UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 6, 2024
KELLY L. STEPHENS, Clerk

No. 23-5498

SHANE A. FOX,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before: GIBBONS, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Shane A. Fox 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

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SHANE A. FOX,

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ORDER

Before: GIBBONS, Circuit Judge.

Shane A. Fox, a pro se federal prisoner, appeals the district court's judgment denying his motion to vacate, set aside, or correct his sentence filed pursuant to 28 U.S.C. § 2255. Fox moves for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b)(2). Because he fails to meet the required standard, the motion is denied.

In 2020, Fox pleaded guilty to conspiring to distribute 280 or more grams of cocaine base, in violation of 21 U.S.C. § 846, and possessing with the intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1). The district court sentenced him to a total of 300 months of imprisonment, the minimum sentence mandated by statute based on Fox's two prior convictions for serious drug felonies. *See* 21 U.S.C. § 841(b)(1)(A). This court affirmed. *United States v. Fox*, No. 20-6039, 2021 WL 3747190 (6th Cir. Aug. 25, 2021).

In 2022, Fox moved to vacate his convictions under § 2255, claiming that trial counsel performed ineffectively in multiple ways. Relevant here, he claimed that trial counsel failed to adequately advise him during plea negotiations, specifically by not explaining the severity of the charges, his sentencing exposure, or the government's intent to seek an enhanced sentence based on his prior drug offenses. In its response opposing the motion, the government provided an affidavit from Fox's counsel, who stated that he thoroughly discussed these issues with Fox,

explaining to him that the government was seeking an enhanced statutory minimum of 300 months of imprisonment, that an open plea—unlike the government's proposed plea agreement—would allow Fox to argue that his prior drug offenses did not qualify him for the enhanced statutory minimum, that his review of the evidence led him to believe that a conviction at trial was likely, and that Fox would likely receive a sentence in the range of 30 years to life if he were convicted at trial. Fox did not file a reply.

A magistrate judge recommended denying Fox's motion, reasoning that most of his claims were conclusory and undeveloped. As to Fox's claim that counsel provided inadequate advice before his plea, the magistrate judge concluded that it was refuted by counsel's affidavit. The magistrate judge noted that, in any case, the district court explained Fox's sentencing exposure at the plea hearing.

Fox moved for an extension of time to file objections to the report and recommendation, which the district court granted. Instead of submitting objections, however, Fox filed a "Response to the Government's Motion in Opposition to Relief Pursuant to 28 U.S.C. § 2255." Unlike in his § 2255 motion, where he alleged that counsel never explained the possibility of an enhanced mandatory minimum sentence, Fox argued in his response that counsel incorrectly informed him that he would likely receive a sentence from 30 years to life imprisonment if he went to trial. He also claimed that counsel led him to believe that he could successfully argue that Fox's prior convictions did not support the application of the 300-month mandatory minimum, which turned out to be a losing argument.

The district court liberally construed Fox's new filing as timely objections to the report and recommendation, but it overruled them because Fox did not specifically object to or even mention the magistrate judge's report and recommendation or reasoning. It therefore adopted the report and recommendation, denied the § 2255 motion, and denied a COA.

Fox now requests a COA from this court. He focuses solely on trial counsel's allegedly deficient performance during the plea-bargaining process. He therefore forfeits the other claims raised in his § 2255 motion. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002).

Fox argues that he likely would have received the same 300-month sentence if he had gone to trial, and thus he received no benefit from pleading guilty. He also now claims that counsel wrongly advised him that he would receive a mandatory life sentence if he went to trial. Fox further contends that counsel influenced him to plead guilty by promising to argue that his prior convictions did not support the application of a mandatory minimum. Fox asserts that counsel either did not properly research this argument or knew it was frivolous and used it to influence Fox to plead guilty.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the denial of a motion is based on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To satisfy this standard, the applicant 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 v. Cockrell*, 537 U.S. 322, 327 (2003).

As an initial matter, the government points out that Fox did not properly object to the magistrate judge's report and recommendation. Although it is true that Fox's response did not contain specific objections to the report and recommendation, reasonable jurists could debate whether it nonetheless sufficiently preserved Fox's broad claim that counsel misadvised him during the plea-bargaining process. In any case, assuming that Fox's claim is preserved, reasonable jurists could not debate that Fox fails to make a substantial showing of the denial of a constitutional right.

Fox claims that trial counsel performed ineffectively during the plea-bargaining process. To show that counsel performed ineffectively, Fox must establish that (1) counsel performed deficiently and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Counsel's performance is considered deficient when it falls "below an objective standard of reasonableness." *Id.* at 688. There is a "strong presumption" that an attorney

"render[s] adequate assistance and [makes] all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689-90. To establish prejudice in the plea-bargaining context, Fox 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).

Fox now claims that counsel misadvised him that he would receive a life sentence, or a sentence in the range of 30 years to life, if he went to trial; that the prospect of that life sentence motivated him to plead guilty; that counsel told him that he "could argue" that his prior drug offenses did not qualify for the statutory enhancement, which also motivated him to plead guilty; and that he did not realize that his guidelines range "could have been as low as 23.5 years" if he went to trial. First, it was not unreasonable for counsel to inform Fox that he could receive a higher sentence if he went to trial. But even assuming that counsel misadvised Fox, reasonable jurists could not debate that he was not prejudiced. This is because the district court fully and thoroughly advised him of his sentencing exposure prior to his plea. The district court informed Fox that if it found he had two or more prior serious drug felonies, his statutory range would be 25 years to life imprisonment. Fox also knew that the argument concerning his prior drug offenses was not a sure thing because the district court discussed it with counsel and asked for briefing on whether those convictions would qualify as predicate offenses for an enhanced statutory minimum in light of recent changes made by the First Step Act of 2018. The district court then warned Fox that "if the Court finds that you do have two or more prior serious drug felonies, the minimum term by statute is a 300-month term." The district court discussed the sentencing guidelines, informing Fox that his guidelines range could be 262 to 327 months of imprisonment, but that with no plea agreement, everything within the statutory range was "in play." It also informed Fox that if he pleaded guilty, he likely would receive a guidelines reduction based on his acceptance of responsibility. The district court directly asked Fox if "any promises" had been "made to you by your lawyers regarding what your sentence is going to be if you plead guilty," and Fox responded "No, sir." "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). Based on all this information that was provided to Fox during his plea

hearing, he was fully informed of his sentencing exposure prior to his plea and knew that he could receive a higher sentence if he went to trial but that his sentence would ultimately be determined by the district court. He therefore does not demonstrate a reasonable probability that, but for the erroneous advice he alleges that counsel gave him, "he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

Fox thus fails to make a substantial showing of the denial of a constitutional right. Accordingly, the application for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CRIMINAL CASE NO. 19-52-DLB-MAS-1
CIVIL ACTION NO. 22-98-DLB-MAS

UNITED STATES OF AMERICA **PLAINTIFF**

v. **ORDER ADOPTING REPORT AND RECOMMENDATION**

SHANE A. FOX (1) **DEFENDANT**

****

This matter is before the Court upon the November 29, 2022 Report and Recommendation ("R&R") of United States Magistrate Judge Matthew A. Stinnett (Doc. # 324), wherein he recommends that Defendant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. # 316) be denied. Defendant has filed a document styled "Response to the Government's Motion in Opposition" (Doc. # 327), which the Court construes as his timely filed objections to the Magistrate Judge's R&R. Thus, with Defendant having filed Objections, and the time for filing a Response having passed with none being filed, the R&R is ripe for the Court's review. For the reasons stated herein, Defendant's construed Objections (Doc. # 327) are **overruled**, the R&R (Doc. # 324) is **adopted in full** as the findings of fact and conclusions of law of the Court, and Defendant's Motion (Doc. # 316) is **denied**.

I. FACTUAL AND PROCEDURAL BACKGROUND

In February 2020, Defendant Shane Fox pled guilty to one count of conspiracy to distribute cocaine and one count of possession with intent to distribute cocaine (Doc. #

144) stemming from his involvement and leadership in an extensive drug trafficking operation located in Mason County, Kentucky. (*See* Doc. # 89). No written plea agreement was entered (*id.*), and following his guilty plea, the Court sentenced Mr. Fox to a total term of 300 months of imprisonment followed by 10 years of supervised release. (Doc. # 279). The Sixth Circuit affirmed Mr. Fox's conviction and sentence on direct appeal in August 2021. *United States v. Fox*, No. 20-6039, 2021 WL 3747190, at *1 (6th Cir. Aug. 25, 2021). Mr. Fox is currently incarcerated at FCI Gilmer in Glenville, West Virginia,.

In August 2022, Mr. Fox filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. (Doc. # 316). In his Motion, Mr. Fox alleges various claims of ineffective assistance of counsel. (*See id.*). The United States filed a Response in opposition to Mr. Fox's Motion in September 2022 (Doc. # 321), and Mr. Fox never filed a reply. The R&R was issued in November 2022 (Doc. # 324), and shortly thereafter, Mr. Fox filed a Motion for an Extension of Time to file his objections to the R&R. (Doc. # 325). The Court granted the extension (Doc. # 326), and Mr. Fox filed a document entitled "Response to the Government's Motion in Opposition" within the extended deadline. (Doc. # 327). For the reasons stated below, that document is construed as Mr. Fox's objections to the R&R.

II. ANALYSIS

A. Mr. Fox's "Response to the Government's Motion" is properly construed as timely-filed objections to the R&R.

First, the Court notes that the document filed by Mr. Fox appears to be a reply brief in support of his original § 2255 motion. (*See* Doc. # 327). Titled "Response to the Government's Motion in Opposition to Relief Pursuant to 28 U.S.C. § 2255," Mr. Fox's

filing rehashes his original arguments in response to the United States' positions. (*Id.*). For example, Mr. Fox has filed an affidavit that he has labeled as "competing" with the affidavit by his prior counsel filed with the United States' response. (*Id.* at 2). Throughout the filing, Mr. Fox persists to argue that his attorney did not properly inform him of sentencing ranges that may apply at trial versus after a guilty plea. (*See generally id.*). That argument formed the primary basis for Mr. Fox's original motion and was addressed by the Magistrate Judge's R&R. (Doc. # 324 at 8-9). Otherwise, the filing contains no mention of the R&R and does not specifically object to any of the Magistrate Judge's findings and conclusions.

However, Mr. Fox was clearly aware of his right to file objections to the R&R, as on December 13, 2022, Mr. Fox filed a motion for an extension of time to file his objections. (Doc. # 325). In that motion, Mr. Fox wrote that he had received the R&R and requested 30 days' time for the R&R to be "properly reviewed, researched, and responded to[.]" (*Id.* at 2). The Court granted his motion, extending the deadline to January 15, 2023. (Doc. # 326). Mr. Fox's responsive filing was received on January 9, 2023, in accordance with the extended deadline. (Doc. # 327). The document is signed and dated January 6, 2023. (*Id.* at 21).

Even though Mr. Fox's filing seems to be a reply brief instead of objections to the R&R, the Court will construe the filing as his objections, because pro se filings are to be construed liberally. *Martin v. Overton*, 391 F.3d 710, 712 (6th Cir. 2004) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). Furthermore, when considering whether a habeas petitioner has waived his right to file objections to an R&R, the court considers whether the petitioner received notice and was provided an opportunity to seek an extension of

time. *Spencer v. Bouchard*, 449 F.3d 721, 724 (6th Cir. 2006). Here, because Mr. Fox actually sought (and received) an extension of time, indicating his receipt of the R&R and his actual notice of the right to file objections, the Court is not inclined to state that Mr. Fox waived his right to file objections as a matter of law. Instead, the Court will liberally construe the filed document as Mr. Fox's objections to the Magistrate Judge's R&R. *Cf. Johnston v. Geise*, 88 F. Supp. 3d 833, 839 (M.D. Tenn. 2015) (construing pro se plaintiff's objections to an R&R while noting that they were "far from a model of clarity"). But unfortunately for Mr. Fox, the Court's liberal construction of his filing is not assistive to him, as his construed objections are non-specific and must be overruled.

B. Mr. Fox's construed objections are non-specific and must be overruled.

Under Federal Rule of Civil Procedure 72(b)(2), a habeas petitioner may object to a magistrate judge's recommended disposition. If the petitioner objects, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1). The district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(c). The Sixth Circuit has held that "only those specific objections to the magistrate's report made to the district court will be preserved for appellate review." *Carson v. Hudson*, 421 F. App'x 560, 563 (6th Cir. 2011) (alteration omitted) (quoting *Souter v. Jones*, 395 F.3d 577, 585 (6th Cir. 2005)). A specific objection "explain[s] and cite[s] specific portions of the report which [counsel] deem[s] problematic." *Robert v. Tesson*, 507 F.3d 981, 994 (6th Cir. 2007) (alteration in original) (quoting *Smith v. Chater*, 121 F.3d 709, 1997 WL 415309, at *2 (6th Cir. July 18, 1997) (unpublished table opinion)).

Here, even construed liberally, Mr. Fox's filing does not make any mention of the Magistrate Judge's R&R. (*See* Doc. # 327). In the absence of specific references to the R&R, Mr. Fox's construed objections are non-specific and cannot be addressed. *Robert*, 507 F.3d at 994. Otherwise, to the extent that Mr. Fox seeks to relitigate arguments made in his original petition, the law is clear that the "R&R process is not designed to allow a litigant merely to rehash the arguments that he made below, hoping for a fresh bite at the judicial apple." *Deters v. Hammer*, 568 F. Supp. 3d 883, 887 (S.D. Ohio 2021) (citation omitted). Accordingly, Mr. Fox's construed objections must be overruled.

III. CONCLUSION

For the reasons stated herein, **IT IS ORDERED** as follows:

(1) The Magistrate Judge's R&R (Doc. # 324) is **ADOPTED IN FULL** as the findings of fact and conclusions of law of the Court;

(2) Defendant Shane Fox's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. # 316) is **DENIED**;

(3) For the reasons set forth in the Magistrate Judge's R&R (Doc. # 324 at 11-12), the Court determines that there would be no arguable merit for appeal in this matter, and therefore, **no certificate of appealability shall issue**; and

(4) A separate Judgment is filed concurrently herewith.

This 11th day of May, 2023.

Signed By:
David L. Bunning DB
United States District Judge

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
AT COVINGTON

CRIMINAL CASE NO. 19-52-DLB-MAS-1
CIVIL ACTION NO. 22-98-DLB-MAS

UNITED STATES OF AMERICA **PLAINTIFF**

v. **JUDGMENT**

SHANE A. FOX (1) **DEFENDANT**

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Consistent with the Order Adopting Report and Recommendation entered today, and pursuant to Federal Rule of Civil Procedure 58, it is hereby **ORDERED** and **ADJUDGED** as follows:

(1) The Magistrate Judge's Report and Recommendation ("R&R") (Doc. # 324) is **ADOPTED IN FULL** as the findings of fact and conclusions of law of the Court;

(2) The Defendant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. # 316) is **DENIED**;

(3) For the reasons set forth in the Magistrate Judge's R&R (Doc. # 324 at 11-12), the Court determines there would be no arguable merit for an appeal in this matter and, therefore, **NO CERTIFICATE OF APPEALABILITY SHALL ISSUE**; and

(4) This matter is **DISMISSED WITH PREJUDICE** and **STRICKEN** from the Court's active docket.

This 11th day of May, 2023.

Signed By:
David L. Bunning DB
United States District Judge