United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
November 27, 2024
Lyle W. Cayce
Clerk

No. 24-50354

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

TANNER LANCE KING,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Western District of Texas
USDC No. 7:23-CV-137
USDC No. 7:20-CR-330-1

UNPUBLISHED ORDER

Before HO, WILSON, and RAMIREZ, *Circuit Judges*.

PER CURIAM:

Tanner Lance King, federal prisoner # 15649-509, moves for a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion challenging his conviction for possession with intent to distribute 50 grams or more of actual methamphetamine. He argues that his trial counsel was ineffective for advising him not to accept the

Government's plea offer, in which it agreed not to oppose a reduction for acceptance of responsibility. He also argues that the district court improperly denied his § 2255 motion without holding an evidentiary hearing.

To obtain a COA, King must make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), by showing that reasonable jurists could find the district court's assessment of his constitutional claims debatable or wrong, *see Slack v. McDaniel*, 529 U.S. 473, 484 (2000). King has not made such a showing. Accordingly, his COA motion is DENIED. His motion for leave to proceed in forma pauperis on appeal is also DENIED.

As King fails to make the required showing for a COA on his constitutional claims, we do not reach whether the district court erred by denying an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

UNITED STATES OF AMERICA, §

v. §

(1) TANNER LANCE KING §

MO:20-CR-00330-DC
MO:23-CV-00137-DC

ORDER

BEFORE THE COURT is Defendant Tanner King's Motion to Vacate, Set Aside, or Correct his sentence under 28 U.S.C. § 2255. After considering the record and the Parties' briefing, the Court will deny Defendant's motion.

BACKGROUND

On January 6, 2021, Defendant pleaded guilty to one count of possession with intent to distribute 50 grams or more of actual methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A).[1] Defendant had, however, rejected the Government's "standard plea bargain agreement," which stated the Government would not oppose any acceptance of responsibility credits.[2] As stated by Defendant's counsel at the hearing, the reason for the rejection was that the Government's offer was "not anything that benefits my client."[3]

After Defendant's plea, the United States Probation office prepared a Pretrial Sentencing Report ("PSR"), which initially contained a three-level reduction for acceptance

[1] Doc. 45.
[2] Doc. 45 at 7.
[3] *Id.*

of responsibility.[4] But after Defendant was involved in various disciplinary incidents involving contraband at the Rolling Plains Detention Center, the PSR was amended to remove the acceptance of responsibility points.[5] In the end, the PSR recommended a guideline range of 210 to 262 months in the Bureau of Prisons.[6]

At sentencing, Defendant objected to the removal of the acceptance of responsibility reductions.[7] The Court overruled Defendant's objections and sentenced him to 262 months based on a total offense level of 32 with a criminal history category IV.[8] Defendant then appealed his sentence, which was affirmed by the Fifth Circuit.[9]

Defendant now moves to vacate, set aside, or correct his sentence under § 2255, arguing his counsel's advice—that the Government's plea offer "to not oppose any acceptance of responsibility credits" was not of any benefit to him—constituted ineffective assistance of counsel.[10] The issues are fully briefed and ripe for adjudication.

LEGAL STANDARD

Under 28 U.S.C. § 2255(a), a prisoner may move "to vacate, set aside or correct" a federal court's sentence if that sentence was imposed "in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." "A defendant can challenge a final conviction, but only on issues of

[4] Doc. 34-1.
[5] *Id.*
[6] *Id.* 34-3.
[7] Doc. 48 at 4.
[8] Doc. 34-18.
[9] *See United States v. Defendant*, No. 21-50543 (5th Cir. Apr. 13, 2022).
[10] Doc. 53.

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circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."[18] But that's exactly what Defendant fails to show.

Defendant's argument centers on his claim that, because of his counsel's advice, he rejected the Government's offer and thus lost a three-level reduction credit for acceptance of responsibility. Yet the Government's offer to not oppose an acceptance of responsibility reduction did not bind the Court; even if Defendant accepted the Government's "non-opposition offer," the Court could have withheld acceptance of responsibility credit just as easily as applied it.[19]

And that's the key point: the Court would have withheld any acceptance of responsibility reduction regardless of the Government's offer because the Court's reasoning for denying acceptance of responsibility was due to Defendant's disciplinary problems at the Rolling Plains Detention Center. Indeed, Defendant's PSR even removed acceptance credits because of those incidents.[20] And the Court was quite clear about this fact in response to counsel's objections to its exclusion at sentencing.[21] In short, Defendant cannot show it is "reasonably likely" that his sentence would have been different, and thus Defendant cannot show he was prejudiced. [22] As a result, Defendant's § 2255 motion must fail.[23]

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[18] *Lafler v. Cooper*, 566 U.S. 156, 164 (2012).
[19] Doc. 58-1 at 2.
[20] Doc. 48 at 4.
[21] Doc. 44 at 17. As noted above, the Fifth Circuit affirmed this Court's decision to not include acceptance of responsibility credits when calculating Defendant's sentence. *See United States v. Defendant*, No. 21-50543 (5th Cir. Apr. 13, 2022).
[22] *See Strickland*, 466 U.S. at 696.

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II. A certificate of appealability should be denied.

The Federal Rules of Appellate Procedure provide that an appeal may not proceed unless a certificate of appealability (COA) is issued under 28 U.S.C. § 2253.[24] Rule 11 of the Rules Governing § 2255 Proceedings requires the Court to "issue or deny a certificate of appealability when it enters a final order adverse to the applicant."[25] This Court may only issue a COA if "the applicant has made a substantial showing of the denial of a constitutional right."[26] Defendant can satisfy this standard by showing "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further."[27]

A district court may deny a COA sua sponte without requiring further briefing or argument.[28] The Court believes Defendant has not made a showing that reasonable jurists would question the reasoning found in this Court's denial. Accordingly, the Court denies a COA.

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[23] The Court need not look to whether counsel's performance was deficient because the failure to prove one of the *Strickland* prongs is fatal to his motion. *See United States v. Bass*, 310 F.3d 321 (5th Cir. 2002) ("Such a claim fails unless the defendant establishes *both* deficient performance and prejudice.") (emphasis in original).
[24] *See* FED. R. APP. P. 22(b).
[25] Rules Governing § 2255 Proceedings in the United States District Courts, Rule 11(a) (December 1, 2009).
[26] 28 U.S.C. § 2253(c)(2).
[27] *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).
[28] *See Alexander v. Johnson*, 211 F.3d 898, 898 (5th Cir. 2000).

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CONCLUSION

It is therefore **ORDERED** that Defendant's Motion to Motion to Vacate, Set Aside, or Correct his sentence under § 2255 be **DENIED**. (Doc. 53).[29]

It is also **ORDERED** that a certificate of appealability be **DENIED**.

It is so **ORDERED**.

SIGNED this 10th day of April, 2024.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE

[29] The Court finds that an evidentiary hearing on Defendant's motion is not necessary because Defendant's claims are affirmatively contradicted by the record. *See United States v. Guerra*, 588 F.2d 519, 521 (5th Cir. 1979), *cert. denied*, 450 U.S. 934 (1981) ("A hearing is not required on patently frivolous claims or those which are based upon unsupported generalizations. Nor is a hearing required where Movant's allegations are affirmatively contradicted by the record.").

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