NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

DARIUS SMITH

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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APPENDIX A

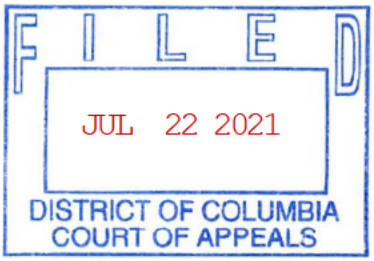
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 19-CO-946

DARIUS SMITH, APPELLANT,

v.

UNITED STATES, APPELLEE.



Appeal from the Superior Court
of the District of Columbia
(CF1-9403-12)

(Hon. Robert E. Morin, Trial Judge)

(Argued June 16, 2021 Decided July 22, 2021)

Before THOMPSON and EASTERLY, *Associate Judges*, and OKUN, *Associate Judge, Superior Court of the District of Columbia.*[*]

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Darius Smith appeals from the denial of his motion to vacate sentence pursuant to D.C. Code §23-110 (2012 Repl.). For the reasons set forth below, we affirm.

I.

In October 2012, Mr. Smith pled guilty to First-Degree Sexual Abuse in violation of D.C. Code § 22-3002(a)(1) (2012 Repl. & 2021 Supp.). At the plea hearing, Mr. Smith stated under oath that he understood the rights he was waiving by pleading guilty, that no one had threatened him, coerced him, or pressured him to plead guilty, that no one had promised him anything to get him to plead guilty, and that he was satisfied with his attorney. Mr. Smith also agreed with the prosecutor's proffer of facts, indicating that Mr. Smith had penetrated the

[*] Sitting by designation pursuant to D.C. Code § 11-707 (a) (2012 Repl.).

complainant's vagina with his penis by force and without her consent. The trial court accepted Mr. Smith's plea after finding that the plea was freely and voluntarily made and that there was a factual basis for the plea, and ordered both a pre-sentence report and a study to determine whether Mr. Smith would benefit from sentencing under the Youth Rehabilitation Act, D.C. Code § 24-903(e) (2012 Repl. & 2021 Supp.).

Both the pre-sentence report and the Youth Act study provided information about Mr. Smith's mental health history and intellectual limitations. More specifically, the pre-sentence report noted that Mr. Smith previously attended a high school for children with "learning, language and social challenges," and that he had been admitted to a psychiatric hospital when he was eleven years old and diagnosed with Bipolar Disorder, Attention Deficit Hyperactivity Disorder ("ADHD") and a learning disability. Likewise, the Youth Act study noted Mr. Smith's prior diagnoses of ADHD and Bipolar Disorder and found that he cognitively functioned in the twelfth to sixteenth percentile of intellectual abilities, which it classified as the low average range. The pre-sentence report's evaluative summary further noted that Mr. Smith presented with "several risk factors that could indicate the potential for future criminality."

At the sentencing hearing, Mr. Smith's counsel argued that the trial court should consider as a mitigating factor Mr. Smith's mental health problems, asserting that Mr. Smith had not received the degree of counseling he needed to address these problems. The trial court then noted Mr. Smith's untreated mental health issues as a mitigating factor before imposing a sentence of 228 months' imprisonment, which was in the lower half of the voluntary sentencing guidelines range.[1]

More than two years after he was sentenced, Mr. Smith filed a *pro se* motion to vacate his conviction under D.C. Code § 23-110. In his *pro se* motion, Mr. Smith asserted that his conviction should be vacated because his counsel provided ineffective assistance by failing to raise an insanity defense and by coercing him to plead guilty. Mr. Smith also claimed that he was not competent when he pled guilty. In support of his motion, Mr. Smith attached an affidavit in which he stated that his counsel had threatened him by telling him that he would be sentenced to 30 years of imprisonment if he did not plead guilty but would only be sentenced to 12 years of imprisonment if he did plead guilty. Mr. Smith further asserted that he only pled guilty because of this threat.

[1] According to the pre-sentence report, the voluntary sentencing guidelines range was 168-312 months of imprisonment.

The trial court subsequently appointed new counsel to supplement Mr. Smith's motion. In the amended motion filed by counsel, Mr. Smith claimed that his plea counsel was ineffective by failing to properly examine Mr. Smith's mental health history, exerting undue pressure on him to plead guilty, failing to present mental health issues as a mitigating factor at sentencing, and failing to correct the "pseudo-science" in the pre-sentence report that identified several risk factors indicating a potential for future criminality. Counsel also argued that Mr. Smith was incompetent to plead guilty and that the trial court violated his rights to due process and against cruel and unusual punishment when it considered the "pseudo-science" in the pre-sentence report. Mr. Smith's counsel attached a report from Dr. William Stejskal, Ph.D., in support of his claim that Mr. Smith was incompetent at the time of his plea. In this report, Dr. Stejskal opined that Mr. Smith currently was incompetent and was incompetent at the time of his plea.

The Government opposed Mr. Smith's motion and argued that it should be denied without a hearing. In support of its opposition, the Government attached a report from Dr. Mitchell Hugonnet, Ph.D., in which Dr. Hugonnet stated that Mr. Smith was competent at the time he pled guilty and throughout the proceedings in this case.

The trial court denied Mr. Smith's Section 23-110 motion in part. More specifically, the court denied Mr. Smith's claim that he was coerced to plead guilty because it was contradicted by the record of the plea hearing, and denied his claim that counsel was ineffective for failing to present mitigating evidence at sentencing because it was contradicted by the record of the sentencing hearing and the information contained in both the pre-sentence report and Youth Act study. The trial court also denied Mr. Smith's claim that counsel was ineffective for failing to challenge the "pseudo-science" concerning risk factors in the pre-sentence report, and that the court violated Mr. Smith's due process and Eighth Amendment rights when it sentenced him based on this "pseudo-science." The trial court found that counsel's failure to challenge this one paragraph in the pre-sentence report was an "obvious strategic choice" and that Mr. Smith was not prejudiced in any event because the court did not consider the risk factors in the pre-sentence report when it imposed sentence, a finding that also resolved Mr. Smith's due process and Eighth Amendment claims. However, the trial court did not deny Mr. Smith's competency claim without a hearing because the competing expert opinions set forth conflicting facts concerning Mr. Smith's competency, and the court instead scheduled an evidentiary hearing on this claim.

The trial court conducted an evidentiary hearing on Mr. Smith's competency claim at which both Dr. Stejskal and Dr. Hugonnet testified, and subsequently issued a twenty-four page order denying this claim. After weighing the testimony of both experts and reviewing the record of the proceedings in this case, two other cases where Mr. Smith had pled guilty, and a case where Mr. Smith had testified as a witness, the trial court found that Mr. Smith was competent when he entered his plea.

Mr. Smith filed his appeal within thirty days of the trial court's denial of his competency claim, arguing that the trial court abused its discretion in denying his ineffective assistance claims without a hearing and in finding that he was competent at the time of his plea. The Government, by contrast, argues that the trial court's denial of his competency claim was not clearly erroneous. The Government further argues that Mr. Smith's challenge to the trial court's denial of his ineffective assistance claims should be dismissed because he did not file a timely appeal of that denial and, in the alternative, that the denial should be affirmed on the merits because the record conclusively refutes Mr. Smith's ineffective assistance claims.

II.

A. Appellant's Competency Claim

It is well established that a defendant must be competent to plead guilty. *See, e.g.*, *Carmichael v. United States*, 479 A.2d 325, 327 (D.C. 1984). Pursuant to D.C. Code § 24-531.04(b) (2012 Repl.), a defendant is presumed to be competent and the party asserting incompetence has the burden of proving it by a preponderance of the evidence. *See also Hargraves v. United States*, 62 A.3d 107, 111 (D.C. 2013).

In determining whether a defendant is competent, the trial court must decide whether a defendant has a "rational [and] factual understanding of the proceedings against him" and whether he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Williams v. United States*, 137 A.3d 154, 160 (D.C. 2016) (citation and internal quotation marks omitted). This Court reviews the trial court's competency determination for "clear error" and will not set it aside unless it is "clearly arbitrary or erroneous." *Id.* Further, this Court affords "great deference to the trial court's inferences from its personal observations of, and conversations with, the defendant." *Id.* at 162. Finally, when the trial court conducts an evidentiary hearing on the issue of a defendant's competence and hears from competing experts, this Court's case law is "clear that when there is a plausible

explanation presented by two competing groups of experts, the decision is one for the fact finder," and that the "[trial] court's choice between them cannot be deemed clearly erroneous." *Wallace v. United States*, 936 A.2d 757, 770 (D.C. 2007).

In this case, the trial court conducted an evidentiary hearing and heard extensive testimony from competing experts about Mr. Smith's competency. Dr. Hugonnet, in determining that Mr. Smith was competent at the time of the plea, gave greater weight than Dr. Stejskal to Mr. Smith's answers during the 2012 plea proceeding in this case, the plea proceedings in two other cases in which Mr. Smith pled guilty in 2010 and 2011, and Mr. Smith's testimony before a grand jury on an unrelated matter in 2011. Dr. Hugonnet also gave greater weight than Dr. Stejskal to intelligence testing that was conducted closer in time to Mr. Smith's plea in this case.[2] Dr. Hugonnet's conclusions were plausible evaluations of Mr. Smith's competency, and the trial court did not clearly err in giving more weight to Dr. Hugonnet's opinion than to Dr. Stejskal's opinion. Furthermore, the trial court also properly relied on its own inferences from its observations of Mr. Smith and its conversation with Mr. Smith during the plea hearing in reaching its competency decision, inferences to which this Court accords "great deference." *Williams*, 137 A.3d at 162. In sum, the trial court did not clearly err in finding that Mr. Smith was competent at the time of his plea.

B. Appellant's Ineffective Assistance Claims

In order to demonstrate ineffective assistance of counsel, a defendant must show "both that his counsel's performance was deficient and that this deficiency prejudiced the defense." *Campbell v. United States*, 224 A.3d 205, 209 (D.C. 2020) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). To establish deficiency, a defendant must show that trial counsel "made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment." *Dickerson v. District of Columbia*, 182 A.3d 721, 730 (D.C. 2018) (internal quotations omitted). To show prejudice, a defendant must establish that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Campbell*, 224 A.3d at 209 (citation and internal quotations omitted). Failure to satisfy either prong of the *Strickland* standard defeats the ineffective assistance claim, and the court "may address the prejudice prong first and is not required to address deficiency if the [defendant] fails to show prejudice."

[2] Dr. Huggonet primarily relied on an intelligence test conducted in 2013 as part of the Youth Act study in this case, while Dr. Stejskal primarily relied on an intelligence test conducted in 2006 by the District of Columbia Public Schools.

Gaulden v. United States, 239 A.3d 592, 597 (D.C. 2020) (citation and internal quotations omitted).

There is a presumption in favor of a hearing when a defendant files a Section 23-110 motion. *See, e.g.*, *Metts v. United States*, 877 A.2d 113, 118-19 (D.C. 2005); *Lopez v. United States*, 801 A.2d 39, 42 (D.C. 2002). However, a hearing is not required when "the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." D.C. Code § 23-110(c). Thus, no hearing is required where defendant's motion "consists of (1) vague and conclusory allegations, (2) palpably incredible claims, or (3) allegations that would not merit relief even if true." *Dorsey v. United States*, 225 A.3d 724, 728 (D.C. 2020) (citation and internal quotations omitted). Nonetheless, if there is any question as to whether the motion can be resolved without a hearing, such a question "should be resolved in favor of holding a hearing." *Id*.

As an initial matter, we must decide whether we have jurisdiction to hear Mr. Smith's ineffective assistance claims. The Government argues that the appeal was untimely filed because it was not filed within thirty days of the trial court's denial of this claim. We disagree.

Pursuant to D.C. Code § 11-721(a)(1), this Court, with certain exceptions not applicable here, only has jurisdiction to review final orders and judgments of the Superior Court. This provision is meant to "eliminat[e] piecemeal litigation," and "applies with particular force in the criminal justice system." *United States v. Harrod*, 428 A.2d 30, 34 (D.C. 1981). In this case, the trial court did not fully and finally resolve Mr. Smith's Section 23-110 motion when it denied his ineffective assistance claims and scheduled a hearing on his competency claim in its January 7, 2019, order. Rather, the 23-110 motion was not finally resolved until the trial court issued an order on September 26, 2019, denying Mr. Smith's competency claim as well, and the Government does not argue that Mr. Smith's appeal of that order was untimely. Therefore, because Mr. Smith was not required to appeal the partial denial of his Section 23-110 motion, and because he timely appealed the denial of that motion when it was fully resolved by the trial court, Mr. Smith's appeal of the denial of his ineffective assistance claims was timely filed and we have jurisdiction to consider the merits of those claims.

However, on the merits of those claims, Mr. Smith fares no better than he did with respect to his competency claim. First, Mr. Smith's claim that his counsel coerced him to plead guilty is contradicted by the record of the plea hearing. Indeed, Mr. Smith affirmatively stated at the plea hearing that his counsel did not threaten

or coerce him to plead guilty, and indicated that he was satisfied with his attorney. In addition, Mr. Smith's answers to the trial court's questions were unambiguous and straightforward, and did not raise any concerns that would have required the trial court to ask additional questions to ensure that the plea was knowing and voluntary. Thus, the trial court did not abuse its discretion in denying this claim without an evidentiary hearing because it was conclusively refuted by the existing record. *See, e.g.*, *McClurkin v. United States*, 472 A.2d 1348, 1361 (D.C. 1984) (upholding summary denial of ineffective assistance allegations where allegations were refuted by defendant's answers to trial court's questions during plea hearing); *Hilliard v. United States*, 879 A.2d 669, 671 (D.C. 2005) (reversing summary denial of ineffective assistance claims where claims were not refuted by existing record because there were no transcripts of the plea hearing).

Likewise, the existing record contradicts Mr. Smith's claim that his counsel was ineffective in failing to present information about Mr. Smith's mental health issues as a mitigating factor at sentencing. To the contrary, counsel did present information about Mr. Smith's mental health history as a mitigating factor at the sentencing hearing, and the trial court considered this information as a mitigating factor when imposing sentence. Furthermore, the trial court received extensive information about Mr. Smith's mental health history through both the pre-sentence report and the Youth Act study. Thus, the trial court did not abuse its discretion in denying this claim without a hearing.

Finally, we agree with Mr. Smith that the trial court erred when it determined, without hearing from trial counsel, that counsel made a strategic decision not to challenge the paragraph in the pre-sentence report concerning Mr. Smith's risk factors for future criminality. *See Dorsey*, 225 A.3d at 733. However, this error was harmless because Mr. Smith cannot show that he was prejudiced by his counsel's alleged failure. To the contrary, the trial court explicitly stated it did not rely on these risk factors when imposing sentence, so any failure to challenge these risk factors did not affect Mr. Smith's sentence. Accordingly, the trial court did not abuse its discretion when it denied this claim without an evidentiary hearing.

In sum, because Mr. Smith's ineffective assistance claims are conclusively refuted by the existing record, the trial court did not abuse its discretion in denying them without a hearing.

III.

For the reasons set forth above, the order of the Superior Court is

Affirmed

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Robert Morin

Director, Criminal Division

Copies e-served:

Deborah Persico, Esquire

Chrisellen R. Kolb, Esquire
Assistant United States Attorney

APPENDIX B

District of Columbia
Court of Appeals

No. 19-CO-946

DARIUS SMITH,

Appellant,

v.

CF1-9403-12

UNITED STATES,

Appellee.

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman, Thompson, *†† Beckwith, Easterly, * McLeese, and Deahl, Associate Judges; Okun, *† Senior Judge.

O R D E R

On consideration of appellant's petition for rehearing or rehearing *en banc*, and appellee's opposition to appellant's petition for rehearing or rehearing *en banc*, and it appearing that no judge of this court has called for a vote on the petition for rehearing *en banc*, it is

ORDERED by the merits division* that appellant's petition for rehearing is denied. It is

FURTHER ORDERED that appellant's petition for rehearing *en banc* is denied.

PER CURIAM

† Sitting by designation pursuant to D.C. Code§ 11-707 (a) (2012 Repl.).

†† Judge Thompson was an Associate Judge of the court at the time of argument. Judge Thompson's term expired Saturday, September 4, 2021, however, she will continue to serve as an Associate Judge until her successor is confirmed. *See* D.C. Code § 11-1502 (2012 Repl.) ("Subject to mandatory retirement at age 74 and to the provisions of subchapters II and III of this chapter, a judge of a District of Columbia court appointed on or after the date of enactment of the District of Columbia Court Reorganization Act of 1970 shall serve for a term of fifteen years, and upon completion of such term, such judge shall continue to serve until the judge's successor is appointed and qualifies.").

No. 19-CO-946

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