United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 18, 2024
Lyle W. Cayce
Clerk

No. 24-10751

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RUSSELL WAYNE DRIVER,

Defendant—Appellant.

Application for Certificate of Appealability
the United States District Court
for the Northern District of Texas
USDC No. 4:23-CV-994
USDC No. 4:21-CR-200-1

UNPUBLISHED ORDER

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

PER CURIAM:

Russell Wayne Driver, federal prisoner # 53227-509, pleaded guilty to one count of conspiracy to possess with intent to distribute methamphetamine and received a sentence of 240 months in prison. He now seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2255 motion challenging this conviction. Driver

APPENDIX A

contends that his trial counsel rendered ineffective assistance by failing to argue at sentencing for a downward variance. According to Driver, he established that if counsel had filed such a motion, it was reasonably likely that the district court would have imposed a lower sentence.

To obtain a COA, Driver must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When, as here, the district court has denied relief on the merits, a COA applicant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. Driver has not made the required showing.

Accordingly, the motion for a COA is DENIED. Driver's motion for leave to proceed in forma pauperis on appeal is likewise DENIED. Because Driver has not satisfied the COA standard, we do not reach his contention that the district court erred by failing to conduct an evidentiary hearing. *See United States v. Davis*, 971 F.3d 524, 534-35 (5th Cir. 2020).

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RUSSELL WAYNE DRIVER,
INSTITUTIONAL ID NO. 53227-509,

Movant,

v. **No. 4:23-cv-0994-P**

UNITED STATES OF AMERICA,

Respondent.

ORDER

On August 4, 2021, Russell Wayne Driver pleaded guilty to one count of conspiracy to possess with intent to distribute a controlled substance, in violation of 21 U.S.C. § 846. The Court later adjudged Driver guilty and sentenced him to 240 months' imprisonment. *See* ECF No. 43, *United States v. Driver*, 4:21-CR-00200-P-1 (N.D. Tex. Feb. 25, 2022). The United States Court of Appeals for the Fifth Circuit dismissed Driver's subsequent appeal as frivolous.

Before the Court is Driver's 28 U.S.C. § 2255 motion to vacate his sentence. *See* ECF Nos. 1, 2. Proceeding pro se, Driver claims that his appointed counsel, Samuel Terry, provided him ineffective assistance of counsel (IAC) before and during sentencing because he failed to obtain and present evidence in support of a motion for downward variance based on the arguments that the statutory maximum 20-year sentence (1) constituted a *de facto* life sentence; and (2) was excessively harsh when compared to sentences imposed on similarly-situated defendants in other drug cases.

In its thorough and well-reasoned response, Respondent argues that the Court should deny Driver's motion because his claims have no merit. *See* ECF No. 15. Specifically, Respondent argues that Driver, for various reasons, has failed to demonstrate that Mr. Terry's performance was deficient or prejudiced his defense, which are required to prevail on an IAC claim under *Strickland v. Washington*, 466 U.S. 668 (1974). Driver

filed a reply in which he reiterates the factual basis for his claims and insists that he is entitled to an evidentiary hearing to resolve them.

The Court disagrees.[1] The Court has carefully reviewed the parties' pleadings, the record in Driver's underlying criminal case, and the applicable law. For the reasons stated in Respondent's response, the Court concludes that Driver has failed to demonstrate that Mr. Terry's performance was ineffective under both prongs of *Strickland*. Driver has, therefore, failed to demonstrate that he is entitled to relief under § 2255.

Driver's § 2255 motion is **DENIED**. For the same reasons, the Court concludes that reasonable jurists could not question the Court's resolution of Driver's claims. As a result, the Court **DENIES** a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B); *see also* FED. R. APP. P. 22(b)(1).

SO ORDERED on this **15th day** of **July 2024.**

Mark T. Pittman
UNITED STATES DISTRICT JUDGE

[1]A district court may forgo an evidentiary hearing in deciding a § 2255 motion "if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." *United States v. Minor*, No. 21-10200, 2022 WL 11776785, at *4 (5th Cir. 2022) (quoting *United States v. Bartholomew*, 974 F.3d 39, 41 (5th Cir. 1992)). If there are no "independent indicia of the likely merit" of the petitioner's allegations, a hearing is not required. *Id.* (citing *United States v. Edwards*, 422 F.3d 258, 264 (5th Cir. 2005)). *See also United States v. Arledge*, 597 F. App'x 757, 759 (5th Cir. 2015) (citing *United States v. Reed*, 719 F.3d 269, 374 (5th Cir. 2013)). Here, the Court finds that there is nothing in the record that indicates Driver's claims have any merit.

APPENDIX B