

APPENDIX

21-2306

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- (B). Deni~~al~~ of rehearing,
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A

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

No: 21-2306

Bryan Lee Gregory

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:20-cv-03294-SRB)

JUDGMENT

Before COLLOTON, GRUENDER, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

Appellant's motions for a briefing schedule and for remand are also denied.

October 01, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

B

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

B

No: 21-2306

Bryan Lee Gregory

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:20-cv-03294-SRB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 21, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

A

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION**

JUDGMENT IN A CIVIL CASE

BRYAN L. GREGORY,

Movant,

V.

Case No. 20-3294-CV-S-SRB-P
(Criminal No. 17-03044-01-CR-S-SRB)

UNITED STATES OF AMERICA,

Respondent.

- ☐ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ **DECISION OF THE COURT.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: ORDERED that Movant's motion to vacate sentence pursuant to 28 U.S.C. § 2255 is denied. Movant's motions to stay proceedings and for "production of material evidence" (Docs. 48 and 49) also are denied, and the Court declines to issue a certificate of appealability. The Clerk of the Court shall enter judgment accordingly and dismiss this case.

Entered on: May 18, 2021.

PAIGE WYMORE-WYNN
CLERK OF COURT

/s/ C. Davies
(By) Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

BRYAN L. GREGORY,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

)
)
)
)
) Case No. 20-3294-CV-S-SRB-P
) (Criminal No. 17-03044-01-CR-S-SRB)
)
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)

ORDER DENYING MOTION TO VACATE SENTENCE (28 U.S.C. § 2255)
AND DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY

Movant pled guilty to being a felon in possession of a firearm, and the Court sentenced him to 120 months' imprisonment. Crim. Doc. 97 (judgment). Movant appealed, and the Court of Appeals affirmed, concluding that Movant knowingly and voluntarily pled guilty, that his challenge regarding the denial of a suppression motion was foreclosed by his valid guilty plea, and that there was no error regarding the sentence imposed. Crim. Doc. 111-1 (unpublished opinion). This case involves Movant's motion to vacate sentence pursuant to 28 U.S.C. § 2255, filed *pro se*, in which he asserts numerous grounds for relief. *See* Docs. 16 and 18 (amended motion and supplemental statement).¹

At the outset, the Court notes that a "plea of guilty is a solemn act not to be disregarded because of belated misgivings about its wisdom." *United States v. Green*, 521 F.3d 929, 931 (8th Cir. 2008) (citations omitted). The Court also notes that Movant bears the burden of proving his claims for relief under § 2255. *Kress v. United States*, 411 F.2d 16, 20 (8th Cir. 1969).

¹As Respondent correctly notes, "Gregory misnumbers [some of] his grounds[.]" Doc. 22, p. 1, n.1 (suggestions in opposition to § 2255 relief). For example, it appears that Movant identifies no claims as grounds 33, 36, and 37, *see* Doc. 16, pp. 59-65, 71-73 (amended motion), and that he has identified two claims as ground 18, *see id.* at 25-27, and two claims as ground 40, *see id.* at 75. The Court will address Movant's claims as he has numbered them.

The Grounds for Relief That May Be Reviewed in This Case

When Movant pled guilty, in exchange for the Government's agreement "not to bring any additional charges . . . related to [Movant's] possession of a firearm by a convicted felon," Crim. Doc. 76, p. 4, he agreed to waive appellate and post-conviction (§ 2255) rights as to all but three types of claims – those alleging ineffective assistance of counsel, prosecutorial misconduct, and an illegal sentence, *id.* at 10, ¶ 15. As indicated above, the Court of Appeals affirmed Movant's sentence, thereby foreclosing all sentence-related claims Movant makes in this case.

In grounds 7, 11-13, 15, 16, 20-25, 27, 30, 39, and 40, Movant claims he was denied effective assistance of counsel. Doc. 16, pp. 10, 12, 17, 18, 23, 24, 31-40, 46, 50, 73, and 75 (amended motion). To prevail on these claims, Movant must demonstrate that his attorney's performance was both constitutionally deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (*Strickland* standard applies to the performance of plea counsel). Specifically:

In grounds 7, 11-13, and 25, Movant claims his attorney conspired with the prosecutor regarding the application of a sentencing enhancement and was otherwise ineffective regarding the application of sentencing enhancements. Doc. 16, pp. 10-21, 40-41 (amended motion). However, the Court of Appeals found no error in the enhancement of Movant's sentence. Doc. 111-1, pp. 2-3 (unpublished opinion). Given this finding, Movant cannot demonstrate a constitutional violation under the *Strickland/Hill* standard. Relief is denied on grounds 7, 11-13, and 25.

In grounds 15 and 16, Movant claims that his attorney misled him and otherwise provided ineffective assistance regarding the stipulated facts. Doc. 16, pp. 23-25 (amended motion).

In ground 20, Movant claims his attorney withheld from him certain evidence that was presented at the suppression hearing. *Id.* at 31-33. In grounds 21-23, 27, and 30, Movant claims, albeit unclearly, that his attorney suffered from conflicts of interest. *Id.* at 33-38, 46-47, and 50-51. In grounds 24 and 40, Movant faults his attorney for not challenging the indictment. *Id.* at 39-40, 75. In ground 39, Movant claims he received no benefit from the plea agreement negotiated by his attorney. *Id.* at 73-75. As to all of these claims, having carefully reviewed the record, the Court finds that Movant suffered no *Strickland/Hill* prejudice. This finding is bolstered by the Court of Appeals' determination that Movant "knowingly and voluntarily entered his guilty plea[.]" Doc. 111-1, p. 2 (unpublished opinion). Relief is denied on grounds 15, 16, 20-24, 27, 30, 39, and 40.

In grounds 5, 17-19, 35, 38, and 41, Movant claims he was the victim of government misconduct because the prosecutor violated the plea agreement regarding the enhancement of Movant's sentence and by advocating for a three-year term of supervised release, withheld video and photographic evidence, suborned perjury, and engaged in misconduct before the grand jury. Doc. 16, pp. 9, 25-31, 71-75 (amended motion). To prevail on these claims, Movant must show both "flagrant misconduct and substantial prejudice." *See United States v. Wadlington*, 233 F.3d 1067, 1073 (8th Cir. 2000). Having carefully reviewed Movant's claims, the Court finds that he has shown neither flagrant prosecutorial misconduct nor substantial prejudice. Relief is denied on grounds 5, 17-19, 35, 38, and 41.

The Remaining Grounds for Relief

In the remaining grounds for relief, Movant asserts claims involving his access to the

courts,² the indictment, his innocence, jurisdiction, the presentence investigation report, the validity of his guilty plea, and other error that he attributes to this Court. Doc. 16, pp. 4-9, 16, 12-14, 21, 27, 41, 47, 49, 52-65, 72. Because Movant waived his right to present these claims, relief is denied on grounds 1-4, 6, 8-10, 14, 18, 26, 28, 29, 31, 32, and 34.

As Movant's "one last issue," which he misnumbers as ground 49, Movant claims that the Court of Appeals "violated the plea agreement." Doc. 18, p. 1. This Court is unable to consider such a claim.

Conclusion

For the reasons set out above, Movant's motion to vacate sentence pursuant to 28 U.S.C. § 2255 is denied. Movant's motions to stay proceedings and for "production of material evidence" (Docs. 48 and 49) also are denied,³ and the Court declines to issue a certificate of appealability. See 28 U.S.C. § 2253(c)(2) (certificate of appealability may be issued "only if [Movant] has made a substantial showing of the denial of a constitutional right"). The Clerk of the Court shall enter judgment accordingly and dismiss this case.

So **ORDERED**.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: May 18, 2021.

²In *United States v. Cline*, No. Civ. 04-3400-SAC, 2005 WL 1124403, at *2 (D. Kan. May 10, 2005), Judge Crow found that a "claim of lack of access [to the court] must be brought as a separate civil rights action, and is not properly included in [a] § 2255 motion." (citation omitted). The same is true here. To the extent that Movant claims he has been denied access to this Court, see, e.g., Doc. 16, p. 59 (amended motion), the record clearly disproves his claim.

³Plaintiff's reply suggestions to these motions are due on May 27, 2021, but the Court finds that further briefing is unnecessary.

1 THE DEFENDANT: Yes, sir. At this moment I wish to
2 fire my attorney. I wish to act pro se so my motions can be
3 heard.

4 For starters of it is, the State has violated their
5 plea agreement with me. For starters of it is, whenever we
6 first made our plea agreement, it was based off some points on
7 what was going to be added and what not was going to be added,
8 what can be argued, what was not going to be argued, and he
9 added another section after the fact that wasn't contained in
10 the plea agreement.

11 Furthermore, it -- he involved a day that I didn't
12 know I was -- that I didn't plead guilty to. I thought I was
13 entering a plea of guilty to the day that the firearm was
14 seized from me. Now he's trying to add another day to it,
15 which I would have never pleaded guilty -- entered a guilty
16 plea to my case based off of that, for the simple fact of it is
17 I wasn't guilty of having possession of a firearm that day.

18 THE COURT: All right. I hear you. If you want to
19 fire your attorney, I don't think I can really stop you. I'm
20 not going to hear any of your motions. I've already denied
21 them.

22 THE DEFENDANT: So I'm -- in the end, your Honor,
23 you know, I don't get no due process of law?

24 THE COURT: You're getting all the due process
25 you're entitled to and apparently all that you can handle. So

1 your attorney? The answer would be yes or no.

2 MR. MUSGRAVE: Don't be crazy, Bryan. No.

3 THE DEFENDANT: Well, they ain't going to give us no
4 continuance on this petition.

5 MR. MUSGRAVE: This young lady here is writing down
6 everything, so make sure you speak up and speak slowly.

7 And just in response to Bryan's complaint about the
8 factual basis, the factual basis of the plea agreement does
9 account for both days, and certainly there's no agreement by
10 the probation office as to the guideline calculation (or agreed
11 upon guidelines) Certainly it's not binding upon you, so...

12 THE COURT: I understand your gripe is about the
13 four points for the firearm in connection with another felony.
14 My gut is to deny that. I don't believe that there's going to
15 be any evidence to show that he was emboldened by having a
16 firearm in the vehicle and that, as you argued in your motion
17 and your sentencing memorandum, Judge Rush found that the gun
18 was left in the vehicle when he took off running.

19 MR. MUSGRAVE: Correct.

20 THE COURT: And so I'm planning on knocking those
21 four points out.

22 But the question for you has a yes or no answer, and
23 it's yes, I want to fire my lawyer; or no, I don't want to fire
24 my lawyer.

25 THE DEFENDANT: Your Honor, even with the six-point

1/7/2019

Gmail - Fwd: USA v. Bryan Gregory - draft PSR

M Gmail

Jones Musgrave <jonesandmusgrave@gmail.com>

Fwd: USA v. Bryan Gregory - draft PSR

1 message

Brady Musgrave <bradymusgravelaw@gmail.com>
To: Jones Musgrave <jonesandmusgrave@gmail.com>

Sun, Jan 6, 2019 at 1:13 PM

please print

----- Forwarded message -----

From: Clark, Casey (USAMOW) <Casey.Clark@usdoj.gov>
Date: Wed, Dec 12, 2018 at 9:46 AM
Subject: USA v. Bryan Gregory - draft PSR
To: Karla Duryea@mow.uscourts.gov <Karla_Duryea@mow.uscourts.gov>
Cc: Anita Rice <anita_rice@mow.uscourts.gov>, Brady Musgrave <bradymusgravelaw@gmail.com>

Karla,

The Government has reviewed the draft PSR on Mr. Gregory and has only one objection:

The Government objects to the exclusion of facts in paragraph 5 detailing that at least one law enforcement officer had to jump out of the way of the defendant's vehicle as he sped through the sobriety checkpoint. Accordingly, due to these facts, the Government objects to the exclusion of an six-level enhancement pursuant to USSG Section 3A1.2(c) in the "Offense Level Computation" section for assaulting a law enforcement officer in a manner creating a substantial risk of serious bodily injury during the course of the offense or immediate flight therefrom.

As the facts show, while the defendant was in possession of the firearm in question while driving a vehicle the night of October 28, 2016, he came upon a sobriety checkpoint. In order to evade discovery by law enforcement of his possession of a weapon, and subsequent arrest, the defendant traveled through the checkpoint at a high rate of speed, failing to yield to commands of uniformed police officers to stop, and forcing at least one officer to jump out of the way of the vehicle, creating fear that such officer would be struck by the defendant's vehicle and be seriously injured.

USSG Section 3A1.2(c) allows for a six-level increase "[i]f, in a manner creating a substantial risk of serious bodily injury, the defendant . . . (1) knowing or having reasonable cause to believe that a person was a law enforcement officer, assaulted such officer during the course of the offense or immediate flight therefrom . . ." The term "assault" means common-law criminal assault. *United States v. Olson*, 646 F.3d 569, 572 (8th Cir. 2011). Common-law assault includes "an act which is intended to, and reasonably does, cause the victim to fear immediate bodily harm; such 'menacing' constitutes assault even if no physical harm is attempted, achieved, or intended." *Id.* at 573 (quoting *United States v. Lee*, 199 F.3d 16 (1st Cir. 1999)). "[M]ere knowledge of consequences is enough," along with the fact that a defendant causes the fear through efforts to protect himself from apprehension through some means. *Olson*, 646 F.3d at 573. Indeed, there is no intent requirement present with the enhancement – it only requires that the defendant acted recklessly. See *United States v. Coleman*, 664 F.3d 1047, 1051 (6th Cir. 2012).

The PSR details that the sobriety checkpoint was clearly marked and staffed with uniformed police officers, thus, the defendant knew or had reasonable cause to believe that the persons he endangered by his reckless driving through such checkpoint, for the purpose of protecting himself from apprehension, were in fact law enforcement officers. Given that one such officer had to jump out of the way of the defendant's speeding vehicle shows that such officer feared immediate and substantial bodily harm from the defendant's conduct during the course of the offense and immediate flight therefrom. Therefore, the Government asserts that the PSR should apply the six-level enhancement under Section 3A1.2(c). The application of this six-level enhancement leads to a correct adjusted offense level of 32 in paragraph 36; a total offense level of 29 in paragraph 40; and a Guidelines range of 120 months.

1 of the statutory max, which is now a within guideline sentence,
2 is a sentence that is appropriate to achieve the purposes of
3 those factors, and we also believe that it is not greater than
4 necessary to achieve those purposes. Thank you.

5 THE COURT: Thank you, sir. Mr. Musgrave, sir?

6 MR. MUSGRAVE: Thank you, your Honor. Based upon my
7 negotiations with the Government, I'm bound to ask for a mid
8 range sentence of the guideline range, so that's what I'll do.
9 I think it's maybe 111, 112, something like that. But I really
10 wish I was in a position to ask for something less on Mr.
11 Gregory's case.

12 As I stated in my sentencing memorandum, this
13 offense in and of itself is certainly not the most egregious.
14 He possessed a deer rifle. This man is absolutely a prohibited
15 possessor, but it was never a concealed handgun, it's not an
16 AR15, it's not an automatic weapon; it's a hunting rifle.

17 He employed Rhonda, whom we've heard about, his
18 paramour, to buy this rifle for a couple of reasons. They
19 don't have a lot. He purchased it for its intended purpose,
20 which is to hunt. Rhonda said along with, "I think he put it
21 in the car that night," that he bought it so she could learn
22 how to deer hunt, to put food on the table.

23 The second reason was Bryan has this really nasty
24 scar on his left arm, and it's from a pit bull attacking him in
25 an adjoining property. He urged Rhonda to buy this gun so he

1 the gun in the car. They asked her where I put the gun at in
2 the car. She said she didn't know, and the reason why she
3 didn't know is because I had left out of the house, our
4 trailer, before she did. I took the gun out there and I put it
5 in the truck and locked it up. That gun wasn't in that car.
6 I'll take a lie detector's test.

7 THE COURT: On the 28th?

8 THE DEFENDANT: Yeah. It --

9 THE COURT: So here's the deal: The testimony we
10 just heard on the 28th has nothing to do with a gun. I totally
11 agree with you. It has to do --

12 THE DEFENDANT: But the --

13 MR. MUSGRAVE: Hold on. Let him finish.

14 THE COURT: The 28th is an enhancement related to
15 what I have now found a reasonable person would believe you put
16 an officer in danger. And so it says nothing about the gun.
17 That's --

18 THE DEFENDANT: All right, officer -- I mean your
19 Honor. If that's the case, that gun is what gives them the
20 right to enhance me on them points, because I had to be in
21 possession of that gun. They can't -- I can't be charged for
22 something --

23 THE COURT: You may be right, and you should make
24 that argument to the 8th Circuit and the U.S. Supreme Court,
25 but I find that this is related conduct, and on the 28th --

A

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APPELEE

VS.

BRYAN GREGORY

APPELLANT

No. 19-1583

$$\begin{array}{c}) \\) \\) \\) \\) \\) \\) \\) \end{array}$$

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WHEREFORE, attorney of record, Brady A. Musgrave prays for leave to withdraw as legal counsel in the above styled cause.

Respectfully Submitted,

/S/ Brady A. Musgrave

Jones & Musgrave
Brady Musgrave # 51937
400 East Walnut St. Suite 130
Springfield, MO 65806
417-866-0110
• 877-762-3540

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And as to the additional motions, I do
3 not believe they state a proper legal basis for the remedy that
4 is being sought.

5 Additionally, Mr. Gregory has counsel that's
6 appointed, and so pro se motions can be automatically denied
7 based upon legal counsel being present. So those are the
8 reasons for those to be denied.

9 THE DEFENDANT: Your Honor?

10 MR. MUSGRAVE: May I make a statement, your Honor?

11 THE COURT: Yes.

12 MR. MUSGRAVE: In speaking to Mr. Gregory, I've told
13 him that I have no intention on getting behind those motions
14 because I don't think they're appropriate for the criminal
15 proceeding, but Bryan has suggested that he'd like a
16 continuance of today's sentencing so that he and I can have
17 more discussions about that. And I know that we're kind of in
18 limbo here because he's filed motions about my removal. We've
19 gone back and forth throughout the proceedings for a year plus,
20 so I'm not sure if he wants me to stay on his case today, but I
21 do know he wants to continue today's proceeding so I can look
22 further into this civil forfeiture issue.

23 THE COURT: Motion for continuance is denied.

24 MR. MUSGRAVE: Yes, your Honor. Thank you.

25 Mr. Gregory, you have something you want to say?

1 THE COURT: Well, you're going to have your day in
2 court. I think it's going to take a while before you get there,
3 but you're going to have your day in court. And whether you have
4 counsel with you or you decide to go *pro se*, which I told you
5 last time, I've seen it happen, and it's a complete disaster.
6 I've never seen it go well for a *pro se* defendant.

7 MR. GREGORY: Yeah --

8 THE COURT: In fact, if they weren't -- if it wasn't in
9 my mind as a prosecutor that they weren't guilty before, after
10 they represented themselves, it was pretty clear. It's not a
11 good idea. We'll go over those questions again. If we're here
12 in three or four months from now and you're unhappy with your new
13 attorney, and we can go down that road, but you know, there's a
14 limit. You don't get to just ask and get everything you want. I
15 would deny it even if an attorney requested it and I felt like it
16 wasn't something that was permissible. But so, whether you have
17 counsel or you're *pro se*, I just think you need to do more
18 listening and less talking.

19 MR. GREGORY: Your Honor, you know, the thing about this
20 hearing that's fixing to come up is, you know, I could show you
21 pictures. You could see pictures of that gun, how it's burnt. I
22 can try to explain it to you how it's burnt, but that's just in
23 layman's terms. I know how that gun got burnt in that truck,
24 where that gun was actually laying in that truck. And I know
25 that the physical evidence of the gun itself contradicts what

1 issue, I have a problem with that because it is based off of
2 testimony of my fiancée and it --

3 THE COURT: The answer is really yes or no. And we
4 can do this hearing without you, back down in the jail cell,
5 and you'll get a copy of the transcript, or we can do it with
6 you here. Do you want to fire this lawyer, yes or no?

7 THE DEFENDANT: No.

8 THE COURT: Let me ask some questions here of the
9 Government. Sir, have you had an opportunity to review the
10 pre-sentence report and to file any objections?

11 MR. CLARK: Yes, your Honor, the Government has had
12 a chance to review the pre-sentence report. There were no
13 objections by the Government. "PREJURY"

14 THE COURT: Very good. From the defense, Mr.
15 Musgrave, sir, I know you've had an opportunity to file your
16 objections to the pre-sentence report. I'm planning on
17 granting your objection to the four level enhancement that the
18 firearm was in connection with another felony. Is there
19 anything else you want to tell me about that?

20 MR. MUSGRAVE: There are two other objections on
21 file. The first one would be related to 3(a)1.1 -- oh,
22 3(a)1.2, excuse me, (c).

23 THE COURT: Is that Paragraph 73?

24 MR. MUSGRAVE: And what I should note for the Court
25 is, Bryan and I have not had a detailed meeting about the