United States Court of Appeals for the Fifth Circuit

No. 20-50529

United States Court of Appeals
Fifth Circuit
FILED
December 2, 2021
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DEQWON SAQUOD LEWIS,

Defendant—Appellant.

Application for Certificate of Appealability from the
United States District Court for the Western District of Texas
USDC No. 1:19-CV-373

ORDER:

Deqwon Saquod Lewis moves for a certificate of appealability ("COA") to appeal the dismissal of his 28 U.S.C. § 2255 petition. Lewis asserts that the district court improperly found that he failed to raise his constitutional claims.

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); *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where, as here, the district court has denied a request for habeas relief on procedural grounds, the movant must show that jurists of reason could find it debatable both whether "the petition

states a valid claim of the denial of a constitutional right" and whether "the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. Lewis has not met this standard.

Accordingly, IT IS ORDERED that the motion for a COA is DENIED.

/s/ Catharina Haynes
CATHARINA HAYNES
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DEQWON SAQUOD LEWIS,
Movant,

-vs-

UNITED STATES OF AMERICA,
Respondent.

CAUSE NO.:
1:19-CV-00373-SS
[A-15-CR-00350(1)-SS]

ORDER

BE IT REMEMBERED on this date the Court reviewed the file in the above-captioned matter, and specifically Movant Deqwon Saquod Lewis's Motion to Vacate under 28 U.S.C. § 2255 [#168] and his Memorandum of Law in Support [#178], the Government's Response [#181] to Lewis's 2255 Motion, Lewis's Reply [#186] thereto, and Lewis's Motion for Leave to Amend [#182] his initial motion to vacate. Having reviewed the documents, the governing law, and the file as a whole, the Court now enters the following opinion and orders.

Background

On December 1, 2015, Lewis was named in a three-count indictment charging him and his codefendant Starisha Moore with two counts of recruiting a person under the age of 18 to engage in a commercial sex act in a manner that affected interstate commerce in violation of 18 U.S.C. §§ 1591(a) and 1591(b)(2) and one count of transporting a person under the age of 18 across state lines with the intent that the person engage in prostitution in violation of 18 U.S.C. § 2423(a). Indictment [#1]. At their arraignment, Lewis and Moore both pleaded not guilty. *See* Minute Entry [#26]. After Lewis and Moore requested continuances, the Court set a trial date for May 23, 2016. *See* Order of Jan. 29, 2016 [#42].

On May 27, 2016, a jury found Lewis and Moore guilty on all three counts. *See* Jury Verdict [#88]. The Court then sentenced Lewis to 300 months on all three counts running concurrently for a total term of imprisonment of 300 months, as well as a five-year term of supervised release on each count that also ran concurrently. J. & Commitment [#114].

On August 16, 2016, Lewis timely filed a notice of appeal. *See* Notice of Appeal [#118]. Lewis's only ground for appeal was that his sentence was unreasonable because the Court failed to credit him for accepting responsibility and because the Court applied a two-point enhancement that lacked empirical support. The Fifth Circuit disagreed with these contentions and affirmed Lewis's conviction and sentence in a per curiam opinion issued on August 22, 2017. *See United States v. Lewis*, 705 F. App'x 234 (2017). Lewis then petitioned the United States Supreme Court for a writ of certiorari, which was denied on April 2, 2018. *Lewis v. United States*, 138 S. Ct. 1454 (2018).

On April 1, 2019, Lewis timely filed a motion to vacate his sentence under 18 U.S.C. § 2255. Lewis claims his sentence should be vacated because his conviction violated his right to due process. *See* Mot. Vacate [#168] at 4–6. Lewis further contends his trial counsel rendered ineffective assistance by failing to elicit mitigating evidence through cross-examination of one of the girls Lewis employed as a sex worker and by failing to move to sever Lewis's and Moore's trials. *See id.* at 7–8. The Government responded on July 10, 2019. Resp. [#181]. That same day, Lewis filed a motion for leave to amend his motion to vacate. Mot. Leave Amend [#182]. After receiving an extension from the Court, Lewis filed his reply to the Government on September 5, 2019. Reply [#186]. Lewis's pending motions are ripe for review.

Analysis

I. Legal Standard

Under § 2255, four general grounds exist upon which a defendant may move to vacate, set aside, or correct his sentence: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the District Court was without jurisdiction to impose the sentence; (3) the sentence imposed was in excess of the maximum authorized by law; and (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255. The nature of a collateral challenge under § 2255 is extremely limited: "A defendant can challenge his conviction after it is presumed final only on issues of constitutional or jurisdictional magnitude . . . and may not raise an issue for the first time on collateral review without showing both 'cause' for his procedural default, and 'actual prejudice' resulting from the error." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991).

II. Application

Lewis presents two classes of claims. First, Lewis contends he suffered from a denial of due process because the statutes he was convicted under are unconstitutionally vague and impermissibly intrude upon the police powers of the States. Second, he contends he suffered from a denial of his right to counsel. The Court considers each class of claims in turn.

A. Due Process Claims

Lewis's motion to vacate includes two due process claims. First, Lewis argues that 18 U.S.C. § 1591 is unconstitutionally vague because it allows for prosecutions "simply for pandering a person under the age of 18 that voluntarily engaged in a commercial sex act" and because it usurps the role of the State's police powers in regulating the sex trade. Mem. Support [#178] at 8–9, 17–19. Second, Lewis argues § 1591 is unconstitutionally vague because it

criminalizes panderers who traffic sex workers who are younger than 18 even though the federal age of consent is 16. *See id.* at 20–29. The Government contends each of these claims are procedurally defaulted because Lewis has failed to show cause for failing to press these arguments during his appeal or prejudice if the Court does not hear his claims. Resp. [#181] at 2.

The Court concludes Lewis's first due process claim is barred due to his procedural default. Citing *Reed v. Ross*, 468 U.S. 1 (1984), Lewis contends he has established cause because his claim is "so novel that his counsel did not have a 'reasonable basis' to raise [it] at trial or on direct appeal." Reply [#186] at 24. But Lewis's situation is very different from *Reed*. In *Reed*, a habeas petitioner sought to bring a claim based on a constitutional rule the Supreme Court had announced and retroactively applied after the petitioner's time to appeal had run. The Supreme Court held that because the constitutional issue was novel during the state habeas proceedings, the petitioner had established cause for failing to press this issue before the state courts. *Id.* at 16. By contrast, in this case not a single legal authority has announced a constitutional rule that aligns with Lewis's claim. Simply put, Lewis fails to show his constitutional claim is novel instead of simply meritless.[1] Accordingly, Lewis's first due process claim is barred.

The Court also concludes Lewis's second due process claim is barred because of his failure to show cause. The closest Lewis comes to showing cause is to imply that this claim relies on a rule announced by the Supreme Court in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), which was announced after the deadline for Lewis's appeal had elapsed. *See* Mot. Vacate [#168] at 6. Lewis asserts that *Esquivel-Quintana* held "that the age of sexual consent in the

[1] At the risk of announcing dicta, Lewis's first claim is unquestionably meritless. For starters, 18 U.S.C. § 1591 says nothing about the voluntariness of the sex worker and so does not punish panderers of "voluntary" sex workers. Second, the statute is not equivalent to state solicitation laws since § 1591 requires actions by a panderer that "affect[] interstate commerce." 18 U.S.C. § 1591(a)(1). Third, even if there were significant overlap between state and federal laws on sex trafficking, Lewis offers no authority holding that such overlap renders a federal law unconstitutionally vague.

[f]ederal [s]ystem is 16 years" and that this holding renders § 1591 unconstitutionally vague because it results in "disparate treatment among similarly situated defendants." Mem. Support [#178] at 20–21. Both propositions, however, are incorrect. First, *Esquivel-Quintana* did not hold the federal age of consent was 16, but rather held that "in the context of statutory rape offenses that criminalize sexual intercourse *based solely on the age of the participants*, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." *Esquivel-Quintana*, 137 S. Ct. 1568 (emphasis added). Second, even if *Esquivel-Quintana*'s holding could be read as broadly as Lewis advocates, that would not make § 1591 impermissibly vague because the statute explicitly sets liability for recruiting people under the age of 18, not for recruiting undefined "minors." *See* 18 U.S.C. § 1591(a) (making it criminal to recruit a person to commit a sex act affecting interstate commerce "knowing, or . . . in reckless disregard of the fact . . . that the person has not attained the age of 18 years"). Thus, there is no reason to think *Esquivel-Quintana* has led or will lead to "disparate treatment" among defendants convicted under § 1591. Lewis thus fails to show cause for not presenting his second due process claim to the court of appeals, and this claim is accordingly denied as barred by Lewis's procedural default.

Lewis raises two additional due process claims in an attachment to his motion to amend.[2] First, he claims § 1591 violates the Tenth Amendment by regulating in an area that is exclusively left to the States. Mot. Amend [#182-2] at 9–16. Second, he contends this Court lacked jurisdiction to hear his case because Congress never formally enacted the provision under which he was sentenced.

Both claims are barred because of Lewis's procedural default. Lewis does not even attempt to show cause for his failures to press these arguments during his appeal. As Lewis fails

[2] Lewis also reiterates his claim that § 1591 is unconstitutionally vague because it applies to conduct that is already policed by the States. *See* Mot. Amend [#182-2] at 2–9. This claim is barred for the same reasons as his first claim, *see supra* at 4.

to demonstrate cause for any of the procedurally defaulted claims presented in his motion to amend, the Court declines to consider them here.

In sum, all of Lewis's due process claims are procedurally barred because of his failure to pursue these arguments during his appeal. Accordingly, the Court denies Lewis's first two claims. Additionally, because Lewis is barred from raising the claims in his proposed amended motion to vacate, amendment of his motion would be futile. The Court therefore denies Lewis's motion for leave to amend. *See Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 872–73 (5th Cir. 2000) (explaining that a district court may deny a motion to amend as futile where the amended pleading "fail[s] to state a claim upon which relief could be granted").

B. Ineffective Assistance of Counsel Claim

Lewis also brings two claims of ineffective assistance of counsel. A defendant's claim of ineffective assistance of counsel gives rise to a constitutional issue and is cognizable under § 2255. *United States v. Walker*, 68 F.3d 931, 934 (5th Cir. 1996). In general, such claims are also not subject to a movant's procedural default. *See id.* ("[A]bsent unusual circumstances, ineffective assistance of counsel, if shown, is sufficient to establish the cause and prejudice necessary to overcome a procedural default.").

To prevail on a claim of ineffective assistance of counsel, a movant must show that (1) his counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

First, counsel's performance is deficient if it falls below an objective standard of reasonableness. *Id.* A court will not find ineffective assistance of counsel merely because it disagrees with counsel's trial strategy. *Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir. 1999). A court's review of counsel's performance must be highly deferential, with a strong presumption

that the performance was reasonable. *Strickland*, 466 U.S. at 689. Moreover, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Id.*

Second, to demonstrate prejudice, a movant must show "a reasonable probability that the result of the proceedings would have been different but for counsel's unprofessional errors." *Crane*, 178 F.3d at 312. "[T]he mere possibility of a different outcome is not sufficient to prevail on the prejudice prong." *Id.* at 312–13 (internal quotation marks omitted) (quoting *Ransom v. Johnson*, 126 F.3d 716, 721 (5th Cir. 1997)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Lewis complains of two deficiencies by his trial counsel. First, Lewis contends his counsel failed to vigorously cross-examine one of the girls who worked for Lewis ("C.M.") by inquiring into, *inter alia*, the fact that C.M. spent time with her mother while she was employed by Lewis, C.M.'s drug use and cohabitation with her drug dealer, Lewis's refusal to permit a 15-year-old to join his "crew" because she was too young, and Lewis's efforts to prevent C.M. from using drugs. *See* Mem. Support [#178] at 29–30. Second, Lewis contends his counsel failed to timely move to sever Lewis's trial from Moore's. *See id.* at 32. Because Lewis fails to show how either of these purported deficiencies prejudices his case, the Court concludes both of his ineffective assistance claims should be denied. *See Strickland*, 466 U.S. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.").

As to his first claim, Lewis contends he was prejudiced by his counsel's deficient cross-examination because a proper cross-examination would have elicited responses that would have mitigated Lewis's role in the offense, which would have resulted in a reduced sentence. *See id.* at

31. But as the Government notes, this evidence came before the Court either through cross-examination of C.M., direct examination of C.M., or examination of other members of Lewis's "crew." For example, Lewis's counsel was able to get C.M. to admit on cross that she could communicate with her mother and friends while she was a sex worker, that other girls in Lewis's "crew" were permitted to leave, that C.M. turned down an offer to join another group of sex workers, and that C.M. recruited friends to join Lewis's "crew." *See* Resp. [#181] at 4. C.M. also testified about her drug use and living with her drug dealer on direct examination. *See id.* Therefore, Lewis's purported mitigation evidence was introduced into the record and was considered by the Court when it sentenced Lewis. Lewis consequently fails to show that a more effective cross-examination would have resulted in a different outcome at sentencing, and thus the Court denies his first ineffective assistance of counsel claim.

As to his second claim, Lewis insists that had his counsel timely moved to sever his case from Moore's, the result at trial would have been different. But this argument fails because a motion to sever Lewis's case would not have been granted. "Generally, persons who are indicted together should be tried together." *United States v. McCord*, 33 F.3d 1434, 1452 (5th Cir. 1994) (internal quotation marks omitted); *see also Zafiro v. United States*, 506 U.S. 534, 537 (1993) ("There is a preference in the federal system for joint trial of defendants who are indicted together."). Overcoming this preference requires a defendant to show "(1) the joint trial prejudiced him to such an extent that the district court could not provide adequate protection; and (2) the prejudice outweighed the government's interest in economy of judicial administration." *United States v. DeVarona*, 872 F.2d 114, 120–21 (5th Cir. 1989). The prejudice alleged by the defendant must be "specific and compelling." *See United States v. Krenning*, 93 F.3d 1257, 1267 (5th Cir. 1996).

Lewis's alleged prejudice is neither specific nor compelling. The prejudice is not specific because it does not describe precisely what aspects of a joint trial prejudiced Lewis; rather, it is based solely on Lewis's assertion that Moore's counsel "shift[ed] the blame entirely on[to] [Lewis]" and "acted in the capacity of a second prosecutor." Mem. Support [#178] at 32. The prejudice is not compelling because it is entirely rooted in the fact that Lewis and Moore had antagonistic defenses, and "[m]utually antagonistic defenses are not prejudicial *per se*." *Zafiro*, 506 U.S. at 538. Because Lewis fails to present any evidence that the prejudice of a joint trial outweighed the government's interest in a joint trial, he has failed to establish that the Court was reasonably likely to grant a motion to sever. This means Lewis fails to show he was prejudiced by his counsel's allegedly deficient performance, and the Court accordingly denies his second ineffective assistance claim.

III. Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255 "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(a). Pursuant to Rule 11 of the Federal Rules Governing Section 2255 Proceedings, the district court must issue or deny a certificate of appealability when it enters a final order adverse to the movant.

A certificate of appealability (COA) may issue only if a movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). In cases where a district court rejected a movant's constitutional claims on the merits, "the 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). "When a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying

constitutional claim, a COA should issue when the petitioner shows, at least, 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." *Id.*

In this case, reasonable jurists could not debate the denial of Lewis's motion to vacate on substantive or procedural grounds, nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack*, 529 U.S. at 484). Accordingly, a certificate of appealability shall not be issued in this case.

Conclusion

The Court declines to hear Lewis's due process claims because he failed to press those claims before the court of appeals and does not establish either cause for this failure or resulting prejudice. The Court denies Lewis's ineffective assistance of counsel claims because he has failed to establish prejudice. Finally, the Court denies Lewis's motion to amend as futile because each of the claims contained therein have been procedurally defaulted.

Accordingly,

IT IS ORDERED that Movant Deqwon Saquod Lewis's Motion to Vacate under 28 U.S.C. § 2255 [#168] is DENIED, and

IT IS FURTHER ORDERED that Lewis's Motion for Leave to Amend [#182] is DENIED, and

IT IS FINALLY ORDERED that a certificate for appealability is DENIED.

SIGNED this the twenty-third day of April 2020.

SAM SPARKS
SENIOR UNITED STATES DISTRICT JUDGE

Additional material from this filing is available in the Clerk's Office.