

S.D.N.Y. – N.Y.C.
16-cr-311
Wood, 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 29th day of December, two thousand twenty-one.

Present:

Susan L. Carney,
Joseph F. Bianco,
*Circuit Judges.**

United States of America,

Appellee,

v.

21-1252

Kenneth Rudge, AKA Slay, AKA mr_no_regret, AKA slaymulaynrsavage, et al.,

Defendants,

Rashod Lewis, AKA Santana, AKA el_chapoballa, AKA santana bugatti,

Defendant-Appellant.

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 Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

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


Catherine O'Hagan Wolfe

*Chief Judge Debra Ann Livingston has recused herself from consideration of this motion. Pursuant to Second Circuit Internal Operating Procedure E(b), the matter is being decided by the two remaining members of the panel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RASHOD LEWIS,

Petitioner,

v.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: April 27, 2021

16-CR-311 (KMW)
OPINION & ORDER

UNITED STATES OF AMERICA,

Respondent.

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KIMBA M. WOOD, District Judge:

Petitioner Rashod Lewis, proceeding *pro se*, seeks a writ of habeas corpus, pursuant to 28 U.S.C. Section 2255, to vacate his conviction and sentence. Lewis argues that the Supreme Court's holding in *United States v. Davis*, 139 S. Ct. 2319 (2019), invalidates his conviction. The Government opposes the Petition. For the reasons that follow, Lewis's Petition is DENIED.

On August 31, 2016, the Government filed a Superseding Indictment (the "Indictment") charging Lewis with, among other counts, conspiracy to distribute and to possess with the intent to distribute heroin and crack, in violation of 21 U.S.C. Section 846 (Count One), and use and possession of firearms in furtherance of narcotics trafficking, in violation of 18 U.S.C. Sections 924(c)(1)(A)(iii) and 2 (Count Six). (Indictment at 1-3, 7-8, ECF No. 63.) On June 8, 2017, Lewis pleaded guilty to Count Six of the Indictment. (ECF No. 182-2.)

On October 30, 2017, the Court sentenced Lewis to 360 months' imprisonment, followed by five years of supervised release. (ECF No. 282.) Lewis appealed his judgment of conviction

on November 3, 2017 (ECF No. 261), and the Second Circuit affirmed Lewis's conviction on August 23, 2018, *United States v. Lewis*, 735 F. App'x 28 (2d Cir. 2018) (summary order).

On April 8, 2020, Lewis filed a *pro se* Section 2255 petition to vacate his conviction and sentence.¹ (Pet., ECF No. 417.) The Government filed an opposition on June 2, 2020. (Gov't Opp'n, ECF No. 430.) Lewis filed a *pro se* reply on August 3, 2020. (ECF No. 449.)

Because Lewis is proceeding *pro se*, the Court construes his petition liberally. *See Green v. United States*, 260 F.3d 78, 83 (2d Cir. 2001) (quoting *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996)) ("It is well settled that *pro se* litigants generally are entitled to a liberal construction of their pleadings, which should be read 'to raise the strongest arguments that they suggest.'"). Lewis's petition lacks merit even by this standard.

Lewis's request for relief is based on his mistaken reading of *United States v. Davis*, 139 S. Ct. 2319 (2019). In *Davis*, the Supreme Court held that the "crime of violence" language contained in the "residual" clause of 18 U.S.C. Section 924(c)(3)(B) is unconstitutionally vague. *Id.* at 2336. As the Government correctly points out, however, *Davis* is inapplicable to Lewis's conviction. Lewis was *not* charged with possession of a firearm in furtherance of a "crime of violence"; he was charged and convicted under Section 924(c) on the basis of firearms offenses committed in furtherance of the drug trafficking crime charged in Count One. (*See* Indictment at 1-3, 7-8; Plea Tr. at 4-5; Gov't Opp'n at 1.) Thus, Lewis's reliance on *Davis* is misplaced. *See, e.g.*, *Estrada v. United States*, 2020 WL 6048302, at *4 (S.D.N.Y. Oct. 11, 2020) (Gardephe, J.).

CONCLUSION

For the foregoing reasons, Lewis's petition under Section 2255 is DENIED. Because Lewis has not made a substantial showing of the denial of a constitutional right, the Court denies

¹ The Court notes that on April 22, 2020, Lewis filed a letter to the Court requesting to amend his initial Section 2255 petition. (ECF No. 420.) However, the petition that Lewis attached to his letter is identical to his original Section 2255 petition, which the Court addresses herein.

a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Clerk of Court is respectfully directed to terminate the petitions at ECF Nos. 417 and 420, and to mail a copy of this Opinion and Order to Lewis.

SO ORDERED.

Dated: New York, New York
April 27, 2021

/s/ Kimba M. Wood
KIMBA M. WOOD
United States District Judge

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1 his own battles, as I understand it, with both drugs and with
2 money, and was far from a perfect man, but a good one. I start
3 with that to give Mr. Lewis an understanding of the person who
4 I think is the most important person in this proceeding today.

5 I think it's important that Mr. Lewis and any
6 defendant in a violent crime case have that kind of
7 understanding. This is not simply the government or the Court
8 speaking at Mr. Lewis, but to him and with him, so that he can
9 understand the significance of what his acts caused and
10 understand, and I think I expect that he would agree that a
11 sentence today should speak to the significance of the pain
12 that those acts have caused in his community.

3 He mentioned in his own statement his own sympathy and
4 consideration for the community, so it's my hope that this can
5 truly be an engagement with Mr. Lewis about the significance of
6 that pain.

7 Mr. Dubon was not killed in self-defense. He was
8 actually killed in defense of others and in a moment that must
9 have been terrifying to him.

10 As I said, he was not a drug dealer, and he was not
11 rich. So the idea of people barging into this bar to assault
12 his friends with guns, to beat them with pool cues, was
inexplicable and I am sure terrifying.

This was not an isolated incident. It was the only
murder in this case, but it was far from the only robbery. It

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1 sentencing I think speaks to an extremely significant sentence
2 here. I think the guidelines appropriately capture the
3 significance both of this community's pain and of the failings
4 by Mr. Lewis over a long period of time.

5 For those reasons we ask for a guidelines sentence.

6 THE COURT: Thank you very much.

7 Would anyone else like to be heard?

8 All right.

9 I begin, as I must, by calculating the advisory
10 sentencing guidelines.

11 The total offense level calculated by probation ~~is 40~~
12 and the criminal history category is VI.

13 Moving to the factors under 3553, I find that the
14 offense is so serious that it's hard to describe. Partaking in
15 the action that killed a man who had a 14-year-old son, who's
16 now lost his father is as serious as things get.

17 The life that led up to this, starting at a young age,
18 is also very serious and very deleterious to the community.
19 Possession and discharge of firearms is a scourge on the
20 community.

21 Moving to Mr. Lewis' character, I believe Mr. DeMarco
22 and the defendant when they say this has brought about a change
23 in him. He's now taken courses in prison, and I believe that
24 he will continue to try to improve his situation while he's in
25 prison so that when he gets out he will be a law-abiding

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