UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-5967

DARRYL LAMONT DAVIS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before: THAPAR, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Darryl Lamont Davis 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

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ORDER

Before: THAPAR, Circuit Judge.

Darryl Lamont Davis, a pro se federal prisoner, appeals a district court judgment denying his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 and moves this court for a certificate of appealability (COA). His counsel has filed a motion to extend his appointment under the Criminal Justice Act. Davis also moves for leave to proceed in forma pauperis.

In 2009, a jury found Davis guilty of committing bank robbery with a dangerous weapon, in violation of 18 U.S.C. § 2113(a) and (d); three counts of using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c); two counts of interfering with commerce by robbery (Hobbs Act robbery), in violation of 18 U.S.C. § 1951; one count of possession of a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g)(1); and one count of obstruction and concealment of evidence, in violation of 18 U.S.C. §§ 2 and 1512(c)(1). He was sentenced to 762 months in prison. This court affirmed. *United States v. Davis*, 515 F. App'x 486 (6th Cir. 2013).

In 2014, Davis filed a § 2255 motion to vacate, raising four claims. The district court denied the motion and declined to issue a COA. This court, though, granted a COA and then vacated and remanded as to Davis's claim that his trial counsel was ineffective for failing to move

to suppress evidence from a buccal swab taken from him before trial and that his appellate counsel was ineffective for failing to argue on appeal that the buccal swab evidence should have been suppressed. *See Davis v. United States*, No. 18-6125 (6th Cir. June 19, 2020) (order).

On remand, after an evidentiary hearing, a magistrate judge recommended that Davis's ineffective-assistance claim be denied. The district court agreed, adopted the magistrate judge's report and recommendation, denied Davis's motion to vacate, and declined to issue a COA.

Legal Standards

A COA may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). That standard is met when the movant demonstrates "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*, 537 U.S. at 327.

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The prejudice inquiry, in the context of a Fourth Amendment claim, requires the defendant to "prove that his Fourth Amendment claim is meritorious and that there is reasonable probability that the verdict would have been different absent the excludable evidence." *Ray v. United States*, 721 F.3d 758, 762 (6th Cir. 2013) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)).

Factual Background

FBI Special Agent Buddy Early, the sole witness at the evidentiary hearing, was involved in the investigation of several armed robberies around Knoxville, Tennessee, that took place in June 2007. During the time of this investigation, on June 5, 2007, officers from the Knoxville

Police Department arrested Davis for public intoxication. The next day, Early executed a grand jury subpoena to obtain a DNA buccal swab (the K1 swab) from Davis.

The government introduced the evidence log for the K1 swab, which showed that Early collected it on the evening of June 6, 2007, held it in a sealed bag in a secured location near his office space, and then submitted it to the evidence control unit on June 11, 2007. A few days later, it was shipped to the testing lab.

Meanwhile, on June 7, 2007, Davis was arrested, and on June 12, 2007, he was indicted on the present charges (except for the § 922(g)(1) and § 1512(c)(1) charges, which were added in a superseding indictment).

On July 19, 2007, law enforcement officials obtained a search warrant for Davis's DNA. According to Early, the prosecutor wanted to obtain a search warrant for another sample of Davis's DNA "just in case the courts were to later on down the road frown upon using a Grand Jury subpoena to obtain a buccal swab." R. 38, Pg. ID 297. Early verified that the affidavit in support of the search warrant did not reference the K1 swab. In addition, Early indicated twice that the FBI had not received the lab results from the K1 swab at the time that the search warrant issued. Indeed, the K1 swab was not returned by the lab to the FBI until August 3, 2007. But before the results from the K1 swab came back, on July 27, 2007, law enforcement officials executed the search warrant, obtaining another sample of Davis's DNA from a buccal swab (the K3 swab). Both the K1 and K3 swabs were later used as evidence at trial.

District Court's Decision

The district court agreed with the magistrate judge's determination that, because "[t]here is competing authority regarding whether the taking of DNA evidence pursuant to a buccal swab obtained through a grand jury subpoena . . . is constitutional," it "cannot conclusively determine that a challenge to a buccal swab obtained by a grand jury subpoena [i.e., how the K1 swab was obtained here] would be meritless." R. 34, Pg. ID 220; R. 40. However, the district court found that Davis failed to show that a motion to suppress the evidence obtained from the K3 swab would have been successful. Thus, even assuming that the evidence obtained from the KI swab was

inadmissible, counsel could not have prevailed on a challenge to the later-obtained K3 evidence, which was obtained pursuant to a valid warrant and admissible under the independent-source doctrine.

The independent-source doctrine permits the admission of evidence "if the government shows that it was discovered through sources 'wholly independent of any constitutional violation.'" *United States v. Jenkins*, 396 F.3d 751, 757 (6th Cir. 2005) (quoting *United States v. Leake*, 95 F.3d 409, 412 (6th Cir. 1996)). "To determine whether the warrant was independent of the illegal [action], one must ask whether it would have been sought even if what actually happened had not occurred." *Murray v. United States*, 487 U.S. 533, 542 n.3 (1988). The government must thus show that (1) no evidence obtained in the initial unlawful search "prompted" the subsequent lawful search and (2) the improperly obtained evidence didn't affect the magistrate's "decision to issue the warrant." *Id.* at 542; *accord Jenkins*, 396 F.3d at 757–58.

Here, the district court determined that, even if the K1 swab was unlawfully obtained through a grand jury subpoena, the DNA evidence from the K3 swab—which linked Davis to the robberies—was obtained through a valid search warrant. Any challenge to suppress the evidence obtained from the K3 swab therefore would have been unsuccessful; thus, the district court denied Davis's ineffective-assistance-of-counsel claim.

Analysis

Davis argues that "K3 is not independent of K1, but is intertwined" with it because "[a]gents only obtained the K3 buccal swab after realizing the issue with the K1 swab and [there is] a real likelihood that it could have been suppressed if Davis' trial counsel had filed a motion [to suppress]." Certificate of Appealability Motion 4. But this argument misunderstands the independent-source doctrine. It suggests that the mere realization that the initial warrant might not be lawful sullies all subsequent attempts to obtain that evidence. Not so. Instead, the doctrine asks whether, if the slate is wiped clean, the government still would have inevitably obtained that evidence anyway. The answer here is yes.

First, the K1 swab couldn't have prompted the government to obtain the K3 swab because the government hadn't yet received the results of K1. In other words, assuming the first search never happened, there's no doubt that the government would have sought (and obtained) the second warrant for Davis's DNA evidence. *Cf. Murray*, 487 U.S. at 542 n.3.

And second, as explained above, the affidavit in support of the search warrant for the K3 swab did not reference the K1 swab. This is because, as Early indicated in his testimony, the FBI "obviously" had not yet received the results from the K1 swab by the time that the search warrant was applied for, issued, and executed. R. 38, Pg. ID 299–300. Davis does not contest these facts. Nor does he challenge the legality of the search warrant for the K3 swab.

At bottom, even if a motion to suppress the K1 buccal swab might have been successful in view of the unsettled law, a motion to suppress the DNA evidence that was independently obtained from the K3 swab almost certainly would have been rejected as meritless. *See Jenkins*, 396 F.3d at 757. And "counsel cannot be ineffective for a failure to raise an issue that lacks merit." *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001); *see also Robinson v. Howes*, 663 F.3d 819, 825 (6th Cir. 2011) ("When claiming that counsel was ineffective for failing to file a suppression motion, Petitioner must 'prove that his Fourth Amendment claim is meritorious . . . .'" (quoting *Kimmelman*, 477 U.S. at 375)).

The court therefore **DENIES** the motion for a COA, **DENIES** the motion for the appointment of counsel, and **DENIES** as moot the motion for leave to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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