

S.D.N.Y. – N.Y.C.
20-cv-3998
Hellerstein, 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 15th day of July, two thousand twenty-one.

Present:

Rosemary S. Pooler,
Raymond J. Lohier, Jr.,
Joseph F. Bianco,
Circuit Judges.

Gustav Kloszewski,

Petitioner-Appellant,

v.

20-3779

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

The seal of the United States Court of Appeals for the Second Circuit is circular. It features the words "UNITED STATES" at the top and "SECOND CIRCUIT" at the bottom, separated by two stars. The center of the seal contains the words "COURT OF APPEALS".

Appendix A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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	:	
GUSTAV KLOSZEWSKI,	:	
	:	
Petitioner,	:	ORDER DENYING MOTION TO
	:	VACATE
-against-	:	
	:	20 Civ. 3998 (AKH)
UNITED STATES OF AMERICA,	:	16 Cr. 200 (AKH)
	:	
Respondent.	:	
	:	
-----	X	

ALVIN K. HELLERSTEIN, U.S.D.J.:

Petitioner Gustav Kloszewski was convicted following a jury trial of conspiracy to traffic in firearms, in violation of 18 U.S.C. § 371; firearms trafficking, in violation of 18 U.S.C. §§ 922(a)(1)(A) and 924(a)(1)(D); Hobbs Act robbery conspiracy, in violation of 18 U.S.C. § 1951; and conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846. The evidence showed that Petitioner participated in a scheme whereby he and his coconspirators stole firearms from a home in Florida, the coconspirators brought the firearms to New York and sold them, and Petitioner and his conspirators made arrangements to rob a drug dealer. I sentenced Petitioner to 360 months of imprisonment and five years of supervised release.

Petitioner now moves (ECF No. 284) to vacate his sentence, arguing that he received ineffective assistance of counsel because his trial counsel, Patrick Joyce, told him to reject a plea offer and failed to locate and question witnesses. Pursuant to my order, Mr. Joyce submitted a sworn declaration responding to Petitioner's factual claims. ECF No. 286. Petitioner then submitted the sworn affidavit of Ralph Abravaya, who claims that Mr. Joyce never contacted him during the investigation of potential witnesses. ECF No. 287.

Petitioner's motion to vacate his conviction is denied.

A petitioner challenging his conviction on the basis of ineffective assistance of counsel must show “that counsel’s representation fell below an objective standard of reasonableness” and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). To warrant a hearing on a Section 2255 motion based on ineffective assistance of counsel, a movant must establish that he has a plausible claim. *Puglisi v. United States*, 586 F.3d 209, 213 (2d Cir. 2009). Neither of Petitioner’s asserted bases for ineffective assistance of counsel meet this standard.

First, Petitioner argues that he would have accepted a plea offer if not for Mr. Joyce’s advice. Specifically, according to Petitioner, Mr. Joyce assured Petitioner that certain audio recordings would be excluded and that the case would be dismissed, and Mr. Joyce failed to warn Petitioner about the sentencing consequences of Petitioner’s career offender status. Mr. Joyce’s declaration denies these charges and gives extensive supporting details that make Petitioner’s charges incredible. The record of proceedings gives further support. Petitioner’s career offender status was discussed on the record in Petitioner’s presence. ECF No. 102 at 18:3-6. I told him that if convicted, “the prospect [is] that [Petitioner] is going to have to spend the rest of his useful life in jail.” *Id.* at 23:19-22. At another conference, the Government stated on the record, again in Petitioner’s presence, that Petitioner rejected a plea offer as late as May 21, 2017, ten days after I denied a motion to dismiss. ECF No. 163 at 34:19-35:2. I find that Petitioner continued to reject plea offers after his counsel and others warned him of the risks and consequences. *See Puglisi*, 586 F.3d at 214 (2d Cir. 2009) (“[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.”). Thus, he cannot show that counsel’s representation fell below an objective standard of reasonableness, nor can he show prejudice.

Second, Petitioner claims that Mr. Joyce failed to locate and interview several key witnesses: Sian Stafford, Blake Hann, and “Carlos,” Petitioner’s coconspirators; and “Justin,” the victim of the home invasion in which Petitioner and his coconspirators stole the firearms. Mr. Joyce attests to his efforts to locate these individuals, including by hiring a private investigator and by contacting an individual named “Ralph,” who Petitioner thought could help find the witnesses but ultimately did not offer any helpful leads. Mr. Joyce further notes that he did not expect the potential witnesses to be able to offer exculpatory information.

Petitioner submitted an affidavit from Ralph Abravaya, presumably the “Ralph” discussed in Mr. Joyce’s declaration. Mr. Abravaya asserts that neither Mr. Joyce nor his associates ever contacted him. Even if Mr. Abravaya’s claim that he was never contacted in the investigation is true, his affidavit does not help Petitioner. Mr. Abravaya claims that he does not know Stafford, Carlos, or Justin, meaning he never would have been able to lead Mr. Joyce to these purportedly exculpatory witnesses. Petitioner also does not offer any theory as to how Mr. Joyce could have located them. Finally, Petitioner cannot show how he was prejudiced by the failure to secure testimony from these witnesses. *See Mazer v. United States*, 2018 WL 7080450, at *5 (S.D.N.Y. Dec. 20, 2018) (for ineffective assistance claim based on failure to interview or call witnesses, “petitioner may not merely allege that certain . . . witnesses might have supplied relevant testimony, but must state exactly what testimony they would have supplied and how such testimony would have changed the result” (internal quotation marks omitted)). To the contrary, Stafford and Hann were cooperating witnesses who helped authorities gather evidence leading to Petitioner’s arrest.

As a final note, having presided over the entirety of Petitioner’s proceedings, I observed that Mr. Joyce conducted as effective a defense as seemed to be possible.

Thus, Petitioner’s motion to vacate his conviction is denied. The Clerk is directed to close the open motion (ECF No. 284) on the criminal docket, Case No. 16 Cr. 200, and to

close the civil case, Case No. 20 Civ. 3998. The Clerk's Office is directed to mail a copy of this order to Gustav Kloszewski, Register No. 34390-019, USP Lewisberg, P.O. Box 1000, Lewisburg, PA 17837.

SO ORDERED.

Dated: July 24, 2020
New York, New York

/s/ Alvin K. Hellerstein
ALVIN K. HELLERSTEIN
United States District Judge

Appendix B

Kloszewski v. United States

United States District Court for the Southern District of New York

September 29, 2020, Decided; September 29, 2020, Filed

20 Civ. 3998 (AKH); 16 Cr. 200 (AKH)

Reporter

2020 U.S. Dist. LEXIS 179323 *

GUSTAV KLOSZEWSKI, Petitioner, -against-
UNITED STATES OF AMERICA, Respondent.

Prior History: Kloszewski v. United States, 2020
U.S. Dist. LEXIS 131597 (S.D.N.Y., July 24,
2020)

Counsel: [*1] Gustav Kloszewski, Plaintiff, Pro
se, Lewisburg, PA.

Judges: ALVIN K. HELLERSTEIN, United States
District Judge.

Opinion by: ALVIN K. HELLERSTEIN

Opinion

**ORDER DENYING MOTION FOR
RECONSIDERATION**

ALVIN K. HELLERSTEIN, U.S.D.J.:

Petitioner Gustav Kloszewski moved pursuant to 28 U.S.C. § 2255 to vacate his conviction for firearms trafficking conspiracy, firearms trafficking, Hobbs Act robbery conspiracy, and conspiracy to distribute and possess with intent to distribute controlled substances. Petitioner argued that he received ineffective assistance of counsel because his trial counsel, Patrick Joyce, failed to locate and question witnesses and offered bad advice in recommending that Petitioner reject a plea offer. I rejected those arguments and denied Petitioner's motion. Order Denying Motion to Vacate (July 24, 2020), ECF No. 284 (the "Order"). Petitioner now moves for reconsideration. Petitioner's motion is

denied.

"[R]econsideration of a previous order is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *In re Health Mgmt. Sys., Inc. Secs. Litig.*, 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000). The movant must set forth "matters or controlling decisions which counsel believes the Court has overlooked." S.D.N.Y. Local Civil Rule 6.3; *see also Davidson v. Scully*, 172 F. Supp. 2d 458, 461 (S.D.N.Y. 2001) ("A motion for reconsideration [*2] will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court.").

Here, Petitioner does not point to any factual matters or controlling decisions that I overlooked on the underlying motion. Rather, he rehashes the same arguments that I considered but rejected in my Order. First, Petitioner argues that I erred in crediting Joyce's affidavit, where Joyce detailed his advice in plea negotiations and investigation of potential witnesses. Rather than blindly trusting Joyce over Petitioner, I took into account that Joyce's assertions are corroborated by the record and my own observations during proceedings, while Petitioner's assertions are incredible by comparison. *See Chang v. United States*, 250 F.3d 79, 85-86 (2d Cir. 2001) (holding "detailed affidavit from trial counsel credibly describing the circumstances" was sufficient to dismiss petition without an evidentiary hearing where petitioner made contrary but "self-serving and improbable

assertions"); *Kone v. United States*, No. 05-CR-102-01 (KMK), 2012 U.S. Dist. LEXIS 201960, 2012 WL 13171348, at *1-3 (S.D.N.Y. Jan. 26, 2012) (collecting cases relied on written affidavits and trial records to address ineffective assistance of counsel claims).

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Second, Petitioner [*3] argues that I disregarded the affidavit of Ralph Abravaya, an individual Petitioner says Joyce should have used as a lead to locate exculpatory witnesses. To the contrary, as I highlighted in the Order, I considered Abravaya's affidavit and determined that it actually undermines Petitioner's claims. Abravaya says in his affidavit that he does not know the purported witnesses that Petitioner describes. Thus, Petitioner cannot claim any prejudice arising from Joyce's alleged failure to use Abravaya as a resource. Furthermore, Abravaya's affidavit does not undermine the credibility of Joyce's affidavit.¹

In conclusion, Petitioner's motion for reconsideration is denied. The Clerk is directed to close the open motions, ECF No. 291 on the criminal docket for Case No. 16 Cr. 200, and ECF No. 8 on the civil docket for Case No. 20 Civ. 3998. The Clerk's Office is directed to mail a copy of this order to Gustav Kloszewski, Register No. 34390-019, USP Lewisburg, P.O. Box 1000, Lewisburg, PA 17837.

SO ORDERED.

Dated: September 29, 2020

New York, New York

/s/ Alvin K. Hellerstein

ALVIN K. HELLERSTEIN

United States District Judge

¹For example, Abravaya claims he has not had any contact with Joyce or his associates, yet Joyce's affidavit sets forth details of Abravaya's conversation with investigators, the nature of Abravaya's business, and Abravaya's relationship with Petitioner.

Appendix C

Kloszewski v. United States

United States District Court for the Southern District of New York

July 24, 2020, Decided; July 24, 2020, Filed

20 Civ. 3998 (AKH); 16 Cr. 200 (AKH)

Reporter

2020 U.S. Dist. LEXIS 131597 *

GUSTAV KLOSZEWSKI, Petitioner, -against-
UNITED STATES OF AMERICA, Respondent.

Subsequent History: Reconsideration denied by
Kloszewski v. United States, 2020 U.S. Dist.
LEXIS 179323 (S.D.N.Y., Sept. 29, 2020)

Prior History: Kloszewski v. United States, 2020
U.S. Dist. LEXIS 99501 (S.D.N.Y., June 5, 2020)

Counsel: [*1] Gustav Kloszewski, Plaintiff (1:20-
cv-03998-AKH), Pro se, Lewisburg, PA.

For Gustav Kloszewski also known as Gus,
Defendant (1:16-cr-00200-AKH): Patrick James
Joyce, S/A/A, New York, NY.

For Rudy Velasquez, Defendant (1:16-cr-00200-
AKH): Donald Joseph Yannella, III, LEAD
ATTORNEY, Donald Yannella P.C., New York,
NY.

For Steven Guzman, Defendant (1:16-cr-00200-
AKH): Lisa Scolari, LEAD ATTORNEY, Law
Office of Lisa Scolari, New York, NY.

For Elvis Nunez, Defendant (1:16-cr-00200-AKH):
Steven R. Kartagener, LEAD ATTORNEY, New
York, NY.

For Joseph Rosario, Defendant (1:16-cr-00200-
AKH): Giovanni Rosania, LEAD ATTORNEY,
Law Offices of Giovanni Rosania, Uniondale, NY.

For USA, Plaintiff (1:16-cr-00200-AKH): Gina
Marie Castellano, LEAD ATTORNEY, U.S.
Attorney's Office, SDNY (St Andw's), New York,
NY; Kimberly Jane Ravener, LEAD ATTORNEY,
U.S. Attorney's Office-Southern District of New
York, New York, NY; Benet Jeanne Kearney,
United States Attorney's Office, Southern District

of New York, New York, NY; Rebekah Allen
Donaleski, United States Attorney's Office, SDNY,
New York, NY.

Judges: ALVIN K. HELLERSTEIN, United States
District Judge.

Opinion by: ALVIN K. HELLERSTEIN

Opinion

ORDER DENYING MOTION TO VACATE

ALVIN K. HELLERSTEIN, [*2] U.S.D.J.:

Petitioner Gustav Kloszewski was convicted following a jury trial of conspiracy to traffic in firearms, in violation of 18 U.S.C. § 371; firearms trafficking, in violation of 18 U.S.C. §§ 922(a)(1)(A) and 924(a)(1)(D); Hobbs Act robbery conspiracy, in violation of 18 U.S.C. § 1951; and conspiracy to distribute and possess with intent to distribute controlled substances, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846. The evidence showed that Petitioner participated in a scheme whereby he and his coconspirators stole firearms from a home in Florida, the coconspirators brought the firearms to New York and sold them, and Petitioner and his conspirators made arrangements to rob a drug dealer. I sentenced Petitioner to 360 months of imprisonment and five years of supervised release.

Petitioner now moves (ECF No. 284) to vacate his sentence, arguing that he received ineffective assistance of counsel because his trial counsel, Patrick Joyce, told him to reject a plea offer and

failed to locate and question witnesses. Pursuant to my order, Mr. Joyce submitted a sworn declaration responding to Petitioner's factual claims. ECF No. 286. Petitioner then submitted the sworn affidavit of Ralph Abravaya, who claims that Mr. Joyce never contacted him during the investigation of potential [*3] witnesses. ECF No. 287.

Petitioner's motion to vacate his conviction is denied.

A petitioner challenging his conviction on the basis of ineffective assistance of counsel must show "that counsel's representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To warrant a hearing on a Section 2255 motion based on ineffective assistance of counsel, a movant must establish that he has a plausible claim. *Puglisi v. United States*, 586 F.3d 209, 213 (2d Cir. 2009). Neither of Petitioner's asserted bases for ineffective assistance of counsel meet this standard.

First, Petitioner argues that he would have accepted a plea offer if not for Mr. Joyce's advice. Specifically, according to Petitioner, Mr. Joyce assured Petitioner that certain audio recordings would be excluded and that the case would be dismissed, and Mr. Joyce failed to warn Petitioner about the sentencing consequences of Petitioner's career offender status. Mr. Joyce's declaration denies these charges and gives extensive supporting details that make Petitioner's charges incredible. The record of proceedings gives further support. Petitioner's career [*4] offender status was discussed on the record in Petitioner's presence. ECF No. 102 at 18:3-6. I told him that if convicted, "the prospect [is] that [Petitioner] is going to have to spend the rest of his useful life in jail." *Id.* at 23:19-22. At another conference, the Government stated on the record, again in Petitioner's presence, that Petitioner rejected a plea offer as late as May

21, 2017, ten days after I denied a motion to dismiss. ECF No. 163 at 34:19-35:2. I find that Petitioner continued to reject plea offers after his counsel and others warned him of the risks and consequences. *See Puglisi*, 586 F.3d at 214 (2d Cir. 2009) ("[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."). Thus, he cannot show that counsel's representation fell below an objective standard of reasonableness, nor can he show prejudice.

Second, Petitioner claims that Mr. Joyce failed to locate and interview several key witnesses: Sian Stafford, Blake Hann, and "Carlos," Petitioner's coconspirators; and "Justin," the victim of the home invasion in which Petitioner and his coconspirators stole the firearms. Mr. Joyce [*5] attests to his efforts to locate these individuals, including by hiring a private investigator and by contacting an individual named "Ralph," who Petitioner thought could help find the witnesses but ultimately did not offer any helpful leads. Mr. Joyce further notes that he did not expect the potential witnesses to be able to offer exculpatory information.

Petitioner submitted an affidavit from Ralph Abravaya, presumably the "Ralph" discussed in Mr. Joyce's declaration. Mr. Abravaya asserts that neither Mr. Joyce nor his associates ever contacted him. Even if Mr. Abravaya's claim that he was never contacted in the investigation is true, his affidavit does not help Petitioner. Mr. Abravaya claims that he does not know Stafford, Carlos, or Justin, meaning he never would have been able to lead Mr. Joyce to these purportedly exculpatory witnesses. Petitioner also does not offer any theory as to how Mr. Joyce could have located them. Finally, Petitioner cannot show how he was prejudiced by the failure to secure testimony from these witnesses. *See Mazer v. United States*, 2018 U.S. Dist. LEXIS 218740, 2018 WL 7080450, at *5 (S.D.N.Y. Dec. 20, 2018) (for ineffective assistance claim based on failure to interview or call witnesses, "petitioner may not merely allege that

certain . . . witnesses [*6] might have supplied relevant testimony, but must state exactly what testimony they would have supplied and how such testimony would have changed the result" (internal quotation marks omitted)). To the contrary, Stafford and Hann were cooperating witnesses who helped authorities gather evidence leading to Petitioner's arrest.

As a final note, having presided over the entirety of Petitioner's proceedings, I observed that Mr. Joyce conducted as effective a defense as seemed to be possible.

Thus, Petitioner's motion to vacate his conviction is denied. The Clerk is directed to close the open motion (ECF No. 284) on the criminal docket, Case No. 16 Cr. 200, and to close the civil case, Case No. 20 Civ. 3998. The Clerk's Office is directed to mail a copy of this order to Gustav Kloszewski, Register No. 34390-019, USP Lewisburg, P.O. Box 1000, Lewisburg, PA 17837.

SO ORDERED.

Dated: July 24, 2020

New York, New York

/s/ Alvin K. Hellerstein

ALVIN K. HELLERSTEIN

United States District Judge