

APPENDICES

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APPENDIX A

Order Denying
Certificate of Appealability -
United States v Wilson, 20-2965 (2d Cir.)

N.D.N.Y.
19-cv-1528
14-cr-273
Suddaby, C.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of April, two thousand twenty-one.

Present:

Amalya L. Kearse,
José A. Cabranes,
Rosemary S. Pooler,
Circuit Judges.

Derrick Wilson,

Petitioner-Appellant,

v.

20-2965

United States of America,

Respondent-Appellee.

Appellant, pro se, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because Appellant has not “made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O’Hagan Wolfe, Clerk of Court


Catherine O'Hagan Wolfe

APPENDIX B

Decision and Order Denying
28 U.S.C. § 2255 Motion

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

5:14-CR-0273
(GTS)

DERRICK WILSON,

Defendant.

APPEARANCES:

HON. GRANT C. JAQUITH
Acting U.S. Attorney for the Northern District of New York
Counsel for the Government
100 South Clinton Street
P.O. Box 7198
Syracuse, NY 13261

DERRICK WILSON, No. 21481-052
Defendant, *Pro Se*
Federal Correctional Complex
P.O. Box 5000
Yazoo City, MS 39194

GLENN T. SUDDABY, Chief United States District Judge

OF COUNSEL:

NICOLAS COMMANDEUR, ESQ.
Assistant United States Attorney

DECISION and ORDER

Currently before the Court, in this criminal action against Derrick Wilson (“Defendant”), is Defendant’s motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Dkt. No. 506.) For the reasons set forth below, the Court denies Defendant’s motion and declines to issue a certificate of appealability.

I. RELEVANT BACKGROUND

In 2013, the Drug Enforcement Agency and other law enforcement agencies began investigating Defendant for drug trafficking; a year later he was arrested with eight co-

conspirators. (Dkt. No. 1.) From the time of his arrest until his trial in January 2016, Defendant had five attorneys, some of whom he fired and some of whom quit as a result of their difficult relationship with Defendant. On the second day of trial, Defendant decided to fire his fifth attorney, Attorney Moynihan (who had replaced Attorney Neroni shortly before trial), and represent himself *pro se* notwithstanding the Court's recommendation that he not do so. (Dkt. No. 308.) Undeterred by the Court's advice, the Defendant knowingly, voluntarily, and intelligently waived his Sixth Amendment rights.

During the trial, the Government introduced evidence of controlled purchases of crack cocaine from Defendant, and evidence showing that, when arrested, Defendant was found with five cell phones, \$5,700 in cash, drug paraphernalia, and keys to houses that, when searched, were found to contain heroin and more drug paraphernalia. Defendant's former girlfriend, her sister, and six of Defendant's co-conspirators testified against him and attested that he dealt heroin and cocaine in kilogram amounts. Subsequently, Defendant was convicted of one count of conspiracy to sell crack cocaine and heroin and one count of possession of heroin with intent to sell, in violation of 21 U.S.C. §§ 841(a) and 846. Defendant was sentenced to serve 28 years in prison. (Text Minute Entry filed Oct. 12, 2016.)

On December 9, 2019, Defendant filed the current motion to vacate, correct, or set aside his sentence pursuant to 28 U.S.C. § 2255. (Dkt. No. 506.)

Familiarity with the factual allegations supporting Defendant's claims and the remaining procedural history is assumed in this Decision and Order, which is intended primarily for review by the parties.

II. PARTIES' BRIEFING ON DEFENDANT'S MOTION

A. Defendant's Memorandum of Law

Generally, in his motion, Defendant asserts four grounds for relief. (Dkt. No. 506, Attach. 9.) First, Defendant argues that the Government fabricated evidence of controlled purchases made by confidential sources and colluded with Verizon officials to fabricate telephone records related to these purchases. (*Id.*) Second, Defendant argues that the Government engaged in a vindictive prosecution when the Assistant United States Attorney handling this case caused the Onondaga County District Attorney's Office to bring a state homicide charge against Defendant as punishment for Defendant filing motions in this case. (*Id.*) Third, Defendant argues that the government made misrepresentations in an affidavit in support of the wiretap applications in this case. (*Id.*) Fourth, and finally, Defendant argues that he was afforded ineffective assistance of counsel insofar as Attorney Moynihan and Attorney Neroni failed to sufficiently pursue the foregoing arguments during the course of this case. (*Id.*)

B. The Government's Opposition Memorandum of Law

Generally, in its opposition memorandum of law, the Government makes three arguments. (Dkt. No. 511.) First, the Government argues that there is no need for an evidentiary hearing in this case because Defendant's arguments are "palpably false or patently frivolous" and legally insufficient in the context of a Section 2255 motion. (*Id.*) Second, the Government argues that all of Defendant's arguments, except his ineffective-assistance-of-counsel arguments, were raised both at trial and on direct appeal (and rejected) and cannot now be re-adjudicated. (*Id.*) Third, the Government argues that Defendant's ineffective-assistance-of-counsel claims with respect to both Attorney Moynihan and Attorney Neroni are insufficient as a matter of law. (*Id.*)

C. Defendant's Reply

Generally, in his reply, Defendant makes three arguments. (Dkt. No. 512.) First, Defendant argues that the Government has not adduced any evidence to refute his arguments. (*Id.*) Second, Defendant argues that he is entitled to an evidentiary hearing because he has obtained “new evidence.” (*Id.*) Third, Defendant repeats his ineffective-assistance-of counsel arguments with respect to Attorney Moynihan and Attorney Neroni. (*Id.*)

III. GOVERNING LEGAL STANDARDS

A. Legal Standard Governing Section 2255 Motions

A prisoner may move to vacate, set aside, or correct a sentence “upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to attack[.]” 28 U.S.C. § 2255(a).¹

On a Section 2255 motion, the movant “bears the burden of establishing by a preponderance of the evidence that he is entitled to relief.” *United States v. Gallo-Lopoz*, 931 F. Supp. 146, 148 (N.D.N.Y. 1996); *accord Parsons v. United States*, 919 F. Supp. 86, 88-89 (N.D.N.Y. 1996). Furthermore, “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.” 28 U.S.C. § 2255(b). Thus, “in order to warrant an evidentiary hearing in the district court on a . . . § 2255 petition, the application must contain assertions of fact that a

¹ See also *United States v. Bokun*, 73 F.3d 8, 12 (2d Cir. 1995) (holding that collateral relief under Section 2255 is available “only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law or fact that constitutes a fundamental defect which inherently results in a complete miscarriage of justice”) (citation and internal quotation marks omitted).

respondent is in a position to establish by competent evidence Airy generalities, conclusory assertions and hearsay statements will not suffice[.]” *Haouari v. United States*, 510 F.3d 350, 354 (2d Cir. 2007) (citation and internal quotation marks omitted). Indeed, “a district court need not assume the credibility of factual assertions, as it would in civil cases, where the assertions are contradicted by the record in the underlying proceeding.” *Puglisi v. United States*, 586 F.3d 209, 214 (2d Cir. 2009).

However, even if the motion presents factual issues, the district court has the authority to deny the motion without a hearing when the motion, any attached exhibits, and the record of the prior proceedings plainly show that the movant is not entitled to relief. *Puglisi*, 386 F.3d at 214 (noting that, “when the judge that tried the underlying proceedings also presides over the Section 2255 motion, a less-than full-fledged evidentiary hearing may permissibly dispose of claims where the credibility assessment would inevitably be adverse to the [movant]”).

B. Legal Standard Governing Claims of Ineffective Assistance of Counsel

To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy a two-part test: (1) “he must show that counsel's performance was . . . so deficient that, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance,” and (2) “he must show that the deficient performance prejudiced the defense, in the sense that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Bennett v. United States*, 663 F.3d 71, 85 (2d Cir. 2011) (citations and internal quotation marks omitted); *accord Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). The *Strickland* standard is “highly demanding” and “rigorous,” and, “if the defendant fails to meet either the performance

prong or the prejudice prong,” the claim must be rejected. *Bennett*, 663 F.3d at 85 (citations and internal quotation marks omitted).

Regarding the first prong of *Strickland*, a court “must maintain a strong presumption that [c]ounsel’s representation was adequate within the wide range of reasonable professional assistance.” *Smith v. United States*, 06-CV-0243, 2006 WL 1742378 at *2 (N.D.N.Y. June 22, 2006) (quoting *Strickland*, 466 U.S. at 689) (internal quotation marks omitted). A petitioner must rebut this presumption by identifying the unreasonable “acts or omissions of counsel.” *Strickland*, 466 U.S. at 690. Then a court must determine if, under all the circumstances, such acts or omissions “constitute[d] a constitutional violation.” *Smith*, 2016 WL 1742378 at *2 (citing *Strickland*, 466 U.S. at 689).

Regarding the second prong of *Strickland*, “[a] reasonable probability [that, but for counsel’s unprofessional errors, the result of the proceeding would have been different] is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. Under *Strickland*, “prejudice relates to the fairness of the proceedings and to the . . . correctness of the verdict.” *Morales v. Greiner*, 273 F. Supp. 2d 236, 247.

IV. ANALYSIS

After carefully considering whether Defendant’s motion has any merit, the Court answers this question in the negative for the reasons stated in the Government’s opposition memorandum of law. (Dkt. No. 511.) To those reasons, the Court adds the following analysis.

Defendant’s arguments about Attorney Neroni’s representation prior to trial lack merit. Defendant was not prejudiced when Attorney Neroni failed to attach documents in support of the pre-trial omnibus motions, and her conduct was not unprofessional. As the Government argues, this Court signed all of the wiretap affidavits that Defendant claims should have been

attached with the motion. (Dkt. No. 511.) Therefore, the Court was aware of everything that Defendant thought was relevant at the time the motion was denied. In any event, Attorney Neroni's conduct did not “[fall] below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 694. The decision by Attorney Neroni not to attach a voluminous amount of documents with which the Court was already familiar was a strategic decision pertaining to the challenging of evidence, which “cannot be second-guessed in an effort to support an ineffective assistance of counsel claim.” *Mitchell v. Griffin*, 2019 WL 6173788, *9 (E.D.N.Y. Nov. 20, 2019). Moreover, Attorney Neroni’s conduct was irrelevant to the outcome of the trial in light of the significant evidence that proved Defendant’s guilt. A determination that a defendant was prejudiced by the error of counsel “is . . . ineluctably tied to the strength of the prosecution’s evidence.” *Garner v. Lee*, 908 F.3d 845, 861-62 (2d Cir. 2018). As a result, “[e]ven serious errors by counsel do not warrant granting habeas relief where the conviction is supported by overwhelming evidence of guilt.” *Lindstadt v. Keane*, 239 F.3d 191, 204 (2d Cir. 2001). Here, numerous of Defendant’s co-Defendants testified that he sold drugs, and a substantial amount of incriminating evidence was found in locations to which Defendant possessed keys when he was arrested. *United States v. Dowdell*, 737 Fed. Appx. 577, 580-581 (2d Cir. 2018). In fact, the evidence against Defendant was described as “overwhelming” by the Second Circuit Court of Appeals. *Dowdell*, 737 F. App’x at 585.

Defendant’s ineffective-assistance-of-counsel arguments with respect to Attorney Moynihan also lack merit. Attorney Moynihan’s decision not to call certain witnesses to testify was “a question of trial strategy that reviewing courts are ill-suited to second-guess.” *Greiner v. Wells*, 417 F.3d 305, 323 (2d Cir. 2005) (internal quotations omitted). In particular, under *Strickland*’s standards, a “defense attorneys’ decisions concerning which witnesses to put before the jury” are

entitled to profound deference. (*Id.*) Defendant's remaining arguments with respect to Attorney Moynihan fail because Defendant relies on implausible and unrealistic inferences that he asserts the jury would have drawn had Attorney Moynihan made different decisions. In this regard, Defendant is not able to establish "prejudice [that] relates to the fairness of the proceedings and to the . . . correctness of the verdict." *Morales*, 273 F. Supp. at 247. The evidence against Defendant in this case is overwhelming, and his conviction is valid.

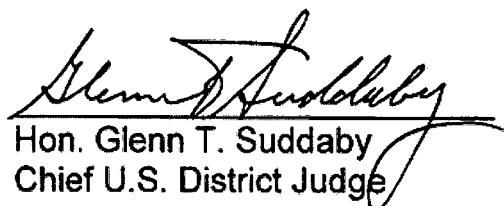
To the extent not specifically addressed herein, Defendant's remaining arguments lack merit and have already been considered and rejected by this Court and by the Second Circuit Court of Appeals.

ACCORDINGLY, it is

ORDERED that Defendant's motion to vacate, correct, or set aside his conviction and sentence under 28 U.S.C. § 2255 (Dkt. No. 506.) is **DENIED**.

The Court declines to issue a certificate of appealability.

Dated: July 27, 2020
Syracuse, New York


Hon. Glenn T. Suddaby
Chief U.S. District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**