

A P P E N D I X B

ANTWAN CRISWELL, Petitioner, v. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN
DIVISION
2021 U.S. Dist. LEXIS 238306
Case No. 1:19-cr-15, (Civil Case No. 1:21-cv-135)
December 14, 2021, Filed

Editorial Information: Prior History

United States v. Criswell, 2019 U.S. Dist. LEXIS 36932 (S.D. Ohio, Mar. 7, 2019)

Counsel {2021 U.S. Dist. LEXIS 1}For Antwan Criswell, Defendant (1:19-cr-00015-MRB All Defendants): Zenaida Renee Lockard, LEAD ATTORNEY, Federal Public Defender, Cincinnati, OH.
For USA, Plaintiff (1:19-cr-00015-MRB All Defendants): Ashley N. Brucato, LEAD ATTORNEY, U.S. Department of Justice, Cincinnati, OH.
Antwan Criswell, Petitioner (1:21-cv-00135-MRB), Pro se, Greenville, IL.

Judges: Michael R. Barrett, United States District Judge.

Opinion

Opinion by: Michael R. Barrett

Opinion

OPINION & ORDER

This matter is before the Court upon Petitioner Antwan Criswell's Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody under 28 U.S.C. § 2255. (Doc. 60). The Government filed a Response in Opposition. (Doc. 67).

I. BACKGROUND

On May 18, 2017, Petitioner was charged on a seven-count indictment for drug trafficking and firearm offenses. (U.S. v. Criswell, Case No. 1:17cr54-TSB, Doc. 3). The case was not pending before the undersigned at that time, but was instead assigned to different district court judge. On February 8, 2019, the Court dismissed the charges without prejudice under the Speedy Trial Act, 18 U.S.C. § 3161. That same day, Petitioner was re-arrested on a new criminal complaint, and the case was then assigned to the undersigned. (Docs. 1, 2). On February 12, 2019, Petitioner {2021 U.S. Dist. LEXIS 2} was re-indicted on all seven counts listed in the May 2017 indictment. (Doc. 8). On March 12, 2019, counsel filed a Motion to Dismiss based upon the speedy trial violation. (Doc. 21). However, on April 15, 2019, Defendant entered a guilty plea under Rule 11(c)(1)(C); and agreed to withdraw the Motion to Dismiss. (Docs. 31, 32). During the proceedings on April 15th, Defendant acknowledged that in the plea agreement, he waived his right to appeal except as to claims of ineffective assistance of counsel or prosecutorial misconduct. (Doc. 65, PAGEID 488, 490). On June 10, 2020, this Court sentenced Petitioner to a total term of imprisonment of 110 months. (Docs. 51,

53). Petitioner did not file an appeal.

In his petition under 28 U.S.C. § 2255, Petitioner sets forth a single ground for relief: ineffective assistance of counsel based on: "speedy trial violation should have been with prejudice - a conceded speedy trial violation in which, once posted, waited 13 additional months to adjudicate [sic], prejudice is found by law and should have issued." (Doc. 60, PAGEID 345).

II. STANDARD OF REVIEW

A prisoner seeking relief under 28 U.S.C. § 2255 must allege either "(1) an error of constitutional magnitude; (2) a sentence imposed outside the{2021 U.S. Dist. LEXIS 3} statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid." *Mallett v. United States*, 334 F.3d 491, 496-97 (6th Cir. 2003) (citing *Weinberger v. U.S.*, 268 F.3d 346, 351 (6th Cir. 2001)).

"In reviewing a § 2255 motion in which a factual dispute arises, 'the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims.'" *Valentine v. United States*, 488 F.3d 325, 333 (6th Cir. 2007) (quoting *Turner v. United States*, 183 F.3d 474, 477 (6th Cir. 1999)). However, no hearing is required "if the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Id.*

III. ANALYSIS

A petitioner claiming ineffective assistance of counsel must show that his attorney's performance was so inadequate as to violate his Sixth Amendment rights. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under the first or "performance" prong of *Strickland*'s two-part test, the petitioner must show that his counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. However, a court considering a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within a wide range of professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged conduct might be considered sound trial strategy." *Id.* at 689. Under the second or "prejudice" {2021 U.S. Dist. LEXIS 4} prong of *Strickland*, the petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Petitioner has made several arguments in support of his argument that his counsel was ineffective. First, Petitioner claims that the dismissal of the original indictment should have been with prejudice, and even though his counsel knew that the Court erred in its Speedy Trial ruling, counsel waived Petitioner's direct appeal rights. Second, Petitioner claims that counsel was ineffective in allowing him to be detained for over a year in violation of 18 U.S.C. § 3161(j). Third, Petitioner argues that counsel made no effort at estoppel. Fourth, Petitioner argues that counsel failed to file motion for reconsideration before he was indicted a second time under the new case. As to prejudice, Petitioner claims that having to spend even one extra day in jail is prejudice.

To the extent that Petitioner challenges any delay in adjudicating his motion to dismiss, counsel has no control over timing of Court's decision.

To the extent that Petitioner is claiming that counsel was ineffective for failing to file a motion for reconsideration{2021 U.S. Dist. LEXIS 5} of the Court's decision to dismiss the original indictment without prejudice before he was re-indicted, the Court notes that counsel followed the proper procedure. See *United States v. Stephens*, 511 F.3d 492, 493 (5th Cir. 2007) (because an order dismissing the original indictment without prejudice is a non-final, non-appealable order, appellate

review must await final judgment after re-indictment).

To the extent that Petitioner claims that the dismissal of the original indictment should have been with prejudice, Petitioner's guilty plea waived his claim of a violation of his constitutional right to a **speedy trial**. See *United States v. Dossie*, 188 F. App'x 339, 345 (6th Cir. 2006) (explaining that a defendant who pleads guilty may not raise challenges based on denial of due process rights to a **speedy trial**) (collecting cases); see also *Hardin v. United States*, 595 Fed.Appx. 460, 461-62 (6th Cir. 2014) ("[a] defendant 'may waive any right, even a constitutional right, by means of a plea agreement.'") (quoting *United States v. Fleming*, 239 F.3d 761, 763-64 (6th Cir. 2001)). Similarly, Petitioner waived his right to assert any potential violations of the **Speedy Trial** Act by pleading guilty. See *United States v. Dunning*, 94 F.3d 645, 1996 WL 464971, *1 (6th Cir. Aug. 14, 1996). Therefore, Petitioner's claim of ineffective assistance of counsel based on a violation of his constitutional or statutory right to a **speedy trial** is barred by the waiver of his right to collateral attack contained in his plea agreement.

IV. CONCLUSION

Pursuant{2021 U.S. Dist. LEXIS 6} to Title 28 U.S.C. § 2255, the Court finds that the motions, files, and records of this case conclusively show that Petitioner is not entitled to relief. Therefore, a hearing is not necessary to determine the issues and make the findings of fact and conclusions of law with respect thereto. *Smith v. United States*, 348 F.3d 545, 550-51 (6th Cir. 2003). The claims raised are conclusively contradicted by the record and the well-settled law of the Sixth Circuit and the United States Supreme Court. Accordingly, Petitioner Antwan Criswell's Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody under 28 U.S.C. § 2255. (Doc. 60) is **DENIED**.

Further, the Court will not issue a certificate of appealability. The Court concludes that none of the claims raised by Petitioner in his motion, which have been decided on the merits, are debatable among reasonable jurists, could be resolved differently on appeal or are adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 & n.4 (1983)). In addition, Petitioner has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c); see also Fed. R. App. P. 22(b).

IT IS SO ORDERED.

/s/ *Michael R. Barrett*

Michael R. Barrett, Judge

United States District Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: June 23, 2022

Mr. Antwan Criswell
F.C.I. Greenville
P.O. Box 5000
Greenville, IL 62246-0000

Re: Case No. 21-4236, *Antwan Criswell v. USA*
Originating Case No. 1:19-cr-00015-1; 1:21-cv-00135

Dear Mr. Criswell,

The Court issued the enclosed Order today in this case. Judgment to follow.

Sincerely,

s/Gretchen S. Abruzzo
Case Manager
Direct Dial No. 513-564-7018

cc: Ms. Ashley Brucato
Mr. Richard W. Nagel

Enclosure

No mandate to issue

No. 21-4236

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jun 23, 2022

DEBORAH S. HUNT, Clerk

ANTWAN CRISWELL,

)

Petitioner-Appellant,

)

v.

)

UNITED STATES OF AMERICA,

)

Respondent-Appellee.

)

ORDER

Before: MOORE, Circuit Judge.

Antwan Criswell, a federal prisoner proceeding pro se, applies for a certificate of appealability, pursuant to 28 U.S.C. § 2253(c) and Rule 22(b) of the Federal Rules of Appellate Procedure, for review of the district court's order denying his motion to vacate, set aside, or correct his sentence filed pursuant to 28 U.S.C. § 2255. Criswell has also filed a motion to proceed in forma pauperis and a motion for the court to identify a different district court case number as the original proceeding for this appeal.

In 2017, as part of Case No. 1:17-cr-54 (the 2017 case), a grand jury indicted Criswell on seven counts of federal drug-trafficking and firearm offenses. Prosecution of the indictment stalled, and Criswell, who was placed into pretrial confinement, filed a motion to dismiss the indictment with prejudice based on violations of the Speedy Trial Act, 18 U.S.C. §§ 3161-74, and the Sixth Amendment's Speedy Trial Clause. The district court in February 2019 dismissed the indictment without prejudice, determining that a technical violation of the Speedy Trial Act occurred, but a violation neither warranting dismissal with prejudice nor involving a constitutional infringement.

A few days after the dismissal, a second grand jury reindicted Criswell on the same charges; this indictment was filed under a case number—Case No. 1:19-cr-15 (the 2019 case)—different

from the original indictment with a different judge assigned to the case. Criswell filed a new motion to dismiss the indictment with prejudice based on violations of the Speedy Trial Act and the Sixth Amendment. In April 2019, while that motion was pending, Criswell entered into a plea agreement on charges in a superseding indictment. Criswell agreed to plead guilty to using or carrying a firearm during and in relation to a drug-trafficking crime (Count 3), in violation of 18 U.S.C. § 924(c), and distribution of a controlled substance (Count 7), in violation of 21 U.S.C. § 841(a)(1); the government agreed to drop all the other charges in the superseding indictment. Criswell also agreed to withdraw his motion to dismiss.

In June 2020, after Criswell entered into a new plea agreement that still required him to plead guilty to Counts 3 and 7, the district court sentenced him to 60 months in prison for Count 3 running consecutively to 50 months for Count 7, for an aggregate sentence of 110 months, with credit for time served. The plea agreement included a waiver of Criswell's rights to appeal his convictions and sentence, except for the right to appeal a sentence exceeding the statutory maximum and to raise claims of ineffective assistance of counsel and prosecutorial misconduct. Accordingly, Criswell did not file an appeal.

In February 2021, Criswell filed a § 2255 motion raising a claim of ineffective assistance of counsel regarding speedy-trial issues. As aptly construed by the district court, Criswell's motion raised four arguments in support of his ineffective-assistance claim: (1) the dismissal of the indictment for a technical violation of the Speedy Trial Act should have been with prejudice, and even though counsel knew that the court erred in dismissing without prejudice, counsel waived Criswell's appellate rights; (2) counsel permitted Criswell to be detained for over a year, in violation of 18 U.S.C. § 3161(j); (3) counsel made no effort to pursue an estoppel argument; and (4) counsel failed to file a motion for reconsideration before the second indictment was filed.

The district court denied the § 2255 motion. The court determined that Criswell waived his first argument by pleading guilty. As to Criswell's continued detention prior to the dismissal of the first indictment, the court pointed out that any delays in the adjudication of the original motion to dismiss were outside the control of counsel. The district court determined that counsel,

in not filing a motion for reconsideration before the grand jury returned the second indictment, followed correct procedure because the dismissal order was not a final appealable order. The court also denied Criswell a certificate of appealability.

Criswell filed a timely notice of appeal. A certificate of appealability may be issued “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 (2003). The applicant must demonstrate that “jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 327. When the district court’s denial of the § 2255 motion is based on the merits of the constitutional claims, the applicant “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 (2000).

Criswell moves to identify the original proceeding for this appeal as the criminal case that began with the original indictment in 2017 rather than the 2019 criminal case associated with the second indictment and, later on, the superseding indictment containing the charges to which Criswell pleaded guilty. By pointing to the 2017 criminal case, Criswell seeks to highlight a violation of the Speedy Trial Act and his Sixth Amendment rights, which he asserts warranted dismissal with prejudice. But the district court in February 2019 dismissed Case No. 1:17-cr-54, and the government filed a criminal complaint to open Case No. 1:19-cr-15. The original proceeding for this appeal is the 2019 case, so Criswell’s motion must be denied.

A defendant receives ineffective assistance of counsel in violation of the Sixth Amendment if counsel provides assistance that is (1) deficient, falling below an objective standard of “reasonableness under prevailing professional norms,” and (2) prejudicial, such 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, 688, 694 (1984). When the assistance at issue implicates a guilty plea, a demonstration of prejudice requires the defendant to “show that there is a reasonable probability that, but for counsel’s errors, he would not have

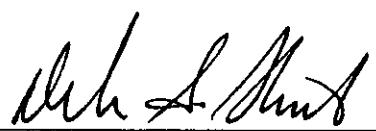
pledged guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Courts are obligated to recognize a strong presumption that the assistance of counsel “falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689.

Criswell’s arguments identify errors allegedly committed by counsel prior to his guilty plea. “When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea,” including claims of ineffective assistance of counsel that do not relate to the voluntariness of the plea. *United States v. Stiger*, 20 F. App’x 307, 308-09 (6th Cir. 2001) (citing *Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973)). “[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process.” *Tollett*, 411 U.S. at 267. Criswell does not explain how he “would not have pleaded guilty and would have insisted on going to trial” had he not experienced counsel’s alleged errors. *See Hill*, 474 U.S. at 59. Nor do those alleged errors suggest that Criswell’s subsequent guilty plea was not made intelligently, knowingly, and voluntarily. *See Stiger*, 20 F. App’x at 308-09. Jurists of reason would not find that the district court’s assessment of the ineffective-assistance claims was debatable or wrong.

The application for a certificate of appealability is **DENIED**. The motion for clarification is also **DENIED**, and the motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jun 23, 2022
DEBORAH S. HUNT, Clerk

No. 21-4236

ANTWAN CRISWELL,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before: MOORE, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Antwan Criswell for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jul 22, 2022

DEBORAH S. HUNT, Clerk

ANTWAN CRISWELL,

)

Petitioner-Appellant,

)

v.

)

ORDER

UNITED STATES OF AMERICA,

)

Respondent-Appellee.

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Before: SUTTON, Chief Judge; GUY and COLE, Circuit Judges.

Antwan Criswell, a federal prisoner, petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: July 22, 2022

Mr. Antwan Criswell
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Re: Case No. 21-4236, *Antwan Criswell v. USA*
Originating Case No.: 1:19-cr-00015-1; 1:21-cv-00135

Dear Mr. Criswell,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Ashley Brucato

Enclosure