

United States Court of Appeals for the Fifth Circuit

No. 22-60169

United States Court of Appeals
Fifth Circuit

FILED

September 12, 2022

UNITED STATES OF AMERICA,

Lyle W. Cayce
Clerk

Plaintiff—Appellee,

versus

JERMAINE SCOTT,

Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court for the Southern District of Mississippi
USDC Nos. 3:21-CV-693, 3:18-CR-225-1

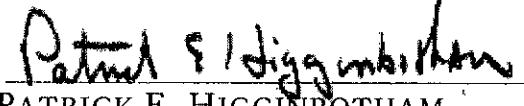
ORDER:

Jermaine Scott, federal prisoner # 21129-043, moves this court for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Scott filed the motion to challenge his 188-month sentence for one count of possession with intent to distribute 28 grams or more of cocaine base and one count of possession with intent to distribute five grams or more of methamphetamine. Scott contends that trial counsel rendered ineffective assistance by failing to challenge the Government's lack of standing to prosecute him for the drug-trafficking offenses.

Appendix A

To obtain a COA, Scott must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where a district court has rejected a claim on the merits, a movant “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack*, 529 U.S. at 484.

Scott has not made the requisite showing. *See id.* He has abandoned the other claims of ineffective assistance raised in the district court by failing to brief them in his COA motion before this court. *See Hughes v. Johnson*, 191 F.3d 607, 613 (5th Cir. 1999); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993). Accordingly, Scott’s request for a COA is DENIED, and his motion to proceed in forma pauperis on appeal is DENIED.


PATRICK E. HIGGINBOTHAM

United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

JERMAINE SCOTT

PETITIONER

v.

CIVIL ACTION NO. 3:21-CV-693-DPJ

UNITED STATES OF AMERICA

RESPONDENT

AND

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 3:18-CR-225-DPJ-FKB

JERMAINE SCOTT

FINAL JUDGMENT

For the reasons given in the order denying Defendant's Motion to Vacate, entered on this date in Criminal No. 3:18-CR-225-DPJ-FKB, the Court hereby enters a judgment, pursuant to Federal Rule of Civil Procedure 58.

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED that this case is dismissed.

SO ORDERED AND ADJUDGED this the 10th day of March, 2022.

s/ Daniel P. Jordan III
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

UNITED STATES OF AMERICA

V.

CRIMINAL NO. 3:18-CR-225-DPJ-FKB

JERMAINE SCOTT

ORDER

Defendant Jermaine Scott seeks an order vacating his sentence under 28 U.S.C. § 2255 based on ineffective assistance of counsel. Mot. [45]. Scott's motion is denied because counsel's performance was not deficient.

I. Background

On November 6, 2018, the federal grand jury returned a two-count drug-trafficking indictment against Scott. Scott entered an open plea of guilty to both charges on June 3, 2019, and the Court began the sentencing hearing on September 6, 2019. The Court accepted the Presentence Investigation Report as its findings of fact, including its conclusion that Scott's criminal history required him to be sentenced as a career offender. When Scott stated on the record that, if he was to be sentenced as a career offender, he would rather go to trial, the Court recessed the hearing so Scott could consider whether to withdraw his guilty plea. Scott's counsel, Terrence L. High, later notified the Court that Scott wanted to resume the sentencing hearing, and on October 4, 2019, the Court sentenced Scott to a bottom-of-the-guidelines total term of incarceration of 188 months. Scott appealed, and the Fifth Circuit affirmed the sentence.

Scott now asks the Court to "vacate and set aside the sentence imposed and sentence [him] to a term of incarceration below the low-end of the applicable guideline range." Mot. [45] at 14. Because Scott alleges High was constitutionally deficient, the Court directed High to file a

Appendix B

responsive affidavit. High complied, and the Government responded; Scott failed to file a reply, and the time to do so has now expired. *See Order [49]* (giving Scott 30 days after Government response to reply).

II. Standards

“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 . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.” 28 U.S.C. § 2255(a). “Relief under . . . § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice.” *United States v. Segler*, 37 F.3d 1131, 1133 (5th Cir. 1994) (quoting *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992)). Finally, Scott is entitled to an evidentiary hearing “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b).

III. Analysis

To establish ineffective assistance of counsel, a defendant must generally show (1) his “counsel’s representation fell below an objective standard of reasonableness” and (2) this ineffectiveness was “prejudicial to the defense.” *Strickland v. Washington*, 466 U.S. 668, 692 (1984). Scott says High was ineffective in five ways:

(1.) Counsel failed to challenge the Government’s (the prosecutor’s) standing to prosecute the case in the district court.

(2.) Counsel failed to subject the [G]overnment’s case to meaningful adversarial testing, to the extent that counsel did not obtain an independent toxicology test of the cocaine base (crack) or the methamphetamine with which petitioner was charged with possessing with the intent to distribute.

(3.) Counsel failed to move the court for a downward departure or a sentence below the low-end of the applicable guideline sentencing range on the basis that a sentence within that range over represented the seriousness of petitioner's criminal history.

(4.) Counsel failed to move the court to dismiss the indictment and case on equal protection grounds, based on selective prosecution of the charged offenses.

(5.) Counsel failed to move the court under Fed. R. Crim. P. 17(c) to subpoena the presentence reports of similarly situated Mississippi criminal defendants not selected for federal prosecution, in order to make a meritorious selective prosecution defense.

Mot. [45] at 4–5 (emphasis omitted). The Court will address each issue in turn.

Starting with the Government's standing, the Court assumes Scott is challenging the jurisdiction of the Court. Title 18 U.S.C. § 3231 grants district courts "original jurisdiction . . . of all offenses against the laws of the United States." The following section specifies that "[p]roceedings [are] to be in [the] district and division in which [the] offense [was] committed." 18 U.S.C. § 3232. Scott violated two federal laws in Lauderdale County, Mississippi, which is within the Northern Division of the Southern District of Mississippi. Jurisdiction and venue were proper. Counsel's performance was not deficient for failing to challenge the Government's standing.

Next, Scott complains that High did not independently test the drugs. At the plea hearing, the prosecutor recited the facts including that the "DEA lab confirmed the crack [Scott sold a confidential source] to be approximately 30.20 grams with 55 percent purity and the methamphetamine to be approximately 28.89 grams with 98 percent purity." Plea Tr. [39] at 18. Under oath, Scott "agree[d] with the facts" as recited by the prosecutor. *Id.* at 18–19. "'Solemn declarations in open court carry a strong presumption of verity,' forming a 'formidable barrier in any subsequent collateral proceedings.'" *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th

Cir. 1998) (quoting *Blackledge v. Allison*, 431 U.S. 63, 73–74 (1977)). High was not deficient in failing to test substances Scott admitted were illegal narcotics.

Scott’s argument that High failed to move for a lower sentence is flatly wrong. At the sentencing hearing, High argued that the prior crimes that earned Scott career-offender status were street-level drug sales and that the Court should therefore ignore the career-offender designation and sentence Scott within the guideline range that would have applied absent that designation. Sentencing Tr. [41] at 5–7. He made an alternative argument for a variance. *Id.* at 7–10. The Court rejected the arguments, but High made them. High’s performance at sentencing was not deficient.

The final two arguments invoke a selective-enforcement/equal-protection theory for dismissal.

The exercise of prosecutorial discretion is limited by the Equal Protection Clause A court’s consideration of an Equal Protection-based claim of selective prosecution necessarily begins with a presumption of good faith and constitutional compliance by the prosecutors. To overcome this presumption, a defendant must prove both discriminatory effect and discriminatory purpose by presenting “clear evidence.” [United States v. Armstrong, 517 U.S. 456,] 465 [(1996).] Before a criminal defendant is entitled to any discovery on a claim of selective prosecution, he must make out a *prima facie* case. The *prima facie* case of selective prosecution requires the criminal defendant to bring forward some evidence that similarly situated individuals of a different race could have been prosecuted, but were not. More specifically, a defendant must first present evidence of *both* discriminatory effect *and* discriminatory intent.

In re United States, 397 F.3d 274, 284 (5th Cir. 2005) (additional citations omitted).

Scott has raised no contested fact issues in support of a *prima facie* case of selective prosecution that would have entitled him to discovery below. He presents no facts tending to show discrimination. Nor does he indicate that High had information to support a selective-prosecution argument but failed to pursue it.

As a result, Scott has given the Court less than the § 2255 petitioner in *United States v. Hall*, who presented the district court with some statistical evidence in support of his equal-protection claim. 455 F.3d 508, 523 (5th Cir. 2006). The Fifth Circuit affirmed the district court’s denial of Hall’s § 2255 motion without a hearing, noting that Hall “ha[d] not provided any direct evidence of discriminatory intent.” *Id.* A district court has the power to deny a § 2255 motion where “it state[s] only bald legal conclusions with no supporting factual allegations.” *Sanders v. United States*, 373 U.S. 1, 19 (1963). Scott has not shown that High was deficient in failing to pursue a selective-prosecution argument.

Nor has Scott shown that High’s pursuit of a selective-prosecution argument would have made a difference (i.e., prejudice). *See Richards v. Quartermar*, 566 F.3d 553, 564 (5th Cir. 2009) (“To demonstrate prejudice, a 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.’” (quoting *Strickland*, 466 U.S. at 694)).

Because the record shows that Scott “‘cannot establish one . . . of the elements necessary’ to his ineffective assistance of counsel claim, ‘an evidentiary hearing [is] not necessary.’” *United States v. Randall*, 803 F. App’x 768, 771 (5th Cir. 2020) (quoting *United States v. Walker*, 68 F.3d 931, 934 (5th Cir. 1995)). Scott’s motion is therefore denied without an evidentiary hearing.

IV. Conclusion

For the reasons stated, Scott’s Motion to Vacate [45] is denied. A separate judgment will be entered in Case No. 3:21-CV-693-DPJ as required by Federal Rule of Civil Procedure 58.

SO ORDERED AND ADJUDGED this the 10th day of March, 2022.

s/ Daniel P. Jordan III
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

JERMAINE SCOTT

PETITIONER

v.

CIVIL ACTION NO. 3:21-CV-693-DPJ

UNITED STATES OF AMERICA

RESPONDENT

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v.

CRIMINAL NO. 3:18-CR-225-DPJ-FKB

JERMAINE SCOTT

FINAL JUDGMENT

For the reasons given in the order denying Defendant's Motion to Vacate, entered on this date in Criminal No. 3:18-CR-225-DPJ-FKB, the Court hereby enters a judgment, pursuant to Federal Rule of Civil Procedure 58.

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED that this case is dismissed.

SO ORDERED AND ADJUDGED this the 10th day of March, 2022.

s/ Daniel P. Jordan III
CHIEF UNITED STATES DISTRICT JUDGE

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 3:18-cr-225-DPJ-FKB

JERMAINE SCOTT

CERTIFICATE OF APPEALABILITY

A final order adverse to the applicant having been filed in the captioned habeas corpus case, in which the detention complained of arises out of process issued by a state court or a proceeding pursuant to 28 U.S.C. § 2255, the court, considering the record in the case and the requirements of 28 U.S.C. § 2253, Rule 22(b) of the Federal Rules of Appellate Procedure, and Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, hereby finds that: A Certificate of Appealability should not issue. The applicant has failed to make a substantial showing of the denial of a constitutional right.

SO ORDERED AND ADJUDGED this the 10th day of March, 2022.

s/ Daniel P. Jordan III
CHIEF UNITED STATES DISTRICT JUDGE

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

UNITED STATES OF AMERICA

V.

CRIMINAL NO. 3:18-CR-225-DPJ-FKB

JERMAINE SCOTT

ORDER

Defendant Jermaine Scott asks the Court to permit him to appeal its denial of his § 2255 petition in forma pauperis. Mot. [57]. “An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.” 28 U.S.C § 1915(a)(3); *see also* Fed. R. App. P. 24(a). “Good faith is demonstrated when a party seeks appellate review of any issue not frivolous.” *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). For the reasons stated in the Order [52] denying Scott’s § 2255 motion—incorporated herein—the Court certifies this appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 n.21 (5th Cir. 1997) (“To comply with Rule 24 in this regard, it often may suffice for the district court to incorporate by reference its decision dismissing the prisoner’s complaint on the merits with or without supplementation, as the trial court deems appropriate, to fully apprise us of the reasons for its certification.”). Scott’s Motion to Appeal In Forma Pauperis [57] is denied.

SO ORDERED AND ADJUDGED this the 9th day of May, 2022.

s/ Daniel P. Jordan III
CHIEF UNITED STATES DISTRICT JUDGE

Appendix E

**Additional material
from this filing is
available in the
Clerk's Office.**