UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-5265

TEDDY SHAWN HAWKINS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before: SILER, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Teddy Shawn Hawkins 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: SILER, Circuit Judge.

Teddy Shawn Hawkins, a pro se federal prisoner, appeals the district court's judgment denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255. Hawkins has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

In February 2019, Hawkins pleaded guilty, pursuant to a written plea agreement, to possession with intent to distribute a mixture or substance containing fentanyl, in violation of 21 U.S.C. §§ 841(a)(1), and possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A). These convictions stem from an overdose death in May 2018. The decedent had Robert McGowan's phone number saved in his cell phone as his narcotics supplier. Law enforcement officers arrested McGowan, who agreed to cooperate with them. McGowan informed the officers that Hawkins had supplied him with heroin, including the heroin that he had sold to the decedent. McGowan, acting as an informant, then set up a "controlled buy" of narcotics with Hawkins. When law enforcement officers approached Hawkins at the site of the drug deal that McGowan had arranged, Hawkins fled on foot, discarding a Sig Sauer 9mm P320 pistol in the process. Law enforcement officers apprehended Hawkins at the scene and searched

his person, at which time they discovered a plastic bag containing suspected heroin or fentanyl hidden in his buttocks.

Prior to his plea, Hawkins moved to suppress the evidence obtained during the search incident to his arrest, challenging the constitutionality of his warrantless arrest. The district court denied the suppression motion following an evidentiary hearing. After accepting Hawkins's plea, the district court sentenced him to 106 months of imprisonment and six years of supervised release. We affirmed Hawkins's convictions and sentence on direct appeal. *United States v. Hawkins*, No. 19-5596, slip op. at 4 (6th Cir. Jan. 31, 2020).

In December 2020, Hawkins filed a § 2255 motion, which he later supplemented and amended, claiming that the prosecutors violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972); his warrantless arrest was not supported by probable cause; law enforcement officers engaged in misconduct by lying and by fabricating evidence to "cover up" the illegal arrest; the district court erred by accepting his plea on the § 924(c)(1)(A) charge because there was no factual basis for that plea; and his sentence was procedurally unreasonable. Hawkins also claimed that his attorneys rendered ineffective assistance by not discovering, researching, investigating, or challenging facts and evidence that allegedly supported the aforementioned claims.

The magistrate judge recommended that the district court deny Hawkins's amended and supplemental § 2255 motions after concluding that his claims were procedurally barred, without merit, or both. The magistrate judge also advised Hawkins that he had 14 days after service to file written objections to the report and recommendation, but Hawkins did not file any objections. The district court therefore adopted the report as being without objection, denied Hawkins's § 2255 motion with prejudice, and declined to issue Hawkins a COA.

Hawkins now seeks a COA from this court. A COA 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). To be entitled to a COA, the movant 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 appeal concerns a district court's procedural ruling, a COA should issue when the petitioner demonstrates "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

As a preliminary matter, a party typically forfeits the right to appellate review by failing to file written objections to a magistrate judge's report and recommendation. *See Thomas v. Arn*, 474 U.S. 140, 142 (1985); *see also United States v. Walters*, 638 F.2d 947, 949 (6th Cir. 1981). For forfeiture to apply, however, a magistrate judge must inform the party that forfeiture may follow from inaction. *See Walters*, 638 F.2d at 949-50. In this case, the magistrate judge did not explicitly warn Hawkins that any objection not made within the 14-day deadline could be deemed forfeited. Hawkins thus did not forfeit his right to challenge the denial of his claims.

Nevertheless, Hawkins's non-ineffective-assistance-of-counsel claims do not deserve encouragement to proceed further because they are procedurally barred. Hawkins's freestanding suppression- and sentencing-related claims do not deserve encouragement to proceed further because Hawkins raised those claims on direct appeal. *See Hawkins*, 19-5596, slip op. at 2-3. "Absent exceptional circumstances, or an intervening change in the case law, [a defendant] may not use his § 2255 petition to relitigate" issues brought on direct appeal. *Wright v. United States*, 182 F.3d 458, 467 (6th Cir. 1999). Hawkins did not show an intervening change in the law or the presence of exceptional circumstances. Moreover, Hawkins's prosecutorial-misconduct, officer-misconduct, and sufficiency-of-the-evidence claims are procedurally defaulted because Hawkins could have raised those claims on direct appeal but failed to do so. *See Vanwinkle v. United States*, 645 F.3d 365, 369 (6th Cir. 2011); *see also Regalado v. United States*, 334 F.3d 520, 528 (6th Cir. 2003). Although a movant may obtain review of a procedurally defaulted claim by demonstrating either cause for the default and actual prejudice, or that he is actually innocent, *Vanwinkle*, 645 F.3d at 369, Hawkins made no such showing.

Hawkins's remaining claims allege that his attorneys rendered ineffective assistance. A defendant receives ineffective assistance of counsel in violation of the Sixth Amendment if counsel's performance 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). To demonstrate prejudice when the assistance at issue implicates a guilty plea, the defendant must "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded 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.

Hawkins claimed that counsel was ineffective for allowing him to plead guilty to the § 924(c)(1)(A) charge because there was not sufficient evidence that he possessed a firearm "in furtherance of" a drug-trafficking crime. For the possession of a firearm to be in furtherance of a drug-trafficking crime, it "must be strategically located so that it is quickly and easily available for use." *United States v. Mackey*, 265 F.3d 457, 462 (6th Cir. 2001). Other factors include "whether the gun was loaded, the type of weapon, the legality of its possession, the type of drug activity conducted, and the time and circumstances under which the firearm was found." *Id.*

The evidence in this case establishes that Robert McGowan, a known narcotics supplier who was cooperating with local law enforcement officials, set up a controlled purchase of $600 worth of heroin with a contact in McGowan's phone. McGowan and the contact arranged to meet at Valley Park in Lexington, Kentucky. During their communications, the contact informed McGowan that he was bringing "fire" with him to the meeting. Once at the park, the contact called McGowan and said that the meeting location would need to change because he had noticed undercover police officers around the park. Police officers then activated their emergency lights and approached the contact. The contact ran from the police, discarding two cell phones and a handgun in the process. Once detained, the contact identified himself as Teddy Hawkins, and upon

searching Hawkins's person, police officers discovered a plastic bag containing 17.899 grams of fentanyl hidden between his buttocks and $6,145 in cash in his left pants pocket. Officers then discovered individually packaged fentanyl in Hawkins's car. They also recovered the loaded Sig Sauer pistol that Hawkins had tossed.

In his plea agreement, Hawkins admitted these operative facts and admitted that he possessed the Sig Sauer pistol "to advance or promote" the drug offense to which he also pleaded guilty—specifically, possession with intent to distribute fentanyl. At the change-of-plea hearing, the district court recited many of these facts and Hawkins again confirmed that they were correct. Hawkins is bound by his admissions in open court, which provided a sufficient basis for his firearm conviction. *See Brady v. United States*, 397 U.S. 742, 757 (1970). In any event, the fact that Hawkins showed up to a scheduled drug transaction equipped with a loaded pistol provided a sufficient factual basis for his guilty plea on the firearm charge. *See Mackey*, 265 F.3d at 462-63. Reasonable jurists therefore could not debate the district court's conclusion that counsel was not ineffective for failing to challenge the factual basis of the § 924(c)(1)(A) charge.

Hawkins also claimed that counsel was ineffective for not objecting to the district court's consideration of uncharged conduct in crafting its sentence. To that end, Hawkins argued that counsel should have objected at his sentencing hearing when the district court opined that "you know somewhere in the back of your mind that you had something to do with" the drug-related death of another person. But Hawkins raised this issue on direct appeal when arguing that his sentence was procedurally unreasonable. *See Hawkins*, No. 19-5596, slip op. at 2. In rejecting Hawkins's procedural-reasonableness claim, we explicitly concluded that "a district court 'may look to uncharged criminal conduct, indeed even acquitted conduct, to enhance a sentence within the statutorily authorized range.'" *Id.* (quoting *United States v. Rayyan*, 885 F.3d 436, 441 (6th Cir. 2018)). Our conclusion on that point is fatal to Hawkins's claim that counsel should have objected to the district court's remarks at sentencing. *See Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001) (noting that counsel cannot be considered ineffective for failing to raise meritless objections). This ineffective-assistance claim does not deserve encouragement to proceed further.

The same holds true for Hawkins's remaining claims, which all concern errors allegedly committed by his attorneys 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.[1] *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. To the extent that Hawkins argued that his attorneys' alleged errors rendered his guilty plea unintelligent, unknowing, or involuntary, *see Stiger*, 20 F. App'x at 308-09, the record undercuts that assertion. Specifically, the record reflects that the district court verified that Hawkins's guilty plea was voluntary and that he understood the constitutional rights that he was relinquishing by pleading guilty, the nature of the crimes charged, the consequences of pleading guilty, and the factual basis for concluding that he had committed the crimes charged. *See United States v. Webb*, 403 F.3d 373, 378-79 (6th Cir. 2005). Because the record shows that the district court scrupulously fulfilled its duties under Federal Rule of Criminal Procedure 11, Hawkins is bound by his responses to the court's inquiries, including his representations that he understood the terms of his plea agreement, that he was "fully satisfied with" his attorneys' advice and representation in this matter, that he agreed with the factual basis for his plea, and that nobody coerced or threatened him to plead guilty.

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[1] We have suggested that the *Tollett* rule might not apply to issues that are preserved by a conditional guilty plea. *See United States v. Cottage*, 307 F.3d 494, 499 (6th Cir. 2002); *see also United States v. Ormsby*, 252 F.3d 844, 848 (6th Cir. 2001). But even if *Tollett* does not bar Hawkins from attacking his attorneys' performance with regard to his suppression-related issues (the subject of his conditional plea), the record reflects that Hawkins's attorneys filed a motion to suppress the evidence that was obtained during the arrest and represented Hawkins actively at the evidentiary hearing on that suppression motion and at a preliminary "probable cause" hearing. Viewed against this record, Hawkins failed to make a substantial showing that his attorneys' performance was constitutionally deficient. *See Strickland*, 466 U.S. at 687. Therefore, reasonable jurists could not debate the district court's rejection of Hawkins's suppression-related ineffective-assistance-of-counsel claims.

For these reasons, Hawkins's COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk