APPENDIX A

No. 20-1997

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 30, 2021
DEBORAH S. HUNT, Clerk

MICHAEL JEROME PETTWAY,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: GRIFFIN, KETHLEDGE, and MURPHY, Circuit Judges.

Michael Jerome Pettway petitions for rehearing en banc of this court's order entered on April 8, 2021, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Pettway v. United States

United States Court of Appeals for the Sixth Circuit

April 8, 2021, Filed

No. 20-1997

Reporter
2021 U.S. App. LEXIS 10246 *

MICHAEL JEROME PETTWAY, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.

Prior History: *United States v. Pettway, 2020 U.S. Dist. LEXIS 167209 (E.D. Mich., Sept. 14, 2020)*

Core Terms

ineffective, firearm, plea agreement, guilty plea, possessed, district court, sentence, jurists, factual basis, indictment, knowingly, notice, drugs

Counsel: **[*1]** For MICHAEL JEROME PETTWAY, Petitioner - Appellant: Michael Jerome Pettway, F.C.I. Morgantown, Morgantown, WV.

For UNITED STATES OF AMERICA, Respondent - Appellee: John N. O'Brien II, Assistant U.S. Attorney, United States Attorney's Office, Detroit, MI.

Judges: Before: SUHRHEINRICH, Circuit Judge.

Opinion

ORDER

Michael Jerome Pettway, a federal prisoner proceeding pro se, appeals a district court order denying his motion to vacate his sentence under 28 U.S.C. § 2255. Pettway has filed an application for a certificate of appealability ("COA"). *See Fed. R. App. P. 22(b)*. He also moves to proceed in forma pauperis on appeal.

In 2018, Pettway pleaded guilty to four counts of possessing controlled substances with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (counts1-4), possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (count 5), and being a felon in possession of a firearm, in violation of 18 U.S.C. §922(g) (count 6). Pursuant to a written plea agreement, Pettway waived his right to appeal unless his sentence exceeded 131 months of imprisonment, excluding claims of ineffective assistance of counsel. The district court sentenced him to a total of 120 months of imprisonment. Pettway did not appeal.

In 2019, Pettway filed his § 2255 motion, **[*2]** claiming that: (1) counsel was ineffective for not objecting to the district court's alleged failure to explain the essential elements of his crimes as required under Federal Rule of Criminal Procedure 11(b)(1)(G); (2) there was an insufficient factual basis to support his guilty plea to count 5, possessing a firearm in furtherance of a drugtrafficking crime, as required under Rule 11(b)(3); (3) counsel was ineffective for failing to file a pretrial motion to dismiss count 5 of the indictment because the indictment did not include the word "knowingly"; and (4) counsel was ineffective for advising him that he could not file a notice of appeal in light of the appellate waiver contained in his plea agreement and not consulting with him about filing an appeal, in violation of Roe v. Flores-Ortega, 528 U.S. 470, 477-78, 480, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

The district court denied the § 2255 motion, concluding that: (1) Pettway failed to establish that counsel was ineffective because the nature of each charge was set forth in his plea agreement and Pettway acknowledged that he reviewed the plea agreement with counsel; (2) there was a sufficient factual basis to support Pettway's guilty plea to count 5 because he acknowledged that he possessed the firearms discovered in his home in order "to protect the drugs" and "any proceeds" **[*3]** from the sale of drugs; (3) counsel was not ineffective for failing to move to dismiss count 5 because the indictment was not required to include the word "knowingly"; and (4) counsel was not ineffective for failing to consult with Pettway about filing a notice of appeal because he agreed to waive his right to appeal if his sentence did not exceed 131 months. Pettway appeals and seeks a

COA with respect to each of his claims.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*; *Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*. When the district court's denial is on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*. ***Pettway*** has not met this burden.

Reasonable jurists would not debate the district court's rejection of ***Pettway***'s claims that counsel rendered ineffective assistance. To prove an ineffective-assistance claim, a movant must show that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*. In the plea context, a movant can establish prejudice by showing "that there is a reasonable probability that, but for counsel's **[*4]** errors, he would not have pleaded guilty and would have insisted on going to trial," *Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)*, "that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time," *Missouri v. Frye, 566 U.S. 134, 147, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012)*, or "that counsel's deficient performance infected his decisionmaking process, and thus undermines confidence in the outcome of the plea process," *Rodriguez-Penton v. United States, 905 F.3d 481, 488 (6th Cir. 2018)* (citing *Lee v. United States, 137 S. Ct. 1958, 1967, 198 L. Ed. 2d 476 (2017)*).

Pettway claims that counsel was ineffective for failing to object to the district court's alleged non-compliance with *Rule 11(b)(1)(G)*, which requires a district court to "inform the defendant of, and determine that the defendant understands, . . . the nature of each charge to which the defendant is pleading" before accepting a defendant's guilty plea. In particular, ***Pettway*** claims that he was not informed that the *§ 924(c)* offense charged in count 5 required *knowing* possession of a firearm in furtherance of a drug-trafficking crime. But reasonable jurists would agree that counsel's failure to object was not objectively unreasonable. The plea agreement accurately set forth the elements of count 5, tracking the language of *§ 924(c)(1)(A)*, which does not include the word "knowingly." The agreement also set out the factual basis for **[*5]** the plea, including that ***Pettway*** possessed three firearms for the purpose of protecting himself, the house in which the firearms were found, and drugs and proceeds of drug sales. At the plea hearing, the government recited the substance of the plea agreement, noting that it set out the elements of the charged offenses and the factual basis for the plea. And the district court confirmed that ***Pettway*** had reviewed the plea agreement with his attorney and understood it. On this record, there was no basis to object that the district court had not adequately informed ***Pettway*** of the elements of count 5.

Next, ***Pettway*** claims that counsel was ineffective for failing to move to dismiss count 5 of the indictment. Reasonable jurists could not debate the district court's rejection of this claim. As noted above, *§ 924(c)(1)(A)* does not include the word "knowingly," so the absence of that word from count 5 did not render the indictment defective. *See, e.g., United States v. Anderson, 605 F.3d 404, 411 (6th Cir. 2010)*. Count 5 essentially tracked the statutory language by alleging that ***Pettway*** "possess[ed]" firearms "in furtherance of a drug distribution offense." That language adequately conveys the mens rea of "knowingly," as it is difficult to conceive of how a defendant **[*6]** could possess a firearm in furtherance of a particular objective without knowing that he possessed the firearm. Reasonable jurists would agree that counsel's failure to move for dismissal of count 5 was neither objectively unreasonable nor prejudicial.

Pettway has not made a substantial showing that counsel was ineffective for failing to consult with him about pursuing a direct appeal. In order to establish ineffective assistance in this regard, ***Pettway*** must demonstrate that either (1) the attorney disregarded his instructions to file a notice of appeal, or (2) the attorney failed to consult with him about an appeal when counsel knew or should have known that he might want to appeal. *See Flores-Ortega, 528 U.S. at 477-78, 480*. The district court arguably erred when it concluded that ***Pettway***'s claim necessarily lacked merit in light of the appeal waiver in his plea agreement. The waiver provision preserved ***Pettway***'s right to raise ineffective-assistance claims on appeal, and it could not bar him from attacking the validity of the plea agreement or the appeal waiver itself. But ***Pettway***'s claim still falls short because he failed to allege facts indicating that counsel knew or should have known that he might want to appeal. **[*7]** ***Pettway*** does not allege that he advised counsel to file a notice of appeal or even that he advised counsel that he was interested in pursuing an appeal. And ***Pettway*** has not identified any potential error that

would have placed counsel on notice that ***Pettway*** might want to appeal. After all, ***Pettway*** pleaded guilty and received the minimum sentence contemplated by his plea agreement. His current challenges to the validity of his guilty plea are not colorable, for the reasons expressed here. In these circumstances, ***Pettway*** has not made a substantial showing that counsel's performance ran afoul of *Flores-Ortega*.

Finally, reasonable jurists could not debate the district court's determination that there was a sufficient factual basis for ***Pettway***'s guilty plea to possessing a firearm in furtherance of a drug-trafficking crime. ***Pettway*** admitted at the plea hearing that he possessed the firearms discovered in his home and that he did so in order "to protect the drugs" and "any proceeds" from the sale of drugs.

Accordingly, ***Pettway***'s application for a COA is **DENIED**, and the motion to proceed in forma pauperis is **DENIED** as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL JEROME PETTWAY,

Defendant.
_____/

Criminal No. 17-CR-20543
Civil Action No. 19-CV-12590

HON. BERNARD A. FRIEDMAN

OPINION AND ORDER DENYING DEFENDANT'S § 2255 MOTION

This matter is presently before the Court on defendant's motion to vacate his sentence pursuant to 28 U.S.C. § 2255 [docket entry 41]. The government has responded and defendant has replied. Pursuant to E.D. Mich. LR 7.1(f)(2), the Court shall decide this motion without a hearing. For the following reasons, the Court shall deny the motion.

In August 2017, defendant was charged in a six-count indictment. The charges were for the following drug and firearms offenses: possession of 28+ grams of crack cocaine, in violation of 21 U.S.C. § 841 (Count I); possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841 (Count II); possession of heroin with intent to distribute, in violation of 21 U.S.C. § 841 (Count III); possession of suboxone with intent to distribute, in violation of 21 U.S.C. § 841 (Count IV); possession of several firearms in furtherance of a controlled substance distribution offense, in violation of 18 U.S.C. § 924(c) (Count V); and felon in possession of firearm and ammunition, in violation 18 U.S.C. § 922(g)(1) (Count VI).

In June 2018, defendant entered into a Rule 11 Plea Agreement wherein he agreed to plead guilty to all charges. The parties agreed that the sentence would not exceed the top of defendant's guideline range (117-131 months) and that the sentence would not be less than 120

months, as two mandatory minimum 60-month sentences applied. The parties also agreed to the following factual basis for the plea:

> On or about June 29, 2017, the FBI assisted the Westland Police Department in connection with the search of a house at 7765 Rosemont in the city of Detroit. Information obtained by the Westland Police revealed that illegal narcotics including cocaine and heroin were being sold from the house.
>
> Upon approaching the house, defendant Jerome Pettway was located on the front porch. He was taken into custody and he and his house were searched. Taken from Mr. Pettway personally was $354.00, 2 cellular telephones and a plastic bag containing crack cocaine and heroin. The search of the house resulted in the recovery of a box of Suboxone strips, crack cocaine, powder cocaine, and the following firearms: 1 Bushmaster AR-15 semi-automatic rifle . . . that was previously stolen from the true owner; Winchester .12 gauge shotgun with a barrel length of less than 18 inches, . . . and 1 Browning semi-automatic handgun . . . . Law enforcement also recovered $3247.50 and digital scales. Mr. Pettway possessed the controlled substances with intent to sell or deliver them to other people. Additionally, Mr. Pettway possessed the firearms to protect himself, the house on Rosemont and drugs and money generated from drug sales.
>
> At the time of the search, Pettway had previously been convicted of a felony offense. The crack cocaine that was seized weighed in excess of 28 grams and the firearms in Mr. Pettway's possession had been manufactured outside of the state of Michigan.

Rule 11 Plea Agreement ¶ 1C.

At the plea hearing, defendant testified that he had read the plea agreement, discussed it with his attorney, understood it, agreed to all of its terms, and had signed it. Plea Hr'g Tr. at 8. Defendant further testified that he understood and waived his right to go to trial. *Id.* at 8-10. Defendant also agreed to the factual basis that the prosecutor placed on the record, which tracked the factual basis in the plea agreement. *Id.* at 11-13. The Court accepted the plea and sentenced defendant to 120 months' imprisonment (60 months concurrently on Counts I, II,

III, IV, and VI, and 60 months consecutively on Count V), the lowest possible sentence.

In his § 2255 motion, defendant argues that his sentence should be vacated for four reasons. Defendant first argues that his attorney was ineffective by failing to object to "the Court's failure to explain the essential elements of his six counts . . . as required pursuant to the Federal Rules of Criminal Procedure 11(b)(1)(G)." The Court rejects this argument. Rule 11(b)(1)(G) requires the Court to inform a defendant of "the nature of each charge to which the defendant is pleading." The nature of the charges was set forth in detail in the Rule 11 Plea Agreement, which, according to defendant's testimony at the plea hearing, defendant read, discussed with his attorney, understood, and signed. The nature of the charges was further explained at the plea hearing.

Second, defendant argues that there was an insufficient factual basis to support the plea as to Count V, in violation of Fed. R. Crim. P. 11(b)(3), and that his lawyer was ineffective for failing to object on this basis. The Court rejects this argument. Under Fed. R. Crim. P. 11(b)(3), the Court "must determine that there is a factual basis for the plea" before accepting it. The factual basis for all of the charges in this matter was plainly spelled out in the plea agreement and at the plea hearing. In particular as regards Count V, which charged defendant with possession of three firearms in furtherance of a controlled substance distribution offense, in violation of 18 U.S.C. § 924(c), the factual basis was that defendant possessed several firearms for the purpose of protecting his drug dealing operation. At the plea hearing, defendant agreed that he knew these firearms, which were discovered during the search of his house, were in his house and that he possessed them "to protect the drugs, or protect any proceeds if you would have been able to successfully sell drugs." Plea Hr'g Tr. at 12-13.

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 September 1, 2020.

Michael Jerome Pettway, 55989-039
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s/Johnetta M. Curry-Williams
Case Manager