilty to a single count of felonious assault in exchange for dismissal of the other charges and reduced habitual offender sentence enhancement, should have made clear to his trial attorney that he sought to pursue a defense theory of innocence at trial. (*See, e.g.*, ECF No. 12, PageID.98; ECF No. 16, PageID.744–45.)

In his opening statement, trial counsel stated that, "[a]fter you've heard all the evidence I think you'll be convinced that Mr. Pennebaker is guilty of assaulting these young men with a knife, inappropriately, wrongfully[,] there is no excuse for what he did." (ECF No. 13-5, PageID.339). However, he continued, Petitioner "never intended at all to rob these young men." (*Id.* at PageID. 339; *see also id.* at 338.) Similarly,

in his closing statement, counsel concluded that Petitioner was "guilty of two counts of felonious assault, he is because that's what he did. But he didn't assault those boys intending to rob." (*Id.* at 418.) In support, defense counsel read from a letter Petitioner wrote to the victims (which was identified and described as an admission by one of the victims (*id.* at 353).). (*Id.* at 416.) In that letter, Petitioner admitted to pulling out his knife, which frightened the victims, who then ran away. (*Id.* at 417.) Counsel argued that the letter demonstrated that Petitioner was panhandling and pulled out the knife after he felt the victims laughed at him, humiliating him, but he never intended to rob them. (*Id.*)

The Michigan Court of Appeals ruled that Petitioner's ineffective assistance of counsel claim lacked merit. *Pennebaker*, 2015 WL 6439047, at *1. It found that "[i]t is clear from the record that defense counsel did not make a complete concession of guilt, but rather defense counsel conceded that defendant was guilty of the lesser charged offenses of felonious assault." *Id.* The court continued:

> Here, defendant was positively identified by both of the victims; defendant had a knife with him when police stopped him; and defendant admitted, in a letter to the victims, that he pulled a knife on both of them and both of them appeared to be scared. "When defense counsel ... recognizes and

> candidly asserts the inevitable, he is often serving his client's interests best by bringing out the damaging information and thus lessening the impact." *People v. Wise*, 134 Mich. App 82, 98; 351 N.W.2d 255 (1984). Accordingly, defense counsel's performance was not objectively unreasonable; thus, defendant's ineffective assistance of counsel claim of error lacks merit.

Pennebaker, 2015 WL 6439047, at *1.

Petitioner cites Supreme Court cases *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), and *Florida v. Nixon*, 543 U.S. 175 (2004), as well as Sixth Circuit case *Wiley v. Sowders*, 647 F.2d 642, 650 (6th Cir. 1981), in support of his argument. None establish that he is entitled to habeas relief.

First, *McCoy* was issued on May 14, 2018, two and a half years after the Michigan Court of Appeals decided this question in Petitioner's first direct appeal. A state court decision cannot be challenged under § 2254(d) based on Supreme Court decisions not yet decided at "the time the state court render[ed] its decision." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quotations and emphasis omitted); *see also Cullen*, 563 U.S. at 182.

Furthermore, *McCoy* is distinguishable. In *McCoy*, the Supreme Court held that it was impermissible for defense counsel to concede a defendant's guilt during the guilt phase of a two-phase death penalty

trial, when the defendant "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." 138 S. Ct. at 1505, 1508. The Court reasoned that while "[t]rial management is the lawyer's province," such as deciding to "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence," a criminal defendant is entitled to the "[a]utonomy to decide that the objective of the defense is to assert innocence" and to "insist on maintaining her innocence at the guilt phase of a capital trial." *Id.* at 1508. As a result, the Sixth Amendment gives a defendant the right to insist that counsel refrain from admitting guilt over the defendant's objection, even when counsel believes that it is in the defendant's best interest to do so to avoid a harsh sentence. *Id.* at 1511–12.

McCoy found this denial of autonomy to be structural error, and therefore the ineffective assistance of counsel analysis of *Strickland v. Washington*, 466 U.S. 668 (1984), did not apply. 138 S. Ct. at 1511. *McCoy* distinguished *Florida v. Nixon*, another case in which guilt was conceded by trial counsel. In the latter case, counsel was found not to be constitutionally ineffective, because "Nixon's attorney did not negate

Nixon's autonomy by overriding Nixon's desired defense objective." *McCoy*, 138 S. Ct. at 1509 (citing *Nixon*, 543 U.S. at 181; *see also id.* at 192). Unlike McCoy's "adamant[] object[ions]," *id.* at 1505, Nixon was "generally unresponsive," and never articulated a defense objective; nor did he approve of or protest counsel's proposed strategy. *McCoy*, 138 S. Ct. at 1509 (citing *Nixon*, 543 U.S. at 181). Nixon only complained about counsel's concession of guilt after trial. *Nixon*, 543 U.S. at 185. "McCoy, in contrast, opposed [his attorney's] assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court." *McCoy*, 138 S. Ct. at 1509.

Petitioner's circumstances correspond more closely to Nixon's failure to respond than to McCoy's vociferous insistence on innocence. That is, Petitioner argues that his attorney should have been aware of his desire to assert his innocence at trial based primarily on his rejection of a plea offer to a single count of felonious assault many months before the March 2014 trial.[2] He does not argue that he objected to this strategy with his attorney or the court before or during trial.

[2] Petitioner also cites in support of his argument statements he made at an October 2013 hearing purportedly asserting innocence. As with the plea rejection, those remarks preceded his trial by several months; in addition, they are not the clear

Petitioner demonstrated at his October 2013 pretrial hearing that he was capable of advocating for himself directly with the court, when he sought replacement of appointed counsel or the opportunity to represent himself. (ECF No. 13-3, PageID.246, 249–51.) Even if, as Petitioner alleges, his attorney never discussed trial strategy with him, he was on notice of counsel's defense theory as soon as counsel made his opening statement. Yet Petitioner failed to oppose this strategy with his attorney or before the court; nor did he clearly and consistently insist on a defense of innocence. Instead, Petitioner, like the defendant in *Nixon*, only objected to counsel's defense ~~strategy after trial~~. As a result, this is not a case of structural error, as in *McCoy*, but rather, invokes *Nixon*'s analysis of ineffective assistance of counsel.

The *Nixon* Court determined that *Strickland* governed the question before it, namely, whether a defendant must consent to counsel's strategic choices. It rejected a "blanket rule demanding" consent, and instead held that "if counsel's strategy, given the evidence bearing on the

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assertion of innocence he suggests. Specifically, Petitioner said to the trial court, "I do not claim innocence of a crime taking place. I do claim that the crimes as charged did not take place." (ECF No. 13-3, PageID.251.) Petitioner's dispute was the result of his perception the length of his knife's blade determined whether charges should have been issued. *Id.*

defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain."[3] *Nixon*, 543 U.S. at 192.

Claims for habeas relief based on ineffective assistance of counsel are evaluated under a "doubly deferential" standard. *Abby v. Howe*, 742 F.3d 221, 226 (6th Cir. 2014) (citing *Burt v. Titlow*, 571 U.S. 12, 15 (2013)). First, under the two-pronged standard of *Strickland*, a habeas petitioner must show "that counsel's representation fell below an objective standard of reasonableness," and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (citations omitted). *Strickland* requires a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance[.]" *Abby*, 742 F.3d at 226 (citing *Strickland*, 466

[3] *Nixon* does suggest that a defense strategy that includes the admission of a defendant's guilt outside its capital context might, "in a run-of-the-mine trial might present a closer question," as to whether counsel "fail[ed] to function in any meaningful sense as the Government's adversary." 543 U.S. at 190 (quoting *United States v. Cronic*, 466 U.S. 648, 666 (1984)). However, those remarks are dicta, and therefore do not represent "clearly established Federal law" for the purposes of section 2254 analysis. *See White v. Woodall*, 572 U.S. 415, 419 (2014) (citing *Howes v. Fields*, 132 S. Ct. 1181, 1187 (2012)).

U.S. at 689), and that "under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Bell v. Cone*, 535 U.S. 685, 698 (2002) (citing *Strickland*, 466 U.S. at 689).

AEDPA provides the second layer of deference, under which the Court may "examine only whether the state court was reasonable in its determination that counsel's performance was adequate." *Abby*, 742 F.3d at 226 (citing *Burt*, 134 S. Ct. at 18). "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable," which "is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Harrington*, 562 U.S. at 101.

Against *Nixon* and the doubly deferential standard AEDPA requires, the state courts were not unreasonable to find that defense counsel provided Petitioner effective assistance. Counsel's choice of strategy was a reasonable attempt to mitigate the impact of significant evidence against Petitioner, especially Petitioner's own admission in his letter that he used a knife to frighten the victims.

Further, Petitioner cannot establish that he was prejudiced by counsel's concession of guilt. His sole argument in favor of prejudice is that counsel's admission exposed him to a higher potential sentence than

that of the July 2013 plea offer, had he accepted it. (ECF No. 1, PageID.33.) However, the plea offer, which Petitioner rejected months before while represented by a different appointed attorney, bears no relation or relevance to his sentence after trial. Petitioner does not suggest he declined the plea offer as the result of ineffective assistance of counsel and then received a longer sentence as the result of proceeding to trial. *See Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Defense counsel's admission of the felonious assaults had no direct impact on the sentence Petitioner ultimately received. And an unsuccessful trial strategy does not establish that counsel was ineffective. *See Moss v. Hofbauer*, 286 F.3d 851, 859 (6th Cir. 2002) ("an ineffective-assistance-of-counsel claim cannot survive so long as the decisions of a defendant's trial counsel were reasonable, even if mistaken").

Finally, Petitioner is not entitled to habeas relief based on *Wiley v. Sowders*, a pre-AEDPA Sixth Circuit habeas case in which a petitioner's "lawyer admitted his client's guilt, without first obtaining his client's consent to this strategy." 647 F.2d 642, 650 (6th Cir. 1981). *Wiley* held that consent "must appear outside the presence of the jury on the trial record," and that the failure to obtain that consent, where the evidence

was circumstantial and the likelihood of conviction absent the confession unclear, was ineffective assistance of counsel. *Id.*

However, a later case distinguished *Wiley* and rejected a similar claim, where counsel "argued to the jury that petitioner was guilty only of the lesser included offense of second-degree home invasion" but did not concede guilt in "the charged offenses of armed robbery or first-degree home invasion." *Johnson v. Warren*, 344 F. Supp. 2d 1081, 1095 (E.D. Mich. 2004). That court found trial counsel's admission of guilt, in "an attempt to win an acquittal" on the higher, charged offenses "a legitimate trial strategy." *Id.*

Most importantly, clearly established law for habeas purposes may only be determined by the holdings of the United States Supreme Court, so this Court may not apply *Wiley* to grant habeas relief to Petitioner. *Parker*, 567 U.S. at 48–49. In addition, Petitioner's circumstances correspond more to *Johnson*'s than *Wiley*'s. The evidence in Petitioner's case was much more significant than in *Wiley*, including the location of the suspect very shortly after police were called, matching the victims' descriptions (ECF No. 13-5, PageID.396); the victims' individual identifications of him (*id.* at 383); the knife found within Petitioner's

reach (*id.* at 390); and the letter from Petitioner to the victims admitting he pulled a knife and scared them (*id.* at 353, 416–18).

Further, although the felonious assault charges against Petitioner were not "lesser included offenses" of the assault while attempting to rob charges per se, *see People v. Walls*, 265 Mich. App. 642, 646 (2005), they were much less consequential. *Compare* Mich. Comp. Laws § 750.89 (assault with intent to rob punishable by life or any term of years), Mich. Comp. Laws § 750.82 (felonious assault is a four-year offense; fourth habitual offender enhancement raises the penalty to a maximum of fifteen years, Mich. Comp. Laws § 769.12(1)(c)). Applying *Johnson*, a defense seeking to limit convictions to lower-penalty charges was a "legitimate trial strategy." The state courts' finding that Petitioner's Sixth Amendment rights to counsel were not violated was not unreasonable. Petitioner is not entitled to habeas relief.

IV. Certificate of Appealability and Pauper Status on Appeal

Appealability

Federal Rule of Appellate Procedure 22(b)(1) provides that an appeal may not proceed unless a certificate of appealability is issued under 28 U.S.C. § 2253. Rule 11(a) of the Rules Governing Section 2254

Cases requires the Court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant."

To obtain a certificate of appealability, a prisoner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Section 2253(c)(2) is satisfied only if reasonable jurists could find either that the district court's assessment is debatable or wrong or that the issues presented deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000).

For the reasons set forth above, reasonable jurists could not find this Court's assessment of Petitioner's claims to be debatable or wrong. Nor would reasonable jurists conclude that the issues presented are adequate to deserve encouragement to proceed further. *See Millender v. Adams*, 187 F. Supp.2d 852, 880 (E.D. Mich. 2002). Consequently, Petitioner is not entitled to a certificate of appealability.

Further, an appeal from this decision would be frivolous and could not be taken in good faith. *See Coppedge v. U.S.*, 369 U.S. 438, 444 (1962). Therefore, Petitioner may not proceed *in forma pauperis* on appeal. Fed. R. App. P. 24(a)(3)(A).

V. Conclusion

denied w/ prejudice

For the reasons set forth above, the petition for a writ of habeas corpus (ECF No. 1) is **DISMISSED WITH PREJUDICE**; and a certificate of appealability and permission to appeal *in forma pauperis* are **DENIED**.

IT IS SO ORDERED.

Dated: July 27, 2020
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on July 27, 2020.

s/William Barkholz
WILLIAM BARKHOLZ
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Danny R. Pennebaker,

Petitioner,

v.

Randee Rewerts, Warden,

Respondent.

Case No. 17-12196

Hon. Judith E. Levy
United States District Judge

Mag. J. David R. Grand

/

JUDGMENT

For the reasons set forth in the opinion and order entered on today's date, it is ordered and adjudged that this case is dismissed with prejudice.

DAVID J. WEAVER
CLERK OF THE COURT

By: s/William Barkholz
DEPUTY COURT CLERK

Date: July 27, 2020

APPROVED:

s/JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Danny R. Pennebaker,

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v.

Randee Rewerts,[1] Warden,

Respondent.

Case No. 17-12196

Hon. Judith E. Levy
United States District Judge

Mag. J. David R. Grand

/

OPINION AND ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION [24], DENYING AS MOOT PETITIONER'S MOTION FOR CONSIDERATION OF HABEAS CORPUS PETITION [22], AND DENYING PETITIONER'S MOTIONS TO REOPEN OR EXTEND TIME TO APPEAL [26, 27]

Petitioner Danny R. Pennebaker, a prisoner currently confined at the Carson City Correctional Facility, in Carson City, Michigan, filed a *pro se* petition challenging his convictions for felonious assault and assault with intent to rob while armed. He sought habeas corpus relief on the ground that his trial counsel was constitutionally ineffective for

[1] The proper respondent for a state prisoner seeking habeas relief pursuant to 28 U.S.C. § 2254 is the state officer having custody of the petitioner. *See* Rule 2(a) of the Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254. The Court orders the case caption amended to reflect the name of the warden of Carson City Correctional Facility, Randee Rewerts.

APPENDIX D

conceding guilt on the felonious assault charges after Petitioner had asserted his innocence. The Court denied relief in an Order dated July 27, 2020. (ECF No. 18.) The Court's Order was mailed to Petitioner but was returned as undeliverable. (ECF No. 21.) Petitioner asserts that he did not receive the Court's Order until September 8, 2020. (ECF Nos. 24, 26.)

Now before the Court are four motions filed by Petitioner. The first motion, filed before Petitioner received notice that his petition was denied, sought a ruling on the habeas petition. (ECF No. 22.) Next, Petitioner filed a motion for reconsideration[2] of the Court's denial of his habeas petition. (ECF No. 24.) On September 22, 2020, Petitioner filed a Notice of Appeal (ECF No. 23), which was followed by two motions requesting this Court reopen or extend his time to appeal, on October 19,

[2] Petitioner's motion for reconsideration was erroneously docketed as filed September 22, 2020. Under the "prison mailbox rule," the motion was filed on September 14, 2020, when it was signed and provided to prison authorities for delivery via U.S. Postal Mail. (*See* ECF No. 24, PageID.792). *United States v. Smotherman*, 838 F.3d 736, 737 (6th Cir. 2016) (citing *Houston v. Lack*, 487 U.S. 266, 276 (1988); *Tanner v. Yukins*, 776 F.3d 434, 436 (6th Cir. 2015)) (other citations omitted) (recognizing the "typical rule that a *pro se* prisoner's" pleadings are considered filed when submitted for mailing to the court).

2020, and December 16, 2020. (ECF Nos. 26, 27.) For the reasons stated below, all motions are denied.

I. Background

Petitioner was convicted at a jury trial in Jackson County, Michigan, of two counts of assault with intent to rob while armed ("AWIRA"), Mich. Comp. Laws § 750.89; and two counts of felonious assault (assault with a dangerous weapon), Mich. Comp. Laws § 750.82, for pulling a knife on two individuals. *People v. Pennebaker*, No. 322117, 2015 WL 6439047, at *1 (Mich. Ct. App. Oct. 22, 2015) (unpublished) (per curiam).

Following a direct appeal by right and collateral motions in the state courts, Petitioner filed an application for the writ of habeas corpus in this Court. (ECF No. 1.) Petitioner's sole issue was that his trial attorney was ineffective because he "admit[ed] guilt to two counts of felon[i]ous assault, without my consent, after I have already rejected a plea bargain to admit guilt to only one count of felon[i]ous assault." (*Id.* at PageID.6.)

On July 27, 2020, the Court dismissed Petitioner's application for a writ of habeas corpus because he did not establish his entitlement to

relief. (ECF No. 18.) It also declined to issue a certificate of appealability or grant Petitioner pauper status on appeal. (*Id.*)

Petitioner's motion for "consideration" of his petition, requesting the Court grant or deny it, was filed on August 19, 2020. (ECF No. 22.) As the petition had already been denied, this motion was moot when it was filed. Petitioner's motion for reconsideration argues that the Court erred in its understanding and analysis of his habeas claim. (ECF No. 24.) Alternatively, the motion contends that the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") should not apply to Petitioner's case. (*Id.*)

Petitioner asserts that he did not receive notice of the July 27, 2020, Order and Judgment until September 8, 2020, after it was sent to him by the Jackson County appellate prosecutor. (Pet. Mot. Reconsid., ECF No. 24, PageID.786–87; *see also* Pet. Mot. Reopen/Ext. Time, ECF No. 26, PageID.799 (letter from prosecutor).) Petitioner's account is supported by the case docket, which indicates the order sent to him was returned to the Court by the Michigan Department of Corrections. (*See* ECF No. 21.)

Petitioner filed a notice of appeal of the dismissal on September 22, 2020. (ECF No. 23.) He also filed two motions to reopen or extend the

time to appeal, on October 21, 2020 and December 16, 2020, again noting that he did not receive this Court's July 27, 2020 Order until several weeks after it was entered. (ECF Nos. 26, 27.)

On December 1, 2020, the Sixth Circuit dismissed Petitioner's appeal for lack of jurisdiction because he did not file it within thirty days of the order dismissing his habeas petition and he had not moved for an extension or reopening of the time to file by this court. (*See* Sixth Circuit Court of Appeals Case No. 20-1968, Order, Dec. 1, 2020, ECF No. 15-2.) On January 20, 2021, that Court denied Petitioner's motion for reconsideration, reiterating that his October 2020 motion to reopen his time to appeal was filed too late. (Case No. 17-12196, ECF No. 28.)

II. Legal Standard

Petitioner does not state the basis for his motion for reconsideration. Pleadings by *pro se* litigators must be construed liberally and "held to less stringent standards than formal pleadings drafted by lawyers[.]" *Erickson v. Pardus*, 551 U.S. 89, 90 (2007) (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Because Petitioner's argument is with the Court's legal analysis, the Court construes his motion as brought pursuant to Fed. R. Civ. P. 59 or 60(b)(1). A court "may grant a timely

Rule 59 motion to alter or amend [a] judgment to correct a clear error of law . . ." *Volunteer Energy Servs., Inc. v. Option Energy, LLC*, 579 F. App'x 319, 330 (6th Cir. 2014) (quoting *Doran v. Comm'r of Soc. Sec.*, 467 F. App'x 446, 448 (6th Cir. 2012)). Relief under Rule 60(b)(1) is available "when the judge has made a substantive mistake of law or fact in the final judgment or order." *United States v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002) (citing *Cacevic v. City of Hazel Park*, 226 F.3d 483, 490 (6th Cir. 2000)).

Motions for reconsideration are also governed by Local Rule 7.1 of the Eastern District of Michigan. *Hence v. Smith*, 49 F. Supp. 2d 547, 550 (E.D. Mich. 1999). A motion for reconsideration should be granted if the movant demonstrates a palpable defect by which the court and the parties have been misled and that a different disposition of the case must result from a correction thereof. *Ward v. Wolfenbarger*, 340 F. Supp. 2d, 773, 774 (E.D. Mich. 2004); *Hence*, 49 F. Supp. 2d at 550-51 (citing L.R. 7.1(g)(3)). Under Local Rule 7.1, a motion that merely presents "the same issues ruled upon by the Court, either expressly or by reasonable implication," shall be denied. *Ward*, 340 F. Supp. 2d at 774.

III. Analysis

A. Motion for Reconsideration

Petitioner asserts in his motion for reconsideration that the Court misunderstood his sole issue of ineffective assistance; specifically, overlooking his claim of structural error and mistakenly analyzing the issue for harmless error. (ECF No. 24, PageID.787.). He seeks review of the "proper issue" or alternatively, analysis "outside the constraints" of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). (*Id.* at PageID.788.) Petitioner also argues that *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), applies to his case because it was decided before the state court issued its decision on collateral review. (*Id.* at PageID.789-90.)

First, under E.D. Mich. Local Rule 7.1, Petitioner's motion is denied because his arguments for reconsideration are the same as those considered by the Court in its original order. *Hence*, 49 F. Supp. 2d at 553. In addition, contrary to Petitioner's assertions, the Court analyzed whether *McCoy* entitled Petitioner to relief (*see* ECF No. 18, PageID.759–62), and further, it expressly reached the question of structural error he argues the Court overlooked. The order explained the appropriate

inquiry in Petitioner's case was ineffective assistance of counsel under *Florida v. Nixon*, 543 U.S. 175 (2004), not structural error under *McCoy*. (*Id.* at 762.) Petitioner is thus not entitled to relief on this motion.

Alternatively, Petitioner argues AEDPA should not apply to his habeas petition because "the state courts were given an opportunity to address, as new evidence, the plea rejection issue and refusal to admit guilt . . ." but they did not do so. (ECF No. 24, PageID.788.) Petitioner describes this "new evidence" as "the details of the rejected plea offer . . . which outlines and validates the refusal to admit guilt to only one count of FA in a plea offer." (*Id.* at 791, n. 2.) Petitioner refers to a letter by his first appointed trial counsel. (*Id.*; *see also* Pet. Mot. Rel. fr. J., ECF No. 15-1, PageID. 686.) However, the attorney's letters provide no details of the plea offer, at best referring only to a "verbal plea offer, should Mr. Pennebaker waive preliminary examination." (*See* Pet. Mot. Expand Rec., ECF No. 12, PageID.144; *see generally id.* at PageID.143–47.) In fact, counsel's letters are clear that any record of the offer and his rejection of it, which might have informed successor counsel of Petitioner's purported assertion of innocence, likely did not exist and would not have been in his criminal case file. (*See id.* at PageID.143–47.)

Regardless, the presence or absence of a record of the plea offer's details and Petitioner's rejection of it does not change the outcome here. As explained in the Court's order dismissing the petition, the single rejection of a plea offer months before trial simply does not correspond to the "strenuous[] object[ions]" the defendant in *McCoy* raised "at every opportunity." *McCoy*, 138 S. Ct. at 1509, 1512. Petitioner's "new evidence" does not demonstrate he is entitled to relief under *McCoy*.

In sum, Petitioner has identified no palpable error, the correction of which would result in a different outcome. For the reasons stated in the Court's July 27, 2020 Order, Petitioner is not entitled to a certificate of appealability because he has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). In addition, because an appeal from this decision would be frivolous and could not be taken in good faith, Petitioner may not proceed *in forma pauperis* on appeal. *See Coppedge v. U.S.*, 369 U.S. 438, 444 (1962); Fed. R. App. P. 24(a)(3)(A).

B. Motion to reopen or extend time to appeal

The Sixth Circuit has ruled that Petitioner's motion to reopen or extend his time to appeal was untimely and has rejected his motion to

reconsider that ruling. (*See* Sixth Circuit Court of Appeals Case No. 20-1968, Order, Dec. 1, 2020, ECF No. 15-2; Sixth Circuit Order, Jan. 20, 2021, Case No. 17-12196, ECF No. 28.) The Court will explain in more detail why Petitioner is not entitled to relief, and why his pending motion for reconsideration in this Court does not dictate a different outcome.

First, the Federal Rules of Appellate Procedure require that a notice of appeal "must be filed with the district clerk within 30 days after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(A). A party seeking to extend the deadline or reopen the time to file an appeal must file a motion requesting such relief in the district court. R. 4(a)(5), (6).

A court may grant a motion for extension of time that is filed "no later than 30 days" after the expiration of the thirty-day time to file. R. 4(a)(5)(A); *see also Tanner v. Yukins*, 776 F.3d 434, 438 (6th Cir. 2015). Petitioner's first motion to reopen the deadline or extend the time (ECF No. 26) exceeds that sixty-day limit, because it was filed October 19, 2020, eighty-four days after the entry of the order dismissing his petition.

Rule 4 permits a district court to reopen—for fourteen days—a party's time to file an appeal if two conditions are met: first, that the

party did not receive notice of the order being appealed within twenty-one days of its entry; and second, that the motion to reopen be filed within the *earlier* of fourteen days after receiving notice or 180 days after the order or judgement is entered. R. 4(a)(6)(A), (B); 28 U.S.C. § 2107(c); *Hall v. Scutt*, 482 F. App'x 990, 990–91 (6th Cir. 2012) (citing *Bowles v. Russell*, 432 F.3d 668, 672 (6th Cir. 2005), *aff'd*, 551 U.S. 205 (2007)) ("Rule 4(a)(6) is the exclusive remedy for reopening the time to file an appeal").

Petitioner meets the first criterion, having received notice of the Court's July 27, 2020 Order on September 8, 2020, six weeks after its entry. However, he failed to file his motion to reopen the time to appeal within the fourteen days following notice as required by Rule 4(a)(6)(B).

Petitioner asserts in an affidavit filed with his second motion to extend or reopen his time to file that he filed such a motion on September 15, 2020, in both the district court and the Sixth Circuit Court of Appeals. (ECF No. 27, PageID.811.) He stated the pleading also included motions to reconsider, for a certificate of appealability, and for leave to proceed *in forma pauperis* on appeal. (*Id.*) A pleading filed at the Sixth Circuit dated September 14, 2020 includes the latter three motions. (Docket No. 20-

1968, Dkt. Entry 3-2.) However, the document does not include a request to extend the time to appeal. Further, the Court has reviewed in detail Petitioner's pleadings in both the district court and the court of appeals but finds no evidence that he requested such relief before October 19, 2020.

Nor may the Court grant relief because of Petitioner's pending motion for reconsideration, which can impact the timing of a notice of appeal. R. 4(a)(4). Unfortunately for Petitioner, because the motion was filed more than twenty-eight days after the Court's Order and Judgment were filed, it does not provide a basis to extend his time to appeal. R. 4(a)(4)(A)(iv)–(vi) (addressing motions brought pursuant to Fed. R. Civ. P. 59 and 60); *see also Hall*, 482 F. App'x at 991 (citations omitted) ("Rule 60(b) cannot be used to circumvent Rule 4(a)(6)'s requirements."); *McDonald v. Lasslett*, No. 18-2435, 2019 WL 2592572, at *2 (6th Cir. May 28, 2019) (a motion for reconsideration filed "more than twenty-eight days after the district court's August 15 judgment . . . did not meet Rule 4(a)(4)(A)(vi)'s requirements").

In *Bowles*, the Supreme Court held "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement" not subject to

equitable exceptions. 551 U.S. at 214. Accordingly, the restrictions above apply regardless of whether the party received notice within the rules' time limits. As the Tenth Circuit has observed, "[t]he essence of Rule 4(a)(6) is finality of judgment" and the application of that finality "may work misfortune . . ." *Clark v. Lavallie*, 204 F.3d 1038, 1041 (10th Cir. 2000). Petitioner was reasonably diligent in attempting to preserve his rights and his circumstances reflect *Clark*'s "misfortune." The Court is sympathetic, but under *Bowles* and pursuant to the Sixth Circuit's orders in Petitioner's appeal, Petitioner's time to appeal will not be reopened.

IV. Conclusion

For the reasons stated above, Petitioner's motion for reconsideration (ECF No. 24) is **DENIED**.

Petitioner's motion for consideration of the habeas petition (ECF No. 22) is **DENIED AS MOOT**.

Petitioner's motions to reopen or extend the time to file an appeal (ECF No. 26, 27) are **DENIED**.

Petitioner's request for a certificate of appealability and permission to appeal *in forma pauperis* is **DENIED**.

IT IS SO ORDERED.

Dated: January 27, 2021
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on January 27, 2021.

s/William Barkholz
WILLIAM BARKHOLZ
Case Manager

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY RAY PENNEBAKER,

Defendant-Appellant.

UNPUBLISHED
October 22, 2015

No. 322117
Jackson Circuit Court
LC No. 13-004717-FC

Before: M. J. KELLY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Defendant Danny Ray Pennebaker appeals as of right his convictions for two counts of assault with intent to rob while armed, MCL 750.89; and two counts of assault with a dangerous weapon (felonious assault), MCL 750.82. We affirm defendant's convictions, but remand for resentencing.

On June 30, 2013, defendant stopped the two victims on their way to Taco Bell. Defendant asked the two victims for a cigarette and also asked them to purchase a taco for him. Thereafter, defendant rode off on his bicycle, but then he returned and told the two victims that they looked like they were "up to no good." Defendant subsequently pulled out a knife, which caused the two victims to run to the Taco Bell. Police arrived at the Taco Bell shortly thereafter. One of the victims had a cut on his arm. At some point, the police found defendant, and the two victims identified defendant on scene as the perpetrator.

Defendant argues that defense counsel was ineffective when he stated during opening statement and closing argument that defendant was guilty of assault with a dangerous weapon. Review is limited to the facts on the record because the trial court did not hold an evidentiary hearing. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). To demonstrate ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient (i.e. objectively unreasonable), and that there exists "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

A complete concession of guilt amounts to ineffective assistance of counsel. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). However, a lawyer does not

APPENDIX E

render ineffective assistance by conceding certain points at trial, including conceding guilt of a lesser offense. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

During opening statement, defense counsel stated, "[a]fter you've heard all the evidence I think you'll be convinced that Mr. Pennebaker is guilty of assaulting these young men with knife, inappropriately, wrongfully there is no excuse for what he did. But that he never intended at all to rob these young men." During closing argument, defense counsel continued to focus on the intent to rob element of the assault with intent to rob charges. Defense counsel stated, defendant "is guilty of two counts of felonious assault, he is because that is what he did. But he didn't assault those boys intending to rob."

It is clear from the record that defense counsel did not make a complete concession of guilt, but rather defense counsel conceded that defendant was guilty of the lesser charged offenses of felonious assault. *Id.* "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Here, defendant was positively identified by both of the victims; defendant had a knife with him when police stopped him; and defendant admitted, in a letter to the victims, that he pulled a knife on both of them and both of them appeared to be scared. "When defense counsel . . . recognizes and candidly asserts the inevitable, he is often serving his client's interests best by bringing out the damaging information and thus lessening the impact." *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984). Accordingly, defense counsel's performance was not objectively unreasonable; thus, defendant's ineffective assistance of counsel claim of error lacks merit.

Next, defendant argues that he is entitled to an additional 133 days of credit for time served pursuant to MCL 769.11b. Defendant's argument presents an issue of law that we review de novo. *People v Waclawski*, 286 Mich App 634, 688; 780 NW2d 321 (2009).

In *People v Givans*, 227 Mich App 113, 125-126; 575 NW2d 84 (1997), this Court held that the defendant was not entitled to credit for the time he served regarding a different crime, because MCL 769.11b provides that a "defendant shall receive credit for the time he has served before sentencing *for the offense of which he is convicted*."

According to the Presentence Investigation Report (PSIR), defendant was arrested on April 18, 2013 for "B&E w/ intent" and "CS Poss. (Narc/Coc.) < 25 gr." Defendant was released on bond. Thereafter, on April 27, 2013, defendant was arrested for "Larceny $200-$1000." The court of jurisdiction in the April 18 and the April 27 case was the 12th District. Thereafter, defendant committed the crimes herein and was arrested on June 30, 2013. Defendant did not post bond for the crimes herein, and he was placed in jail. On October 29, 2013, defendant entered a plea of guilty in the 12th District cases, which reduced defendant's felony charges to misdemeanors. Defendant was sentenced to 133 days in jail for the April 18 charges, and he received 133 days' credit for time served on the April 27 charges. From June 30, 2013 to the sentencing date, April 24, 2014, defendant was incarcerated for 298 days. Defendant only received credit for 165 days because the trial court found that the 133 days of jail, which were associated with the April 18 and April 27 sentences, were served for those charges.

According to *Givans*, defendant was entitled to jail credit for the time between his arrest in the current case (June 30, 2013) and his sentencing in the 12th District cases (November 27, 2013), which amounted to 150 days. *Id.* Defendant was also entitled to credit between the conclusion of his sentence in the 12th District case and the disposition of this case, which amounted to 15 days. Defendant was not entitled to jail credit for the time he served for the 12th District convictions. *Id.* Accordingly, the trial court did not err when it only provided defendant with 165 days time served.

Defendant also argues that "the denial of jail credit effectively resulted in consecutive sentences." Unpreserved errors are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "Under the concurrent sentence rule, one sentence may not be ordered to begin at the completion of another sentence unless statutory authority provides otherwise." *Givans*, 227 Mich App at 126. However, because commencement of the sentence in this case was not delayed until the completion of the sentence in the 12th District cases, the concurrent sentence rule is not implicated. *Id.* Thus, no plain error affecting defendant's substantial rights exists.

Next, defendant argues that the trial court erred when it scored offense variables (OVs) 3 and 13. Unpreserved sentencing errors are reviewed for plain error affecting a defendant's substantial rights. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005).

Defendant argues that the trial court erred when it scored OV 3 at five points because the record did not support that the victim's injury to his arm was sustained as a direct result of defendant's conduct with the knife. A five-point score is warranted under OV 3 if the victim sustains a "bodily injury not requiring medical treatment[.]" MCL 777.33(e). A five-point score may be sustained for OV 3 if defendant is the factual cause of the victim's injuries. *People v Laidler*, 491 Mich 339, 345; 817 NW2d 517 (2012).

Defendant also argues that if the Michigan Supreme Court was to find that the decision in *Alleyne v United States*, ___ US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), applies to criminal sentencing in the state courts of Michigan—and it has, see *People v Lockridge*, ___ Mich ___; ___ NW2d ___ (2015)—then OV 3 was scored in error because OV 3 was scored based on judicial fact finding. Unpreserved errors are reviewed for plain error affecting a defendant's substantial rights. *Carines*, 460 Mich at 763-764.

We think it is clear that the trial court based its findings of an injury through facts found by the court, rather than admitted to by defendant or found by the jury. None of the crimes of which defendant was found guilty contained an element of injury, and defendant never admitted to cutting one of the victims. Accordingly, we remand this matter to the trial court for it to determine whether defendant continues to seek resentencing, and if so, to resentence defendant in accordance with *Lockridge*. See *People v Stokes*, ___ Mich App ___, ___; ___ NW 2d ___ (2015), slip op at pp 8-9.

Defendant also contends that the trial court erred when it scored OV 13 because the four sentencing convictions arose from a single incident, and they did not show a "pattern" of felonious criminal activity involving three or more crimes against a person. OV 13 addresses a continuing pattern of criminal behavior. MCL 777.43. Here, the trial court scored OV 13 at 25

Order

Michigan Supreme Court
Lansing, Michigan

May 2, 2016

Robert P. Young, Jr.,
Chief Justice

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

152694 & (51)(52)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 152694
COA: 322117
Jackson CC: 13-004717-FC

DANNY RAY PENNEBAKER,
Defendant-Appellant.

/

On order of the Court, the motion for immediate consideration and motion to expedite are GRANTED. The application for leave to appeal the October 22, 2015 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 2, 2016

Clerk

a0418

APPENDIX F

the alleged error, [she] would have had a reasonably likely chance of acquittal," MCR 6.508(D)(3)(b)(i). Here, Defendant has already raised the issue of ineffective assistance of counsel and as such is barred.

THEREFORE, Defendant's Motion is **DENIED**.

IT IS SO ORDERED on this 17 day of April, 2019.

Certificate of Service:
I hereby certify that a copy of this order was sent to the parties via U.S. mail this 18 day of April, 2019.
Brittany Lawe
Brittany Lawe, Court Officer

Hon. Thomas D. Wilson
Circuit Judge