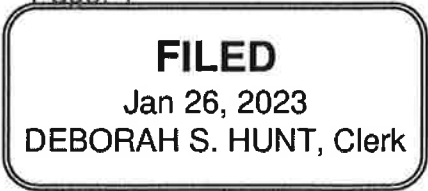


No. 22-5463

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT



DUSTIN JOLLY,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

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ORDER

Before: BOGGS, GRIFFIN, and MATHIS, Circuit Judges.

Dustin Jolly, a pro se federal prisoner, petitions for rehearing en banc of this court's order entered on November 8, 2022, 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.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk

No. 22-5463

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Nov 8, 2022  
DEBORAH S. HUNT, Clerk

DUSTIN JOLLY, )  
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 Petitioner-Appellant, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Respondent-Appellee. )

ORDER

Before: BATCHELDER, Circuit Judge.

Dustin Jolly, 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. Jolly has filed an application for a certificate of appealability (“COA”). *See* Fed. R. App. P. 22(b)(1).

In April 2018, Jolly pleaded guilty, pursuant to a written plea agreement, to conspiracy to distribute 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846, and possession of a firearm in furtherance of a drug-trafficking offense, in violation of 18 U.S.C. § 924(c)(1)(A). Under 21 U.S.C. §§ 841(b)(1)(B) and 846, the 50-grams-or-more quantity required a minimum sentence of five years in prison. Before Jolly entered his guilty pleas, however, the government had filed the required notice under 21 U.S.C. § 851 advising Jolly of its intent to seek an enhanced sentence based on a prior state-court felony drug conviction. The district court accepted Jolly’s guilty pleas and sentenced him to the enhanced mandatory-minimum term of 10 years’ imprisonment on the drug-conspiracy count, *see* § 841(b)(1)(B), followed by a mandatory-minimum consecutive term of five years’ imprisonment on the firearm count, for a total term of 15 years’ imprisonment. Jolly did not file a direct appeal.

In August 2019, Jolly filed a § 2255 motion, claiming that (1) the district court lacked jurisdiction to enhance his sentence because the government's § 851 notice contained "false and inaccurate information," (2) trial counsel was ineffective for not challenging the government's inaccurate § 851 notice, and (3) trial counsel was ineffective for not challenging his prior attorney's alleged conflict of interest. On the recommendation of a magistrate judge, and over Jolly's objections, the district court determined that Jolly's claims were either waived, procedurally defaulted, or without merit. It therefore denied the § 2255 motion and declined to issue Jolly a COA. This appeal followed.

Jolly now seeks a COA from this court as to each of his claims. 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 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).

Jolly first claims that the district court lacked jurisdiction to enhance his sentence under § 841(b)(1)(B) because the government's § 851 notice misstated his prior drug conviction, the date of that conviction, and the sentence imposed on that conviction. It is true that before a district court can impose a conviction-based statutory enhancement under § 841, the government must file an information "stating in writing the previous convictions to be relied upon." 21 U.S.C. § 851(a)(1). But "[a] defendant waives the argument that a sentencing enhancement does not apply by 'explicitly agreeing' that it does, such as through 'plain, positive concurrence.'" *United States v. McBride*, 826 F.3d 293, 294-95 (6th Cir. 2016) (quoting *United States v. Knox*, 593 F. App'x 536, 536, 537 (6th Cir. 2015)). Relatedly, 21 U.S.C. § 851(c)(2) states that "[a]ny challenge to a

prior conviction, not raised by response to the [§ 851 notice] before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.”

Here, Jolly’s signed plea agreement expressly stated that he was subject to an enhanced statutory punishment of 10 years to life in prison because of the prior felony drug conviction described in the § 851 notice. And Jolly expressly confirmed at his sentencing hearing that he understood the contents of the § 851 notice and that he would be relinquishing the right to challenge that notice (including any challenge to the existence of his prior drug conviction) by not objecting to it at that time. And Jolly raised no objection to the § 851 notice despite his later assertion that he suspected at the time of sentencing that it contained inaccurate information. Even assuming, as Jolly contends, that counsel’s ineffectiveness can constitute “good cause” under § 851(c)(2) for not challenging an enhancement notice in a timely fashion, Jolly cannot make a substantial showing that he received ineffective assistance of trial counsel for the reasons discussed later in this order. Reasonable jurists therefore could not debate the district court’s determination that Jolly waived any challenge to his enhanced sentence. To the extent that Jolly argues that this claim is not waivable because it constitutes a jurisdictional challenge to his sentence, reasonable jurists could not debate the district court’s determination that such an argument is foreclosed by binding circuit precedent. *See United States v. Pritchett*, 496 F.3d 537, 546 (6th Cir. 2007).

Waiver notwithstanding, reasonable jurists could not debate the district court’s rejection of this claim on the merits. When examining the adequacy of a notice under § 851, “the proper inquiry is whether the government’s information provided the defendant ‘reasonable notice of [its] intent to rely on a particular conviction and a meaningful opportunity to be heard.’” *United States v. King*, 127 F.3d 483, 488-89 (6th Cir. 1997) (alteration in original) (quoting *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1485 (10th Cir. 1994)). Although the government’s § 851 notice erroneously identified Jolly’s prior conviction (as complicity to traffic in cocaine rather than his actual conviction of possession of cocaine), the date of that conviction (as May 22, 2009, rather than his actual plea date of May 14, 2009), and the sentence imposed on that conviction (as five

years rather than his actual two-year sentence), it otherwise correctly identified the court of conviction and the case number. The government therefore provided Jolly with reasonable notice that it intended to rely on his May 2009 drug conviction in case number 07-CR-03431 in the Jefferson County Circuit Court. *See id.* (holding that the § 851 notice provided adequate notice to the defendant even though it contained the wrong date of conviction); *see also United States v. Steen*, 55 F.3d 1022, 1025-28 (5th Cir. 1995) (holding that the § 851 notice satisfied the statutory requirements even though it misstated the court of conviction and one of the defendant's prior convictions). And, as previously mentioned, the district court afforded Jolly the opportunity to challenge the § 851 notice prior to imposing sentence.

Jolly's remaining claims allege that trial counsel 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).

Jolly claims that counsel was ineffective for not challenging the inaccuracies contained in the government's § 851 notice. Reasonable jurists could not debate the district court's denial of this claim because Jolly failed to make a substantial showing of prejudice. Even if counsel had objected to the errors contained in the § 851 notice, the government would have been free to amend the § 851 notice "at any time prior to the pronouncement of sentence." 21 U.S.C. § 851(a)(1); *see also King*, 127 F.3d at 488-89. And at the time of Jolly's sentencing hearing,<sup>1</sup> a Kentucky

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<sup>1</sup> Section 401(a) of the First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194, altered the terminology of prior convictions that can be used to enhance sentences under § 841(b)(1)(B). *See United States v. Bonds*, 858 F. App'x 873, 875 (6th Cir. 2021). "[E]ven though the changes wrought by enactment of section 401 of the First Step Act can apply to offenses committed prior

No. 22-5463

- 5 -

conviction for possession of drugs could serve as a predicate for the § 841(b)(1)(B) sentencing enhancement. *See United States v. Snow*, 634 F. App'x 569, 573 (6th Cir. 2016). Thus, any challenge by counsel to the adequacy of the government's § 851 notice in this case would have been futile. *See Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013) (holding that counsel is not ineffective for not raising meritless arguments).

Finally, Jolly claims that counsel was ineffective for not challenging his prior attorney's alleged conflict of interest. By way of context, Jolly alleged that, when he was arrested in Kentucky on state charges in March 2017, he was represented by Robert Boyd, and that Boyd's fees were paid by a third party. Jolly alleged that the third party, Willie J. Rowan, was his source for drugs and that Boyd acted as a "covert agent" on Rowan's behalf. He further alleged that Rowan and Boyd "conspired together to extort [him] and [his] father by using coer[c]ion, threats and intimidation, and used counsel's position as [his] attorney to adversely influence both the previous state case and the instant federal case." But Jolly failed to explain how trial counsel's failure to raise his prior counsel's conflict of interest impacted his decision to plead guilty in the present case, so reasonable jurists could not debate the district court's rejection of this claim. *See Hill*, 474 U.S. at 59.

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

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

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to the effective date of the Act, such application is permissible only when 'a sentence for the offense has not been imposed as of [the] date of enactment.'" *Id.* (citing § 401(c)) (second emphasis added). Because the First Step Act became effective on December 21, 2018, over four months after Jolly was sentenced, any retroactive effects of section 401 do not apply to him. *See id.*