[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13104
Non-Argument Calendar

D.C. Docket No. 6:19-cv-00638-PGB-GJK

VALENTINE OKONKWO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 20-13552
Non-Argument Calendar

D.C. Docket No. 6:14-cr-00005-PGB-GJK-1

"Appendix A"

his pharmacy and the writ of *audita querela* was unavailable for him to challenge purported errors that preceded the entry of his forfeiture judgment, we affirm.

I. BACKGROUND

In January 2015, a grand jury returned an amended indictment that charged Okonkwo with conspiring to possess with intent to distribute and ten counts of distributing oxycodone to specific customers outside the usual course of professional practice and for other than a legitimate medical purpose. 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(C). The indictment also sought forfeiture of Okonkwo's pharmaceutical licenses and "a money judgment in the amount of at least $555,000, representing the amount of proceeds [he] obtained . . . from the conspiracy" to distribute oxycodone between December 2009 and October 2012. *Id.* § 853. Later, the government filed a notice requesting the district court enter a forfeiture monetary judgment against Okonkwo.

Business records and testimony from customers, employees, an owner of an adjacent business, and an expert proved that Okonkwo filled forged, altered, and duplicative prescriptions for oxycodone at his Orlando business, Avalon Park Pharmacy. Emily Bird, an oxycodone addict, testified that Okonkwo filled prescriptions without verification in return for cash payments and advised her to obtain prescriptions of better quality. Three Avalon employees who processed internet and mail-order prescriptions testified that customers often appeared to be

misrepresented that Avalon verified prescriptions with physicians and reported fraudulent prescriptions to law enforcement. Agent Deana Diapola testified that she and other agents observed Okonkwo falsely mark forged prescriptions as being verified with issuing physicians.

During trial, the parties disputed the process for obtaining a forfeiture monetary judgment. The prosecutor argued that Federal Rule of Criminal Procedure 32.2(b)(1) and *United States v. Curbelo*, 726 F.3d 1260 (11th Cir. 2013), dictated that the district court should determine the amount Okonkwo had to pay. Defense counsel argued that the determination of the amount rested with the jury.

The jury found Okonkwo guilty of one count of conspiring to distribute and ten counts of distributing oxycodone without a legitimate medical purpose. The jury also returned a special verdict finding that Okonkwo used his professional licenses to commit his crimes. The district court ordered Okonkwo to forfeit his licenses. Later, the district court granted the motion of the government for a forfeiture monetary judgment against Okonkwo of $555,000.

Okonkwo's presentence investigation report provided a base offense level of 38 for distributing more than 15 kilograms of oxycodone between December 2009 and April 2012 by dispensing 491,706 30-milligram tablets and 65,217 15-milligram tablets, which equated to 105,387 kilograms of marijuana. United States

and challenged his convictions, which we affirmed. *United States v. Okonkwo*, 702 F. App'x 866 (11th Cir. 2017).

While Okonkwo's appeal was pending, he moved *pro se* to reduce the forfeiture monetary judgment from $555,000 to $10,000. Okonkwo argued that appellate counsel told him about the judgment and that it should have equaled the proceeds of his unlawful transactions with the ten customers identified in his indictment. The government responded that Okonkwo received notice of the personal money judgment during his trial and at sentencing, that he failed timely to challenge the judgment, and that it was correctly based on the proceeds of the conspiracy. The district court denied Okonkwo's motion.

Okonkwo later moved to vacate his sentence. 28 U.S.C. § 2255. He argued that his trial counsel was ineffective for failing to object to the calculation of his base offense level based on the 556,923 oxycodone tablets dispensed from Avalon and should have asked the district court to determine his offense level based on the 120,829 oxycodone tablets that he dispensed. The district court denied Okonkwo's motion to vacate.

Okonkwo also petitioned *pro se* for a writ of *audita querela*. He argued that his trial counsel failed to notify him of the personal money judgment and then disregarded his instructions to challenge the judgment on direct appeal. He also argued that the district court erred by basing the judgment on gross proceeds

(1984). The movant must first prove "that counsel made errors so serious that [he] was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment" and that counsel's error was "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Id.* at 687. "Surmounting *Strickland*'s high bar is never an easy task." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). Counsel enjoys a "strong presumption" that his performance was reasonable and that his strategic decisions represented "the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689–90. Counsel is ineffective only if his performance falls "outside the wide range of professionally competent assistance." *Id.* at 690.

To determine a defendant's base offense level for a drug offense, the district court must consider both the amount of the substance alleged in his indictment and any amount that is part of his relevant conduct. When "the offense involved both a substantive drug offense and a[] . . . conspiracy. . . , the total quantity involved [must] be aggregated to determine the scale of the offense." U.S.S.G. § 2D1.1 cmt. n.5. "Where there is no drug seizure . . ., the [district] court [is required to] approximate the quantity of the controlled substance." *Id.*

The district court did not err by rejecting Okonkwo's argument that his counsel performed deficiently by failing to object to the amount of drugs attributed to him. Okonkwo was responsible for unlawfully distributing tablets of oxycodone

714 F.3d 1189, 1196 (10th Cir. 2013) ("[A]udita querela addresses unanticipated situations that arise after judgment."); *United States v. Miller*, 599 F.3d 484, 489 (5th Cir. 2010) ("*Audita querela* is only available where the judgment of the district court was correct at the time it was rendered, but is undermined by facts that later come to light."); *United States v. Reyes*, 945 F.2d 862, 866 (5th Cir. 1991) (citing *United States v. Holder*, 936 F.2d 1 (1st Cir. 1991), and *United States v. Ayala*, 894 F.2d 425 (D.C. Cir. 1990), for the proposition that the writ of *audita querela* is available based on a legal objection that "arisen subsequent to that conviction"). *Audita querela*, like *coram nobis*, is an "extraordinary remedy" that is available "only under circumstances compelling such action to achieve justice" to correct "errors of the most fundamental character." *United States v. Morgan*, 346 U.S. 502, 511–12 (1954).

The writ of *audita querela* is not available to address the contemporaneous errors alleged by Okonkwo. Okonkwo alleged that his defense counsel failed to inform him that the government sought a personal money judgment against him or to give him a copy of that judgment and that the district court miscalculated the amount he had to pay and misclassified the funds in business bank accounts as substitute assets. Because all these events occurred *before* entry of the forfeiture money judgment, the remedy of *audita querela* is unavailable to correct any error. The district court correctly denied Okonkwo's petition for extraordinary relief.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

VALENTINE OKONKWO,

Petitioner,

v.

Case No: 6:19-cv-638-Orl-40GJK
(6:14-cr-5-Orl-40GJK)

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER

THIS CAUSE is before the Court on Petitioner Valentine Okonkwo's Motion to Vacate, Set Aside, or Correct Sentence ("Motion to Vacate," Doc. 1) filed by counsel under 28 U.S.C. § 2255. Respondent filed a Response to the Motion to Vacate ("Response," Doc. 3) in compliance with this Court's instruction. Petitioner filed a Reply to the Response ("Reply," Doc. 7).

Petitioner asserts two grounds for relief. For the following reasons, the Motion to Vacate is denied.

I. PROCEDURAL HISTORY

A grand jury charged Petitioner by indictment with conspiracy to possess with intent to distribute and dispense Oxycodone and to distribute the controlled substance outside the usual course of professional practice and for other than legitimate medical purposes (Count One) in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(C) and ten

counts of dispensing and distributing Oxycodone outside the usual course of professional practice and for other than legitimate medical purposes (Counts Two through Eleven) in violation of 21 U.S.C. § 841(a)(1). (Criminal Case No. 6:14-cr-5-Orl-40GJK, Doc. 60).[1] A jury found Petitioner guilty as charged. (Criminal Case, Doc. 215). The Court sentenced Petitioner to a 240-month term of imprisonment for Count One and to 52-month terms of imprisonment for Counts Two through Eleven to run concurrent to each other but consecutive to the sentence for Count One. (Criminal Case, Doc. 251). Petitioner appealed, and the Eleventh Circuit Court of Appeals affirmed. (Criminal Case, Doc. 329).

II. LEGAL STANDARD

Section 2255 allows federal prisoners to obtain collateral relief under limited circumstances:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released 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, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a). To obtain this relief, a petitioner must "clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 166 (1982) (rejecting the plain error standard as not sufficiently deferential to a final judgment). "[I]f the petitioner 'alleges facts that, if true, would entitle him to relief, then the district court should order an evidentiary hearing and rule on the merits of his claim.'" *Aron v. United*

[1] Criminal Case No. 6:14-cr-5-Orl-40GJK will be referred to as "Criminal Case."

States, 291 F.3d 708, 714–15 (11th Cir. 2002) (quoting *Holmes v. United States*, 876 F.2d 1545, 1552 (11th Cir. 1989)). In the event a claim is meritorious, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

III. ANALYSIS

A. Ground One

Petitioner asserts appellate counsel rendered ineffective assistance by failing to appeal the denial of his motion to suppress in which Petitioner maintained the search was involuntary because it was conducted by subterfuge. (Doc. 1 at 13-24.) Petitioner argues that his consent to search his pharmacy was involuntary because the Drug Enforcement Agency ("DEA") diversion investigators were gathering evidence for criminal prosecution under the guise of conducting an administrative search. (*Id.*)

The Supreme Court of the United States established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance: (1) whether counsel's performance was deficient and "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defense.[2] *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) To demonstrate prejudice resulted from appellate counsel's performance, a petitioner

[2]In *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993), the Supreme Court of the United States clarified that the prejudice prong of the test does not focus solely on mere outcome determination; rather, to establish prejudice, a criminal defendant must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable.

must show a reasonable probability that, but for counsel's unreasonable failure to raise an issue, he would have prevailed on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000).

Petitioner has not demonstrated either deficient performance or prejudice. After considering the evidence presented at the suppression hearing, the Court found the testimony of the DEA diversion investigators and task force agent to be credible and determined nothing indicated that the administrative inspection was conducted solely to advance a potential criminal case. (Criminal Case, Doc. 157 at 2-5, 11-12.) The Court concluded, therefore, that the administrative inspection was legitimate and was not the product of subterfuge. (*Id.* at 12.) Furthermore, based on the evidence presented, Petitioner knowingly and voluntarily consented to the administrative inspection after being advised of his rights, including that he had a constitutional right not to have an administrative inspection without an administrative warrant, that he could refuse the inspection or stop it at any time, and most importantly, that anything found during the inspection could be used against him in a criminal prosecution. (*Id.* at 13-15.) Petitioner has not shown that the Court's findings of fact and law are erroneous. No basis existed to suppress the evidence recovered as a result of the administrative search.

Appellate counsel is not deficient for failing to advance a non-meritorious issue. Moreover, because this ground was not meritorious, a reasonable probability does not exist that the outcome of the appeal would have been different had counsel raised this issue. Accordingly, ground one is denied.

B. Ground Two

Petitioner maintains counsel rendered ineffective assistance by failing to object to

the improper calculation of Oxycodone that was dispensed for other than a legitimate medical purpose. (Doc. 1 at 24-30.) Petitioner maintains that the Government improperly counted all the Oxycodone he dispensed during the relevant time period without showing that this amount was dispensed for other than a legitimate purpose. (*Id.*) According to Petitioner, the Government only established that he filled 605 fraudulent prescriptions of Oxycodone totaling 120,829 illegally dispensed pills, which would have qualified Petitioner for a base offense level of 34 versus a base offense level of 38, resulting in a guidelines range of 188 to 235 instead of 292 to 365. (*Id.* at 28-29.)

As explained by the Eleventh Circuit Court of Appeals:

> When there is no drug seizure or the amount seized at the conclusion of an investigation does not reflect the scale of an offense, the guidelines direct the sentencing court to approximate the quantity of the controlled substance attributable to a defendant, and may consider similar transactions by the defendant. U.S.S.G. § 2D1.1, comment n.5. Further, a sentencing court may consider quantities of drugs not specified in the count of conviction. *Id.* A court's approximation of drug quantity "may be based on fair, accurate, and conservative estimates of the quantity of drugs attributable to a defendant, [but it] cannot be based on calculations of drug quantities that are merely speculative." *Almedina*, 686 F.3d at 1316 (quotation omitted). The government bears the burden of establishing drug quantity by a preponderance of the evidence. *Id.* at 1315.

United States v. Weiler, 652 F. App'x 913, 921 (11th Cir. 2016).

The Presentence Investigation Report ("PSR") credited Petitioner with illegally distributing 491,706 Oxycodone 30 mg tablets and 65,217 Oxycodone 15 mg tablets during the relevant period for a total of 15.7294 kg of Oxycodone. (Criminal Case, Doc. 244 at 6.) Petitioner affirmed at sentencing that he had read the PSR and discussed it with his attorney. (Criminal Case, Doc. 265 at 6.) The parties indicated they had no objection

to the factual accuracy of the PSR. (*Id.* at 7.)

Petitioner correctly notes that the Government presented evidence that he filled 605 fraudulent prescriptions for Oxycodone, totaling 120,829 pills. (Criminal Case, Doc. 285 at 162-63; Pl. Tr. Ex. 57). Nevertheless, DEA agent Paul Short testified that this did not encompass all the fraudulent prescriptions for Oxycodone that Petitioner filled. (Criminal Case, Doc. 285 at 163.) The Government further presented evidence demonstrating that, between December 2009 and April 2012, Petitioner dispensed 563,000 Oxycodone pills. (Criminal Case, Doc. 285 at 162.) The national pharmacy average of Oxycodone sales for this time period was approximately 72,000. (*Id.* at 110); *see also* Criminal Case, Doc. 244 at 5 (PSR indicating that "in 2010 the defendant purchased over 400,000 dosage units of Oxycodone for his pharmacy, whereas the national average is 78,000 units. Okonkwo's ratio of sales of controlled substances to non-controlled substances was three times greater than the national average."). Approximately 99% of the prescriptions filled by Petitioner were paid with cash, not insurance, and many of the filled prescriptions were from doctors located substantial distances from Petitioner's pharmacy. (Criminal Case, Doc. 285 at 166-70.) Oxycodone products accounted for approximately 74% of all pills dispensed by Petitioner's pharmacy during the relevant period. (Criminal Case, Doc. 285 at 173); *see also* Criminal Case, Doc. 244 at 6. Evidence also demonstrated that Petitioner repeatedly made false statements to drug distributors to deceive them into sending controlled substances to his pharmacy because he otherwise would not have been allowed to obtain them. (Criminal Case, Doc. 285 at 199-219.) From this evidence, the Government demonstrated by a preponderance of the evidence that

Petitioner's business, centered around the sale of Oxycodone, was a pill mill in violation of pharmacy standards and state and federal law. *See, e.g., United States v. Bacon*, No. 18-15145, 2020 WL 1845284, at *4 (11th Cir. Apr. 13, 2020) (concluding that the Government presented substantial evidence demonstrating the clinic was operating as a pill mill). Consequently, Petitioner has not shown that counsel was deficient for failing to object to the drug quantity or that prejudice resulted from counsel's failure to do so.[3] Accordingly, ground two is denied.

Any of Petitioner's allegations not specifically addressed are without merit.

Accordingly, it is hereby **ORDERED** and **ADJUDGED** as follows:

1. Petitioner's Motion to Vacate, Set Aside, or Correct Sentence (Doc. 1) is **DENIED,** and this case is **DISMISSED** with prejudice.
2. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.

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[3] Even assuming counsel should have objected to the drug calculation, a finding not made by the Court, Petitioner has not demonstrated that a reasonable probability exists that he would have received a lesser sentence. The evidence supports the finding that Petitioner illegally dispensed substantially more than the 120,829 Oxycodone pills from the known fraudulent prescriptions. For instance, if the Court reduced the total amount of Oxycodone dispensed during the course of the offenses by the national average of 72,000, then Petitioner would still be accountable for the illegal distribution of 347,000 Oxycodone pills (563,000 - 72,000 - 72,000 - 72,000 = 347,000). Further, assuming that 300,000 of those pills were 30 mg tablets and 47,000 were 15 mg tablets, Petitioner would have been responsible for approximately 9.705 kg of Oxycodone, which would have made his base offense level 36 versus 38. With the additional two levels for Petitioner's role in the offense, his offense level would have been 38 for a guidelines range of 235 to 293 months. The sentence imposed was 292 months, within this range, and Petitioner has not persuaded the Court that a reasonable probability exists that it would have imposed a lesser sentence.

3. The Clerk of the Court is directed to file a copy of this Order in criminal case number 6:14-cr-5-Orl-40GJK and to terminate the motion (Criminal Case, Doc. 347) pending in that case.

4. This Court should grant an application for certificate of appealability only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner has failed to make a substantial showing of the denial of a constitutional right.[4] Accordingly, a Certificate of Appealability is **DENIED** in this case.

DONE and **ORDERED** in Orlando, Florida on August 4, 2020.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

[4] "The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." *Rules Governing Section 2255 Proceedings for the United States District Courts*, Rule 11(a).

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13104-AA ; 20-13552 -AA

VALENTINE OKONKWO,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, Chief Judge, JILL PRYOR, and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

"Appendix C"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13104-A

VALENTINE OKONKWO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

ORDER:

Valentine Okonkwo is a federal prisoner serving a total 292-month sentence for offenses related to the illegal distribution of Oxycodone outside the usual course of professional practice. He moves for a certificate of appealability ("COA") in order to appeal the denial of his 28 U.S.C. § 2255 motion to vacate, which claimed that: (1) appellate counsel was ineffective for failing to challenge the denial of his motion to suppress evidence from an administrative search of his pharmacy, which was merely a pretext for a criminal investigation; and (2) trial counsel was ineffective for failing to object to the miscalculation of his base offense level, which was based on the total amount of Oxycodone that was distributed, instead of the amount that was illegally distributed. He also moves for leave to proceed on appeal *in forma pauperis* ("IFP").

To merit a COA, Okonkwo must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues

Okonkwo's motion for IFP is GRANTED.

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE