

No. 22-3108

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 24, 2022
DEBORAH S. HUNT, Clerk

JAMES D. SULLIVAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: GRIFFIN, Circuit Judge.

James D. Sullivan, a pro se federal prisoner, appeals the district court's judgment denying his motion to vacate, set aside, or correct his sentence filed pursuant to 28 U.S.C. § 2255. Sullivan applies to this court for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b)(2). He also moves to proceed in forma pauperis and to expedite his appeal.

In 2017, Sullivan pleaded guilty to knowingly accessing with the intent to view child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B). The district court sentenced him to 240 months of imprisonment, to be followed by 10 years of supervised release. The events leading up to Sullivan's arrest began when a woman reported that she saw a camera protruding from the ceiling while showering in a state-park restroom, which led to the discovery of semen matching Sullivan's DNA on a ceiling tile in the attic. The investigation of this incident led police to seize and search Sullivan's laptop, on which police discovered numerous images of child pornography. Those images were the basis for his conviction. *United States v. Sullivan*, 751 F. App'x 799, 802 (6th Cir. 2018). In exchange for his plea, the government agreed to dismiss a count of attempted production of child pornography related to the camera incident, and Sullivan acknowledged in the agreement that, after serving lengthy sentences for multiple state sexual offenses, he knowingly accessed a laptop computer with the intent to view numerous digital files containing child

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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Filed: August 24, 2022

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Mr. Michael A. Sullivan
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Re: Case No. 22-3108, **James Sullivan v. USA**
Originating Case No. : 1:20-cv-00846 : 1:16-cr-00155-1

Dear Counsel,

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

Sincerely yours,

s/Ryan E. Orme
Case Manager
Direct Dial No. 513-564-7079

cc: Ms. Sandy Opacich

Enclosure

No mandate to issue

No. 22-3108

- 2 -

pornography. Sullivan filed a pro se motion to withdraw his guilty plea, which the district court denied. This court affirmed. *Id.* at 808–09.

In 2020, Sullivan filed a § 2255 motion challenging his conviction. In an amended motion, he raised 24 ineffective-assistance-of-trial-counsel claims, six ineffective-assistance-of-appellate-counsel claims, and 15 other claims. The district court denied the claims on the merits and denied a COA.

Sullivan now moves this court for a COA on all of his claims. He objects to the district court's re-organization of his claims in its order, but he does not show that the district court failed to address a meritorious claim. To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the denial of a motion is based on the merits, "[t]he petitioner 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). To satisfy this standard, 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 the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Many of Sullivan's claims involve allegations that counsel performed ineffectively. To show that counsel performed ineffectively, a petitioner must establish that (1) counsel performed deficiently and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). There is a "strong presumption" that an attorney "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689-90. Counsel's performance is considered deficient when "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. To establish 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." *Id.* at 694. In the context of a plea agreement, prejudice requires a showing that "the outcome of the plea process would have been different with competent advice." *Lafler v.*

No. 22-3108

- 3 -

Cooper, 566 U.S. 156, 163 (2012). “[I]neffective assistance of appellate counsel claims are governed by the same *Strickland* standard as claims of ineffective assistance of trial counsel.” *Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010).

Unpreserved Pre-Plea Claims

In Claims (1) through (9), Sullivan argued that trial counsel performed ineffectively by (1) advising him to waive the preliminary hearing and failing to (2) move for a bill of particulars, (3) move to dismiss the indictment, (4) move to sever the charges, (5) investigate the identities of five men who were seen in the park on the day the camera was discovered, (6) identify the victim depicted in an image of child pornography, (7) interview Sullivan’s roommates to determine whether they had accessed his laptop, (8) identify and inspect the specific images that he was charged with accessing, and (9) debrief Sullivan’s sister about the government’s strategy after she testified before the grand jury. In Claims (37) through (40), he argued that the grand jury indicted him without probable cause, the grand jury’s indictment was insufficient, the government abused the grand jury process, and the district court failed to adequately inquire into the use of propensity evidence. All of these claims concern alleged deprivations of constitutional rights that occurred before the entry of Sullivan’s guilty plea and that were not preserved in the plea agreement.

“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.” *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). “Thus, after the entry of an unconditional guilty plea, the defendant may challenge only the court’s jurisdiction and the voluntary and intelligent character of the plea itself.” *Werth v. Bell*, 692 F.3d 486, 495 (6th Cir. 2012). This rule extends to pre-plea claims of ineffective assistance. See *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), and *United States v. Bohn*, 956 F.2d 208, 209 (9th Cir. 1992)). Sullivan preserved his right to appeal the denial of his suppression motion and his motion to exclude evidence of propensity and other acts, but not his claims unrelated to those issues. See *United States v. Ormsby*, 252 F.3d 844, 848 (6th Cir. 2001).

No. 22-3108

- 4 -

Accordingly, reasonable jurists could not debate the district court's rejection of Claims (1) through (9) and (37) through (40).

Guilty Plea

Sullivan raised several challenges to the validity of his guilty plea. In Claims (42) through (44), he argued that the district court accepted an invalid guilty plea, that he did not understand an essential element of his offense, and that he did not understand the nature of the crime. In Claim (27), he argued that trial counsel performed ineffectively by failing to argue that his guilty plea was not made knowingly and voluntarily. A guilty plea is valid if it is entered knowingly, voluntarily, and intelligently. *Brady v. United States*, 397 U.S. 742, 748 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969). The validity of a guilty plea is assessed by reviewing the totality of the circumstances surrounding the plea. *Brady*, 397 U.S. at 749. To be valid, a guilty plea must reflect "sufficient awareness of the relevant circumstances and likely consequences" of the plea. *Id.* at 748. Generally, a state satisfies its burden of showing that a defendant's plea was knowing and voluntary through a transcript of the plea proceedings. *Garcia v. Johnson*, 991 F.2d 324, 326 (6th Cir. 1993); see *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977).

The magistrate judge thoroughly examined Sullivan under oath prior to his guilty plea, during which Sullivan affirmed his understanding of the charge and elements of the offense, the potential penalties, his satisfaction with trial counsel's representation and advice, and the rights he was giving up by pleading guilty, that he could be subject to restitution, and that he read and discussed the plea agreement with counsel and agreed with its terms and the factual basis provided. Based on this transcript, reasonable jurists would agree that Sullivan failed to show that his plea was unknowingly or involuntarily entered, and this court already determined on direct appeal that his plea was knowingly and voluntarily entered. See *Sullivan*, 751 F. App'x at 808. Reasonable jurists could not debate the district court's rejection of his claims that his plea was invalid and that trial counsel performed ineffectively by failing to argue such a meritless claim. See *Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013).

No. 22-3108

- 5 -

In Claim (16), Sullivan alleged that trial counsel performed ineffectively by failing to advise him that the government had to prove that he knew that the images he accessed contained child pornography, but Sullivan was informed of the elements of the crime on the record and admitted that he knowingly accessed the files with the intent to view child pornography. In Claim (17), Sullivan asserted that trial counsel did not give him an adequate opportunity to review the plea agreement, but this assertion is contradicted by the plea transcript, where he expressed his satisfaction with trial counsel, affirmed that he had discussed the plea agreement with his attorney, and went over the agreement paragraph by paragraph with the magistrate judge. He further argued, in Claims (18) and (19), that trial counsel failed to inform him that the plea colloquy was invalid and object to the invalid proceeding, but he does not show any irregularities with the plea proceeding. Reasonable jurists could not debate the district court's rejection of Claims (16) through (19).

Sullivan next challenged the district court's rejection of his motion to withdraw his guilty plea. In Claims (29) and (41), Sullivan disputed the date on which his guilty plea was accepted and asserted that the timing of his motion allowed him to withdraw his plea for any or no reason; in Claim (42), he asserted that the district court accepted an invalid guilty plea; and in Claim (28), he claimed that appellate counsel failed to cite a specific case concerning whether digital files are "material." On direct appeal, this court affirmed the district court's denial of Sullivan's motion to withdraw his plea. *See Sullivan*, 751 F. App'x at 807-08. This court rejected Sullivan's assertions concerning the timing of his motion; approved of the district court's analysis of the factors under *United States v. Bashara*, 27 F.3d 1174, 1181 (6th Cir. 1994) (superseded on other grounds, as stated in *United States v. Caseslorete*, 220 F.3d 727, 734 (6th Cir. 2000)), and Federal Rule of Criminal Procedure 11(d)(2)(B); and rejected his arguments concerning judicial bias and inadequacies in the factual basis of the plea. *See Sullivan*, 751 F. App'x at 808. This included rejecting his argument that digital files are not "material" sufficient to violate § 2252A(a)(5)(B). *See, e.g., United States v. Gray*, 641 F. App'x 462, 467-68 (6th Cir. 2016). Sullivan provides no reason for this court to reconsider these issues on collateral review. He does not show that counsel

No. 22-3108

- 6 -

performed deficiently by failing to cite a specific case in support of a meritless argument, and reasonable jurists could not debate the denial of these claims.

Sullivan raised several challenges concerning the performance of trial counsel during the hearing on his pro se motion to withdraw his guilty plea, such as failing to file a motion to withdraw the plea on Sullivan's behalf (Claim (20)), causing the district court to accept the plea (Claim (21)), creating a conflict of interest with Sullivan (Claim (22)), and failing to advocate for the motion to withdraw the plea and contradicting Sullivan's testimony (Claim (23)). At the hearing on Sullivan's motion to withdraw his plea—which was also a hearing on trial counsel's motion to withdraw as counsel—trial counsel was forced to respond to Sullivan's claims concerning their discussions about potentially moving to withdraw the plea, which counsel explained was the basis for his motion to withdraw. Trial counsel then explained the breakdown in his relationship with Sullivan, refuted Sullivan's claims about the timing of his decision to withdraw his plea and when he communicated that decision to counsel, disputed Sullivan's account of how much time he had to review the plea agreement and Sullivan's claim that trial counsel told him that he had to accept the plea agreement, and disputed other factual allegations Sullivan had made earlier in the hearing, such as that counsel misrepresented potential collateral consequences of his plea.

As noted by the district court, Sullivan placed trial counsel's actions and statements at issue in the hearing, and trial counsel did not perform ineffectively or abandon Sullivan by fulfilling his duty of candor to the court. *See United States v. Evans*, 406 F. App'x 946, 952 n.2 (6th Cir. 2011). In any case, reasonable jurists would agree that Sullivan cannot show prejudice from trial counsel's actions and statements because he did not establish any fair and just reasons to withdraw his guilty plea. *See Coley*, 706 F.3d at 752. Appellate counsel was also not ineffective for failing to argue similar, meritless claims, as Sullivan argued in Claim (25). *See Wilson v. Mitchell*, 498 F.3d 491, 514-15 (6th Cir. 2007). Reasonable jurists thus could not dispute the district court's rejection of Claims (20) through (23) and Claim (25).

Finally, Sullivan argued in Claims (31) through (36) that he was deprived of counsel at the hearing on his motion to withdraw his plea. Because trial counsel did not perform ineffectively or

No. 22-3108

- 7 -

abandon Sullivan, Sullivan's claims that the district court allowed counsel to ineffectively represent him at the plea hearing also lack arguable merit. Reasonable jurists could not debate the denial of Claims (31) through (36).

Suppression and In Limine Motions

Sullivan raised multiple claims that trial and appellate counsel performed ineffectively concerning the district court's denial of his motion to suppress evidence. In Claims (10) through (13), he argued that trial counsel failed to consult with him and pursue his recommended claims regarding the suppression of evidence, subpoena witnesses to challenge the existence of probable cause, obtain leave to raise a "residence-nexus" claim, and object to the district court's good-faith determination regarding the search warrant. In Claim (30), he argued that appellate counsel failed to challenge the district court's good-faith determination regarding the search warrant.

This court affirmed the district court's denial of the suppression motion on direct appeal, determining that the search warrants for Sullivan's apartment, vehicle, and laptop were sufficiently particular and supported by probable cause. *Sullivan*, 751 F. App'x at 803-05. Sullivan argued that the proceedings would have ended differently if trial counsel had raised his preferred arguments, but this court already rejected his nexus, time-frame, and overbreadth arguments on direct appeal, *see id.*, and he does not establish that his other arguments had merit or would have created a reasonable probability of a different outcome if raised. Sullivan asserted that trial counsel should have subpoenaed witnesses to establish the functionality of the camera in the shower, to show that other people had access to his laptop, to show that the police accessed the laptop after its seizure but prior to the execution of the warrant, and to show that the scope of the warrant was exceeded by reviewing his browser history, but, again, he does not show a reasonable probability that the outcome of the proceeding would have been different. This court already determined that the procedure used to discover the child pornography on his laptop was proper, *see id.*, and his allegations about the camera and who had access to his laptop might have been reasonable factual issues to have raised in his defense at trial, but would not be grounds to suppress the evidence altogether. He similarly does not show that he was prejudiced by trial counsel's raising an

No. 22-3108

- 8 -

argument at the suppression hearing without first obtaining leave or show any error in the district court's or this court's analysis of his staleness argument. *See id.* at 803. Reasonable jurists could not debate the rejection of these claims.

Sullivan next claimed that trial counsel performed ineffectively by failing to request an evidentiary hearing on a motion to exclude evidence of Sullivan's prior acts of child sexual abuse and by conceding that Sullivan had prior sexual contact with a minor (Claims (14) and (15)). This court found on direct appeal that the evidence of prior acts of child molestation were admissible under Federal Rules of Evidence 414 and 404(b) and that the district court did not plainly err by determining that the prior acts of molestation occurred because Sullivan did not seriously dispute the proffered evidence. *See id.* at 805-07. Sullivan attacked a single incident of prior molestation in his § 2255 motion, claiming that a police report shows that he did not have sexual contact with a claimed victim. The police report that he cited contains allegations that he touched a minor girl's thighs, breasts, and vagina, however, and that another child participated but was not touched by Sullivan. Sullivan failed to show prejudice because he provided no basis for excluding the evidence of his prior convictions simply because a narrative in a police report states that in a particular incident he touched only one of the victims. Reasonable jurists could not debate the district court's rejection of these claims.

Miscellaneous Claims

Sullivan claimed that both trial and appellate counsel performed ineffectively by failing to argue that the imposition of restitution violated the terms of the plea agreement (Claims (24) and (26)). Reasonable jurists could not dispute the denial of these claims because restitution was mandated by statute, *see* 18 U.S.C. § 2259(a), and counsel did not perform ineffectively by failing to raise a meritless argument, *Coley*, 706 F.3d at 752.

Sullivan also claimed that he is actually innocent (Claim (45)), but he provided no new evidence to support this assertion. In any event, a free-standing claim of actual innocence is not cognizable on federal habeas review in a non-capital case. *See Herrera v. Collins*, 506 U.S. 390,

No. 22-3108

- 9 -

400 (1993); *Cress v. Palmer*, 484 F.3d 844, 854 (6th Cir. 2007). Reasonable jurists could not dispute the denial of this claim.

For these reasons, the application for a COA is **DENIED**. The motions to proceed in forma pauperis and to expedite the appeal are **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read 'Deborah S. Hunt', is written over a horizontal line.

Deborah S. Hunt, Clerk

PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES D. SULLIVAN,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

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CASE NO. 1:20CV0846
(1:16CR0155)

JUDGE BENITA Y. PEARSON

ORDER OF DISMISSAL

The Court, having filed its Order, hereby dismisses Petitioner's Section 2255 Motion to Vacate, Set Aside, or Correct Sentence with prejudice.

The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

December 27, 2021
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge

No. 22-3108

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 11, 2023
DEBORAH S. HUNT, Clerk

JAMES D. SULLIVAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: GUY, SUHRHEINRICH, and STRANCH, Circuit Judges.

James D. Sullivan petitions for rehearing en banc of this court's August 24, 2022, order denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

Further, appellant's motion for leave file a supplemental pleading in support of the petition is DENIED.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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Filed: January 11, 2023

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Re: Case No. 22-3108, **James Sullivan v. USA**
Originating Case No.: 1:20-cv-00846: 1:16-cr-00155-1

Dear Mr. Sullivan,

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: Mr. Michael A. Sullivan

Enclosure

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