**Bell v. United States**

United States Court of Appeals for the Eleventh Circuit

September 25, 2023, Filed

No. 23-11617

**Reporter**
2023 U.S. App. LEXIS 25384 *

TRAYONE LEFFERIO BELL, Petitioner-Appellant, versus UNITED STATES OF AMERICA, Respondent-Appellee.

**Prior History:** [*1] Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 6:20-cv-01848-CEM-EJK.

**Counsel:** For TRAYONE LEFFERIO BELL, Petitioner - Appellant: Andrew Brian Phillips, A. Brian Phillips, PA, ORLANDO, FL; Trayone Lefferio Bell, Seminole County Jail - Inmate Legal Mail, SANFORD, FL.

For UNITED STATES OF AMERICA, Respondent - Appellee: Michelle Thresher Taylor, U.S. Attorney Service - Middle District of Florida, U.S. Attorney, U.S. Attorney's Office, TAMPA, FL.

**Judges:** Kevin C. Newsom, UNITED STATES CIRCUIT JUDGE.

**Opinion by:** Kevin C. Newsom

**Opinion**

ORDER:

Trayone Bell is a federal prisoner serving a 174-month sentence for crimes related to identity theft, fraud, and embezzlement. As construed from his notice of appeal, he moves for a certificate of appealability ("COA"), in order to appeal the district court's denial of his *pro se* 28 U.S.C. § 2255 motion, which raised three claims related to his trial counsel's performance. To obtain a COA, Bell must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *See Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (quotation marks omitted).

Here, reasonable jurists would not debate the [*2] district court's denial of Bell's § 2255 motion. *See id.* To the extent that he alleged, in his first claim, that counsel failed to accept the government's plea offer on his behalf, he could not show that the district court clearly erred in finding that he told counsel to reject the offer. *See Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). The district court made that finding after it held an evidentiary hearing and credited counsel's testimony that Bell rejected the offer, and Bell could not rebut the credibility determination, because nothing about counsel's testimony was "so inconsistent or improbable ... that no reasonable factfinder could accept it." *See*

*Rivers v. United States*, 777 F.3d 1306, 1317 (11th Cir. 2015) (quotation marks omitted). Given Bell's inability to rebut the district court's finding that he told counsel to rebut the plea offer, counsel's failure to accept that offer did not constitute ineffective assistance.

Likewise, Bell could not demonstrate prejudice, in his second and third claims, resulting from counsel's failure to file a suppression motion premised on the allegedly illegal stop of his vehicle, nor from counsel's failure to object to the application of sentencing enhancements. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Because a K-9 positively alerted to the presence of narcotics at the facility where [*3] police officers discovered the evidence of Bell's crimes, officers had an independent basis establishing probable cause to search that location, such that a suppression motion premised on the illegality of the traffic stop would not have resulted in exclusion of the evidence. *See United States v. Whaley*, 779 F.2d 585, 589 n.7 (11th Cir. 1986).

To the extent that Bell's third claim challenged counsel's failure to object to the sentencing enhancements, on the ground that the district court incorrectly calculated the total loss amounts and number of victims involved in his crimes, his allegations were merely conclusory, which is insufficient to establish prejudice. *See Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991). Nothing suggested that an objection would have produced a different outcome at sentencing because, not only did Bell never offer an alternative calculation for the loss amount and number of victims underlying the enhancements, but he also did not produce any evidence suggesting that the district court had incorrectly calculated those figures. *See Strickland*, 466 U.S. at 694.

Because the district court correctly determined that Bell failed to establish ineffective assistance in any of his three claims, reasonable jurists would not debate the denial of his § 2255 motion. *See Slack*, 529 U.S. at 484. Accordingly, his construed motion for a [*4] COA is DENIED.

/s/ Kevin C. Newsom

UNITED STATES CIRCUIT JUDGE

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Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

**TRAYONE LEFFERIO BELL,**

**Plaintiff,**

**v.** **Case No. 6:20-cv-1848-CEM-EJK**

**UNITED STATES OF AMERICA,**

**Defendant.**
_____/

**ORDER**

THIS CAUSE is before the Court on Trayone Lefferio Bell's Motion to Vacate, Set Aside, or Correct Sentence ("Motion to Vacate," Doc. 1) filed pursuant to 28 U.S.C. § 2255. Respondent filed a Response to the Motion to Vacate ("Response," Doc. 3) in compliance with this Court's instruction. Petitioner filed a Reply to the Response ("Reply," Doc. 6). Petitioner asserts three grounds for relief. For the following reasons, an evidentiary hearing will be ordered on Claim One, and Claims Two and Three of the Motion to Vacate are due to be denied.

## I. PROCEDURAL HISTORY

Petitioner was charged with one count of possession of more than fifteen counterfeit and unauthorized access devices, *i.e.*, debit cards, in violation of 18 U..C. § 1029(a)(3) and (c)(1)(A) (Count One), three counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1) (Counts Two, Four, and Six), and two counts

of theft or embezzlement of federal tax returns in violation of 18 U.S.C §§ 641 and 2 (Counts Three and Five). (Criminal Case 6:16-cr-268-CEM-EJK, Doc. 1).[1] After a jury trial, Petitioner was convicted as charged. (Criminal Case, Doc. 57). The Court sentenced Petitioner to concurrent 120-month terms of imprisonment for Counts One and Three, to consecutive 24-month terms of imprisonment for Counts Two, Four, and Six, and to a consecutive 30-month term of imprisonment for Count Five, for a total 174-month term of imprisonment. (Criminal Case, Doc. Nos. 74 and 87). Petitioner appealed, and the Eleventh Circuit Court of Appeals affirmed *per curiam*. (Criminal Case, Doc. 98).

## II. LEGAL STANDARD

To prevail on an ineffective assistance of counsel claim, Petitioner must prove two prongs. First, Petitioner "must show that counsel's performance was deficient." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, Petitioner "must show that the deficient performance prejudiced the defense." *Id.* A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689-90. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *Gates v. Zant*, 863 F.2d 1492, 1497 (11th Cir. 1989).

[1] Hereinafter Criminal Case 6:16-cr-268-CEM-EJK will be referred to as "Criminal Case."

## III. ANALYSIS

### A. Claim One

Petitioner alleges that counsel was ineffective for failing to accept the Government's plea offer on his behalf. (Doc. 1 at 4). According to Petitioner, the Government offered a sentence of "77-96 months' incarceration," and Petitioner told his attorney to accept the offer. (Doc. 1-2 at 1). When Petitioner later inquired into the matter, he learned the plea offer "[was] off the table." (*Id.*).

A criminal defendant is entitled to effective assistance of counsel, including during plea negotiations. *Lafler v. Cooper*, 566 U.S. 156 (2012). For a claim that a defendant would have entered a plea but for counsel's ineffectiveness, a defendant must show there is a reasonable probability that a plea offer would have been presented to the court, the court would have accepted the terms of the plea, and the plea offer terms would have been less severe than the sentence that was imposed. *Id.* at 164.

The Government has provided a sworn affidavit from Petitioner's attorney, who attests that he conveyed the plea to Petitioner, and Petitioner rejected the plea. (Doc. 3-2 at 2). Counsel further attests when he visited Petitioner several days prior to the commencement of trial, Petitioner reiterated that he did not want to plead guilty. (*Id.*). Petitioner disputes the affidavit. (Doc. 6 at 2-3).

The Eleventh Circuit has stated that a district court may not simply reject a petitioner's allegations in favor of his trial counsel's when faced with

uncorroborated allegations of both petitioner and counsel. *See Gomez-Diaz v. United States*, 433 F.3d 788, 793 (11th Cir. 2005) (remanding to the district court to hold an evidentiary hearing to establish the content of the communications between the petitioner and his attorney where the petitioner's pleadings, broadly construed, alleged that his lawyer failed to perfect an appeal when asked to do so); *Gallego v. United States*, 174 F.3d 1196, 1198-99 (11th Cir. 1999) (stating that the Eleventh Circuit cannot adopt a "per se 'credit counsel in case of [a] conflict rule'").

While the affidavits supplied by the Government suggest that Petitioner rejected the Government's plea offer, the Court may not credit counsel's version of events over Petitioner's sworn statements. Thus, the Court finds that a question of fact exists as to whether Petitioner intended to accept the guilty plea and counsel rendered constitutionally ineffective assistance during the plea process. Consequently, the Court concludes that an evidentiary hearing is warranted to determine whether Petitioner has met the standard set forth in *Lafler*.

**B. Claim Two**

Petitioner asserts that he asked counsel to file a motion to suppress the evidence seized from his storage units; however, counsel did not do so despite assuring him he would file such a motion. (*Id.* at 1-2). Petitioner admits that law enforcement obtained a search warrant to search two storage units. (Doc. 6 at 6). Petitioner contends, however, that the information used by law enforcement in the application for the search warrant was based on a prior illegal search of his vehicle,

and therefore, the probable cause to search the storage units was nullified. (Doc. 6 at 6-7).

The Fourth Amendment protects persons from unreasonable searches and seizures, providing in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause." U.S. Const. amend. IV. The general rule is that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject to only a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quotation omitted).

The record reflects that Agent Adam Steuerwald ("Agent Steuerwald") of the Brevard County Sheriff's Office obtained a search warrant to search two storage units leased to Petitioner, wherein the Agent believed Petitioner had stored large quantities of cannabis. (Doc. 6-1 at 4-8). Agent Steuerwald attested that a canine unit had alerted to the "presence of an odor of illegal contraband" in the units leased to Petitioner. (*Id.* at 6). The affidavit in support of the search warrant also noted that law enforcement found a package containing approximately one-quarter pound of cannabis during the search of Petitioner's vehicle after a traffic stop. (*Id.* at 5). According to Petitioner, the state court later found that the traffic stop was conducted without probable cause. (Doc. Nos. 6 at 6; 6-1 at 1).

The Eleventh Circuit has held that probable cause arises when a drug-trained canine alerts to presence of drugs. *See United States v. Holloman*, 113 F.3d 192, 194 (11th Cir. 1997); *United States v. Banks*, 3 F.3d 399, 402 (11th Cir. 1993). Therefore, even if the initial search of Petitioner's vehicle was improper, there was an independent basis upon which Agent Steuerwald had probable cause to obtain the search warrant for the storage units. The prior illegal police conduct did not render the later procurement of the search warrant improper. *See United States v. Jackson*, 548 F. Supp. 2d 1314, 1324 (M.D. Fla. 2008) (concluding when an officer has an independent source of evidence to search, prior illegal conduct will not render a search illegal under the Fourth Amendment).

Therefore, counsel did not act deficiently because he had no basis to file a motion to suppress the evidence obtained from the search of Petitioner's storage units. Accordingly, Claim Two is denied.

**C. Claim Three**

Petitioner contends that counsel was ineffective for failing to challenge the loss amounts at the sentencing hearing, resulting in a sixteen-level enhancement of his Guidelines Range for ten or more victims. (Doc. 1 at 7). The Presentence Investigation Report ("PSR") reflects that Petitioner received a two-level enhancement, as opposed to a sixteen-level enhancement, because the offenses involved ten or more victims. (Criminal Case, Doc. 67 at 9, ¶ 31). Petitioner received a sixteen-level enhancement because the loss amount exceed $1,500,000 but did not

exceed $3,500,000. (*Id.* at 8, ¶ 30). Counsel did not object to either enhancement. (Criminal Case, Doc. 87).

Petitioner has not demonstrated that he is entitled to relief on this claim. The Government presented evidence at trial that Petitioner had in his possession one hundred or more debit cards and lists of names, dates of birth, and social security numbers. (Criminal Case, Doc. No. 94 at 17-41). Additionally, Petitioner filed false tax returns for approximately forty-five people. (*Id.* at 133-39). Thus, counsel had no basis to object to the enhancement for ten or more victims, and his actions did not amount to deficient performance.

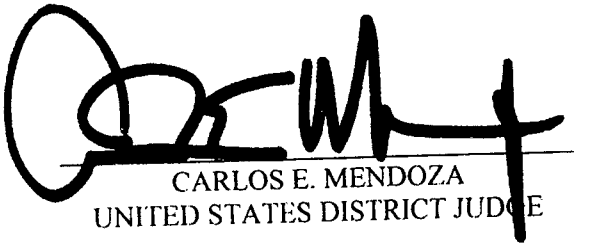
When calculating loss for sentencing purposes, a district court "looks to the greater of actual loss or intended loss." *United States v. Willis*, 560 F.3d 1246, 1250 (11th Cir. 2009) (citing U.S.S.G. § 2B1.1(b)(1), cmt. n.3(A)). Intended loss is "the pecuniary harm that was intended to result from the offense." *Id.* The total loss in this case was $823,797, and the intended loss amount was $1,677,168, based on Petitioner's actions of filing of fraudulent tax returns and possessing 100 or more debit cards. (Criminal Case, Doc. 67 at 7-8, ¶¶ 20 and 22). Because the intended loss was greater than the actual loss, it was properly used in calculating the loss attributable to Petitioner's offenses. Consequently, counsel had no legal basis to object to this enhancement. Petitioner has not met his burden of demonstrating that counsel acted deficiently or that prejudice resulted. Accordingly, Claim Three is denied.

## IV. CONCLUSION

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

1. The Court will hold an evidentiary hearing on Petitioner's claim that counsel rendered ineffective assistance by failing to accept the Government's plea offer. The evidentiary hearing will be set at a telephonic hearing once counsel is appointed. The order appointing counsel will set the telephonic hearing date.
2. Claims Two and Three contained in the Motion to Vacate, Set Aside, or Correct Sentence (Doc. 1) are **DENIED**.

**DONE** and **ORDERED** in Orlando, Florida on November 22, 2022.



CARLOS E. MENDOZA
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party