Ex. A.

No. 20-3909

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 02, 2020
DEBORAH S. HUNT, Clerk

OMAR S. WILLIAMS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: GUY, Circuit Judge.

Omar S. Williams, a pro se federal prisoner, applies for a certificate of appealability ("COA") in his appeal from the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. *See* 28 U.S.C. § 2253(c)(1)(B). Williams also moves to proceed in forma pauperis.

In 2017, Williams pleaded guilty, in accordance with a plea agreement, to conspiracy to possess with intent to distribute six kilograms of cocaine and to being a felon in possession of a firearm. The district court sentenced him to 210 months of imprisonment. In crafting Williams' sentence, the district court determined that he qualified for the career-offender enhancement under the United States Sentencing Guidelines. *See* USSG § 4B1.1. Williams did not appeal his convictions or sentence.

In 2018, Williams filed a § 2255 motion alleging that his pretrial attorney and his attorney at sentencing were ineffective in myriad ways, including claims that his sentencing attorney failed to object to the presentence report and failed to file a notice of appeal. The district court ordered an evidentiary hearing on his claim that counsel failed to file an appeal and denied all his other claims on the merits without a hearing. After holding the evidentiary hearing, the district court denied the failure-to-appeal claim on the merits. The district court also declined to issue a COA.

Williams, through counsel who has since withdrawn, applies for a COA from this court on only the two claims noted above. Because Williams does not present arguments about his other § 2255 claims, he has abandoned them. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,'" *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or when "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

To prove ineffective assistance of counsel, a § 2255 movant must show that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. *United States v. Coleman*, 835 F.3d 606, 612 (6th Cir. 2016) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)).

Williams first argues that his attorney was ineffective for not objecting to his presentence report and thus allowing him to be sentenced as a career offender. Under § 4B1.1(a) of the Sentencing Guidelines, a defendant is subject to the career-offender sentence enhancement if he is convicted of "a felony that is either a crime of violence or a controlled substance offense," and he has at least two prior convictions that also meet either definition. The district court determined that Williams qualified for the enhancement because his drug-conspiracy conviction is a "controlled substance offense," and he had two predicate offenses: an Ohio conviction for felonious assault, which is a "crime of violence"; and a drug-trafficking conviction under Ohio Revised Code § 2925.03(A)(2).

In his § 2255 motion, Williams argued that his Ohio drug-trafficking conviction under § 2925.03(A) did not qualify as a "controlled substance offense." Although § 2925.03(A)(1) is not a career-offender predicate, *see United States v. Palos*, 978 F.3d 373, 375 (6th Cir. 2020),

Williams' presentence report shows that he was convicted under subsection 2925.03(A)(2), which does qualify as a "'controlled substance offense' for purposes of § 4B1.2(b)," *United States v. Smith*, 960 F.3d 883, 891 (6th Cir. 2020), *cert. denied*, No. 20-5457, 2020 WL 5883765 (U.S. Oct. 5, 2020). Thus, because Williams did qualify for the career-offender enhancement, he has not made a substantial showing that his attorney performed deficiently by not objecting to the presentence report.

Williams also argued that his attorney was ineffective for failing to appeal his convictions and sentence. "[A]n attorney is *per se* ineffective if she disregards a defendant's express instructions to file an appeal." *Neill v. United States*, 937 F.3d 671, 676 (6th Cir. 2019) (citing *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)). When "the defendant neither instructs counsel to file an appeal nor asks that an appeal not be taken, . . . the question [is] . . . whether counsel in fact consulted with the defendant about an appeal." *Id.* (omissions and alteration in original) (quoting *Flores-Ortega*, 528 U.S. at 478).

In his § 2255 motion, Williams asserted that he "wanted to appeal but [his attorney] just said 'good luck after sentencing.' [Counsel] never consulted with Williams about a possible appeal." The district court conducted an evidentiary hearing on the matter and then denied Williams' claim. The court credited his counsel's testimony that, after the sentencing hearing ended, he explained to Williams that there was no basis to appeal. The district court noted that testimony from other witnesses who were in the courtroom supported counsel's testimony, as did the circumstances of Williams' case, given that his plea agreement contained a plea waiver and his sentence was within the guidelines range. The court also credited counsel's assertion that Williams never left him a telephone message or otherwise asked him to file an appeal.

In his COA application, Williams argues that the district court "clearly relies on the testimony of [his] attorney and not that of [Williams] or the corroborating witnesses." But this court "generally will not second-guess the credibility findings of the judge who heard the witnesses' testimony." *Cope v. United States*, 385 F. App'x 531, 533 (6th Cir. 2010) (citing *United States v. Aloi*, 9 F.3d 438, 440 (6th Cir. 1993)); *see also Christopher v. United States*, 831 F.3d

737, 739 (6th Cir. 2016). And Williams has not made a substantial showing of a "cognizable basis for altering those findings here." *Cope*, 385 F. App'x at 533.

Accordingly, Williams' COA application is **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Ex. B

ADAMS, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

OMAR S. WILLIAMS, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	CASE NO. 1:17CR83 1:18CV1230 Judge John R. Adams **ORDER**

Pending before the Court is the final issue remaining in Petitioner Omar Williams' Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody, filed pursuant to 28 U.S.C. § 2255. Doc. 156. The final ground lacks merit. Accordingly, the petition is DENIED.

"To prevail under 28 U.S.C. § 2255, a defendant must show a 'fundamental defect' in the proceedings which necessarily results in a complete miscarriage of justice or an egregious error violative of due process." *Gall v. United States*, 21 F.3d 107, 109 (6th Cir. 1994). A federal district court may grant relief to a prisoner in custody only if the petitioner can "demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict." *Griffin v. United States*, 330 F.3d 733, 736 (6th Cir. 2003).

On April 24, 2020, this Court found that a majority of Williams' § 2255 petition lacked merit. However, the Court also found that an evidentiary hearing was necessary to resolve Williams' assertion that his counsel was ineffective following his sentencing. On May 28, 2020, the Court conducted an evidentiary hearing on this final ground for relief. During the hearing, the

Court heard testimony from Attorney John Fatica, Erica Pointer, Joshua James, and Williams. The Court now resolves Williams' final ground for relief.

Williams' burden to establish an ineffective assistance of counsel claim is two-fold. Under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), Williams must first show that counsel's performance was deficient. Pursuant to *Strickland*, "deficient" conduct is not simple error; counsel must have erred so "serious[ly] that counsel was not functioning as the 'counsel' guaranteed...by the Sixth Amendment." *Id.* at 687. When evaluating counsel's performance, a court is required to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (internal citation omitted).

If deficient conduct is identified, Williams must then demonstrate that counsel's deficient performance prejudiced his defense. *Id.* at 692. To demonstrate prejudice, it is not enough to show that the "errors had some conceivable effect on the outcome of the proceeding" as any "act or omission of counsel would meet this test." *Id.* at 693. Instead, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 693. In effect, counsel's performance must have "caused the defendant to lose where he would probably have won" by conduct "so manifestly ineffective that defeat was snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) (emphasis omitted).

In his final argument, Williams suggests that his counsel abandoned him following sentencing. The law in the Sixth Circuit is clear that the "failure to perfect a direct appeal, in derogation of a defendant's actual request, is a per se violation of the Sixth Amendment,"

regardless of whether the appeal would have been successful. *Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998); *see also Carrion v. United States*, 107 F. App'x 545 (6th Cir. 2004)(applying *Ludwig* to a claim of ineffective assistance of counsel for failing to file appeal despite an appellate waiver). Counsel's failure to file an appeal "does not merely deprive the defendant of effective assistance of counsel, it deprives him of the assistance of counsel altogether." *Ludwig*, 162 F.3d at 459. Williams' request, however, is a critical element, as the "Constitution is only implicated when a petitioner actually requests an appeal, and his counsel disregards the request." *Id.* If such a request was made and counsel disregarded it, Williams would be entitled to a delayed appeal. *Id.*

The evidence presented to this Court does not support Williams' claim that he requested that an appeal be filed on his behalf. Attorney John Fatica explained that immediately following sentencing, he made an effort to explain the Court's discussion of Williams' right to appeal:

> Mr. Williams and I were sitting at the table, and I explained to him what the judge meant. You have limited appellate rights. But there's no basis for an appeal in your case, because this was a guideline sentence. He got credit for his cooperation. And I didn't see any prosecutorial misconduct or ineffectiveness on my part that would be a basis for an appeal.

Doc. 204 at 17. Attorney Fatica also testified that he had previously explained the impact of Williams' appellate waiver at the time of the negotiations surrounding the plea agreement. Similarly, this Court explained the legal effect of that waiver during Williams' change of plea colloquy. In contrast to Attorney Fatica's testimony, Williams testified that when his sentencing hearing ended, Attorney Fatica stated "Good luck" to him and left the courtroom. Doc. 204 at 47. Williams indicated that he attempted to make several phone calls to Attorney Fatica over the following days without success.

Upon review of all the testimony presented, the Court finds that Attorney Fatica's version

of the events that occurred immediately after sentencing are credible. The additional witnesses called by Williams bolster this conclusion. Both Erica Pointer and Joshua James testified that they attended Williams' sentencing hearing along with eight to ten others. Both testified that Attorney Fatica stayed in the courthouse following sentencing to speak to the individuals that had attended the hearing in support of Williams. Both Pointer and James[1] claimed during their testimony that they raised the issue of an appeal with Attorney Fatica. Both asserted that Attorney Fatica informed them that an appeal could not be successful. It defies logic to suggest that Attorney Fatica remained in the courthouse to discuss Williams' sentencing with his supporters *and* simply stated "Good luck" to Williams before wholly abandoning him.

In addition, Williams claims to have attempted to contact Attorney Fatica via telephone on several occasions following his sentencing. At no time, however, did Williams testify that he left any message for his counsel or requested that an appeal be filed on his behalf through any medium. Further, Attorney Fatica noted that any voicemail that he received that would require follow-up, he made notes directly in his file. During his examination, Attorney Fatica stated that he had no notes in his final that reflected any call from Williams after his sentencing.

Finally, the underlying facts of this matter also support Attorney Fatica's version of events. First, as noted above, his testimony regarding his interaction with James and Pointer matched up with the testimony offered by those two individuals. Second, the advice that Attorney Fatica testified that he provided to Williams immediately after sentencing matched up with the facts in this matter. This Court had previously explained the impact of Williams' appellate waiver, and

---

1 An issue arose during the evidentiary hearing surrounding whether James had remained on the phone throughout the hearing despite a separation of witnesses order. A later review revealed James had been connected to the call throughout the earlier testimony. However, as the Court could accept James' testimony without altering its conclusion herein, the Court took no action with respect to James.

Attorney Fatica's advice post-sentencing regarding the impact of the waiver appears correct. Thus, all indication in this record support the conclusion that Williams never requested an appeal be filed, nor ever attempted to reach his counsel following sentencing. Accordingly, his final ground for relief lacks merit.

Williams' § 2255 petition is hereby DENIED. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

August 13, 2020
Date

/s/John R. Adams
John R. Adams
U.S. District Judge

Ex. C

Cuyahoga County Common Pleas

THE STATE OF OHIO vs. OMAR WILLIAMS	A TRUE BILL INDICTMENT FOR FELONIOUS ASSAULT R.C. 2903.11 W/CT

DATE OF OFFENSE	THE TERM OF	CASE NO.	COUNT
DECEMBER 4, 2004	SEPTEMBER OF 2004	CR 460493	1-2

The State of Ohio, } ss.
CUYAHOGA COUNTY

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, **IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO**, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully

did knowingly cause serious physical harm to Vicki King.

COUNT TWO - DOMESTIC VIOLENCE R.C. 2919.25

The Grand Jurors, on their oaths, further find that the Defendant(s) unlawfully knowingly caused or attempted to cause physical harm to Vicki King, a family or household member in violation of Section 2919.25 of the Revised Code

RECEIVED FOR FILING
DEC 2 2004
CLERK OF COURTS
BY _____ DEP.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Carl A. Grzesnik
Foreman of the Grand Jury

William D. Mason
Prosecuting Attorney

488