

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

January 2, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MIKEAL GLENN STINE,

Defendant - Appellant.

No. 17-1368
(D.C. No. 1:16-CV-02740-CMA)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **BRISCOE, HARTZ, and BACHARACH**, Circuit Judges.

Defendant Mikeal Glenn Stine seeks a certificate of appealability (COA) to appeal the dismissal by the United States District Court for the District of Colorado of his motion under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(B) (requiring COA to appeal denial of relief under § 2255). Because no reasonable jurist could debate the district court's disposition of Defendant's claims, we deny a COA and dismiss the appeal.

In August 2015, Defendant was convicted by a jury on two counts of threatening a United States Magistrate Judge and one count of threatening an assistant United States attorney in violation of 18 U.S.C. § 115(a)(1)(B) and (b)(4). Defendant appealed and this court affirmed. *See United States v. Stine*, 664 F. App'x 697, 698 (10th Cir. 2016).

Defendant filed his § 2255 motion in November 2016, claiming that his counsel was ineffective in four respects: (1) failing to assert Defendant's speedy-trial right; (2)

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e.g. Appendix (A)

failing to retain a handwriting expert to examine the threatening letters or to call favorable witnesses identified by Defendant; (3) failing to cross-examine all the government's witnesses; and (4) failing to allow Defendant to testify. The district court denied relief on the merits of all claims¹ and also denied his request for appointment of counsel and a private investigator.²

A COA will issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This standard requires “a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). In other words, the applicant must show that the district court’s resolution of the constitutional claim was either “debatable or wrong.” *Id.*

¹ The district court appears to have held that the first three ineffective-assistance claims were also barred because they were not raised on direct appeal. That ground, however, could not be sustained. The Supreme Court has held that ineffective-assistance-of-counsel claims need not be raised on direct appeal. See *Massaro v. United States*, 538 U.S. 500, 509 (2003) (“[F]ailure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255.”); *United States v. Erickson*, 561 F.3d 1150, 1170 (10th Cir. 2009) (“Even before *Massaro* this circuit had held that it is never necessary to bring an ineffectiveness claim on direct appeal because collateral proceedings under 28 U.S.C. § 2255 are almost always preferable.”).

² The record indicates that Defendant also filed in district court a motion for reduction in sentence under Fed. R. Crim. P. 35(b), but the denial of that motion is not at issue in this appeal.

To prevail on his ineffective-assistance claims, Defendant must show both that his counsel's performance was deficient—"that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"—and that "the deficient performance prejudiced [his] defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In undertaking this analysis, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotation marks omitted). Particularly relevant here:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690–91. Further, to establish that a defendant has been prejudiced by counsel's deficient performance, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. "In making this determination, a court . . . must consider the totality of the evidence before the judge or

jury,” recognizing that “a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” *Id.* at 695–96. “[A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.” *Id.* at 696. “Failure to make the required showing of *either* deficient performance or sufficient prejudice defeats the ineffectiveness claim.” (emphasis added)). *Id.* at 700.

We can easily dispose of the ineffective-assistance/speedy-trial claim on *Strickland*’s prejudice prong. As the district court noted, this court determined on Defendant’s direct appeal that his speedy-trial rights were not violated. *See Stine*, 664 F. App’x at 701–03. Defendant could not have been prejudiced by failure to raise an issue that was doomed to fail. *See Dennis v. Poppel*, 222 F.3d 1245, 1261 (10th Cir. 2000).

The remaining claims concern strategic and tactical decisions in the trial. The district judge who denied Defendant’s § 2255 motion, who had also presided at Defendant’s trial, noted that the “government called five witnesses and presented overwhelming evidence of Defendant’s guilt.” R., Vol. I. at 123. In particular, an FBI agent testified that Defendant had confessed to sending the letters. Defense counsel’s strategy therefore focused on Defendant’s scienter, contending that the letters were not serious and he wrote them just to bring attention to what he viewed as his unfair treatment by the federal Bureau of Prisons. Such a strategy would render it unnecessary, or even counterproductive, to challenge much of the government’s case—it could weaken the credibility of Defendant’s argument that he did not intend the letters as threats if he

also denied writing them. Given *Strickland*'s mandate that we defer to properly informed strategic decisions by trial counsel, no reasonable jurist could debate the district court's rejection of Defendant's second and third ineffective-assistance claims. The overall defense strategy explains the decision not to call witnesses identified by Defendant or to seek a handwriting expert to challenge whether Defendant signed the threatening letters; and it also explains why defense counsel cross-examined the witnesses he did: questioning those able to discuss Defendant's intent and not questioning those who would be unable to advance the strategy.

Defendant's fourth claim—that his counsel refused to allow him to testify—requires some additional discussion. A criminal defendant has the constitutional right to testify in his own defense. *See Cannon v. Mullin*, 383 F.3d 1152, 1171 (10th Cir. 2004). This prerogative is the defendant's alone, and “counsel lacks authority to prevent a defendant from testifying in his own defense, even when doing so is suicidal trial strategy.” *Id.* Thus, if Defendant's factual allegation is true and his attorney prevented him from testifying at trial, then the attorney's performance was deficient. But Defendant must still satisfy the prejudice prong of the *Strickland* test. *See Cannon v. Trammell*, 796 F.3d 1256, 1275 (10th Cir. 2015) (holding that there was no prejudice in preventing defendant from testifying because “the inconsistencies between the record evidence, including his recorded statement, and his evidentiary hearing testimony support a conclusion that Cannon would not have advanced his cause by testifying at trial”). Defendant argued below and in this court that he wished to testify, not regarding his intent, but to show that circumstances made it impossible for him to have written or

mailed the threatening letters. This would have been a futile venture. This claim fails on the prejudice prong because the failure to call Defendant as a witness does not come close to undermining confidence in the outcome of the trial. *See Strickland*, 466 U.S. at 694.

In sum, no reasonable jurist could debate that the district court properly rejected Defendant's ineffective-assistance claims. Finally, we see no abuse of discretion in the district court's denial of Defendant's request for counsel or for a private investigator to assist him in the § 2255 proceedings.

We **DENY** Defendant's application for a COA and **DISMISS** this appeal. We **GRANT** Defendant's motion for leave to proceed *in forma pauperis*.

Entered for the Court

Harris L Hartz
Circuit Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Christine M. Arguello**

Criminal Case No. 13-cr-00491-CMA
Civil Case No. 16-cv-02740-CMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MIKEAL GLENN STINE,

Defendant.

ORDER DENYING 28 U.S.C. § 2255 PETITION AND RULE 35(b) MOTION

This matter is before the Court upon Defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (Doc. # 265) and Defendant's Motion for Reduction of Sentence under Rule 35(b) (Doc. # 284). For the reasons discussed herein, the motions are denied.

I. BACKGROUND AND PROCEDURAL HISTORY

On December 3, 2013, Defendant Mikeal Stine was indicted on two counts of threatening a United States Magistrate Judge and one count of threatening an Assistant United States Attorney in violation of 18 U.S.C. § 115(a)(1)(B) and (b)(4) based on the following described conduct. (Doc. # 1.) In 2008, a Magistrate Judge presiding in an unrelated action recommended that Defendant be sanctioned by the district court as a vexatious litigant due to the frivolous nature of Defendant's filings. Frustrated by the Magistrate Judge's recommendation, Defendant wrote a number of inappropriate and threatening letters to the Magistrate Judge and the Assistant United States Attorney. An investigation conducted by the U.S. Marshals Service and the Federal Bureau of

Investigation (FBI) revealed that the letters were mailed by Defendant while he was incarcerated at the ADX facility in Florence, Colorado. In an interview with Deputy United States Marshal Erik Helsing, Defendant verbalized the threats expressed in his letters. In a separate interview with FBI Special Agent Kevin Vest, Defendant admitted that he wrote the threatening letters to the Magistrate Judge.

Defendant's trial commenced on August 6, 2015. (Doc. # 204.) The Government called five witnesses and presented overwhelming evidence of Defendant's guilt, including testimony concerning his confession to Special Agent Vest. Defendant called no witnesses and made a motion for directed verdict, which was denied. A jury found him guilty on all counts, (Doc. # 206), and Defendant was sentenced on November 13, 2015 (Doc. # 238). He thereafter appealed his conviction, and the Tenth Circuit rejected the appeal after concluding the district court properly denied Defendant's motion to dismiss and determining that Defendant's Sixth Amendment rights to a speedy trial were not violated. *United States v. Stine*, 664 Fed. Appx. 697, 698 (10th Cir. 2016).

On November 8, 2016, Defendant, acting pro se, filed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, raising four claims for ineffective assistance of counsel. (Doc. # 265.) Defendant subsequently filed a Motion for Appointment of Private Investigator (Doc. # 278), a Request to Supplement Correct Name of Investigator (Doc. # 288), and a Motion for Evidentiary Hearing (Doc. # 289), all of which were related to his § 2255 petition.

On April 24, 2017, Defendant, acting pro se, filed a Motion for Reduction of Sentence under Rule 35(b), arguing that he provided substantial assistance to the

United States Attorney's Office in the Central District of California by providing information about a jailhouse homicide. (Doc. # 284.) In conjunction with the Rule 35(b) motion, Defendant filed a Motion to Seal. (*Id.*). Defendant thereafter filed a Motion for Evidentiary Hearing on May 5, 2017. (Doc. # 286.)

II. ANALYSIS

A. **MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255**

1. Law

Defendant is acting pro se and is accordingly entitled to "liberal construction" of his pleadings. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Though his pleadings are entitled to liberal construction, a pro se litigant is still bound by the rules of federal and appellate procedure. *Abdelsamed v. United States*, 13 Fed. Appx. 883, 884 (10th Cir. 2001).

Section 2255 permits a federal prisoner to challenge the validity of his sentence and may provide him relief "[i]f the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or was otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack." 28 U.S.C. § 2255(b). However, a § 2255 petition may not be used to test the legality of matters that should have been raised on appeal. *United States v. Walling*, 982 F.2d 447, 448 (10th Cir. 1992); *United States v. Khan*, 835 F.2d 749, 753 (10th Cir. 1987). A defendant who fails to present an issue on direct appeal is procedurally barred from raising the issue in a § 2255 petition, "unless he can show cause for his procedural default and actual prejudice resulting from the alleged errors, or can show that a

fundamental miscarriage of justice will occur if his claim is not addressed.” *United States v. Allen*, 16 F.3d 377, 378 (10th Cir. 1994) (citing *United States v. Cook*, 997 F.2d 1312, 1320 (10th Cir. 1993)). One way a defendant can show cause for his procedural default is by demonstrating ineffective assistance of counsel. *Cook*, 997 F.2d at 1320. If the district court finds that the defendant alleged sufficient cause for his procedural default, the court must then address whether the defendant has been prejudiced by the alleged errors. *Id.*

In order to support a claim of ineffective assistance of counsel, the defendant must show that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The proper standard for attorney performance is that of reasonably effective assistance. *Id.*; *Gillette v. Tansy*, 17 F.3d 308, 310–11 (10th Cir. 1994). The first prong of the *Strickland* test is satisfied if the defendant proves that counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed . . . by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. The second prong of the test is satisfied by showing that counsel’s errors “were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.* The defendant must overcome the “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Laycock v. New Mexico*, 880 F.2d 1184, 1187 (10th Cir. 1989) (quoting *Strickland*, 466 U.S. at 689).

2. Analysis

Defendant asserts four ineffective assistance claims: (1) failure to investigate, (2) failure to cross examine, (3) failure to allow Defendant to testify, and (4) failure to assert Defendant's speedy trial rights.

With respect to Defendant's first three claims, Defendant argues his attorney failed to investigate by not retaining a handwriting expert, failed to cross examine all of the Government's witnesses, and failed to call Defendant to testify that the circumstances made it impossible for him to have written or mailed the letters. The Court disagrees. At trial, Defendant and his counsel made the strategic decision to admit that Defendant wrote the letters, and then argue that the threats contained therein were not serious. Defense counsel framed the threats as an ill-considered gambit designed to draw the Court's attention to Defendant's otherwise legitimate grievances with the Bureau of Prisons. The record contains ample evidence that counsel vigorously advocated the necessity defense on behalf of Defendant. (Doc. ## 257 at 186–87, 258 at 222.) This necessity defense renders unnecessary a handwriting expert and Defendant's testimony, because the defense is rooted in an admission that Defendant authored the letters. For the same reason, the Court fails to see the efficacy of calling witnesses who would have allegedly testified that Defendant did not write the letters when that testimony plainly runs counter to the theory at the heart of his defense. Further, Defendant's attorney cross examined only Marshal Helsing and Special Agent Vest because they were the ones who interviewed Defendant, and were the individuals appropriately situated to answer counsel's questions about Defendant's intent and ability to carry out the threats expressed in his letters. Accordingly, the Court finds that

Defendant's first, second, and third claims each fail the first prong of the *Strickland* test because counsel's performance was not deficient in any manner, but rather, was reasonable in light of the adopted necessity defense strategy. These claims also fail because Defendant did not raise them on direct appeal to the Tenth Circuit. See *Stine*, 664 Fed. Appx. at 698. Plaintiff fails to show cause to excuse this procedural default and actual prejudice resulting from these alleged errors, and he fails to show that a fundamental miscarriage of justice will occur if his claim is not addressed. See *Cook*, 997 F.2d at 1320.

Defendant also argues his attorney failed to assert his speedy trial rights. Defendant raised the same Sixth Amendment speedy trial issue in his direct appeal to the Tenth Circuit. *Stine*, 664 Fed. Appx. at 701. The Tenth Circuit concluded that Defendant's speedy trial right was not violated and also discussed that the delay between indictment and trial was largely caused by Defendant's own actions, such as filing "numerous pro se notices, letters, and motions." *Id.* at 701–02. In light of the Tenth Circuit's conclusion, Defendant's argument that his attorney ineffectively failed to raise a speedy trial issue is unavailing. Defendant's fourth claim also fails because a defendant may not raise an issue in a § 2255 petition after raising it on direct appeal. See *United States v. Prichard*, 875 F.2d 789, 791 (10th Cir. 1989) (discussing that issues disposed of on direct appeal will not be considered on § 2255 collateral attack); *Cook*, 997 F.2d at 1328 n.6 (refusing to address allegation in a § 2255 petition because it was previously raised on direct appeal). "[F]ederal prisoners challenging the validity of their convictions or sentences may seek and win relief only under the pathways prescribed by § 2255." *Prost v. Anderson*, 636 F.3d 578, 580 (10th Cir. 2011).

In sum, the Court concludes that Defendant failed to prove his attorney's performance was in any way deficient. Therefore, Defendant's § 2255 petition is denied.

3. Motion for Appointment of Private Investigator

Defendant asks the Court to grant his Motion for Appointment of Private Investigator so that he can meet with the investigator to discuss which ADX staff and inmates need to be contacted for the purpose of preparing declarations to support his § 2255 petition. A defendant generally has no right to counsel or other representation for a § 2255 petition because the right to appointed counsel extends to the first appeal of right, and no further. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *see also Murphy v. Archuleta*, No. 06-cv-01899, 2006 WL 3318787, at *1 (D. Colo. Nov. 14, 2006). Although the Court may appoint counsel or other representation when "the interests of justice so require," 18 U.S.C. § 3006A(a)(2)(B), in light of the Court's rulings as set forth above, the Court finds that the interests of justice do not require the appointment of an investigator. Defendant's Motion for Appointment of a Private Investigator is denied.

B. MOTION FOR SENTENCE REDUCTION UNDER RULE 35(b)

In order for a defendant to be eligible for a sentence reduction under Rule 35(b), the Government must be the moving party. Fed. R. Crim. P. 35(b)(1) ("Upon the government's motion...the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person."). Although the Government has the power, it does not have a duty to file such a motion when a defendant has provided substantial assistance. *See, e.g., United*

States v. Berger, 251 F.3d 894, 907 (10th Cir. 2001) (discussing that the government has “the power, but not a duty”). Generally, if the Government chooses to file a Rule 35(b) motion, it must do so within one year of sentencing. Fed. R. Crim. P. 35(b)(1); *United States v. Baker*, 769 F.3d 1196, 1197 (10th Cir. 2014).

In this case, the Government represents that it “has not, and will not file any substantial assistance motion” pursuant to Rule 35(b). (Doc. # 287 at 2.) Further, the Government did not enter into any agreement with Defendant that would require the Government to file a Rule 35(b) motion in exchange for Defendant’s alleged substantial assistance. Based on this information, the Court finds that Defendant is entitled to no relief under Rule 35(b) because Defendant, and not the Government, filed the motion. The Motion is accordingly denied.

In connection with the Defendant’s Rule 35(b) motion, Defendant also filed a Motion to Seal asking the Court to restrict the public’s access to his Rule 35(b) Motion because the contents discussed therein may jeopardize the lives of inmates and the security of correctional facilities.

Although there is a presumption that documents essential to the judicial process be made available to the public, the documents may be sealed when the public’s right of access is outweighed by interests that favor nondisclosure. *United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997). It is within the district court’s discretion to determine whether a particular document should be sealed. See *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 599 (1978).

The Court has reviewed Defendant’s Motion and finds that Defendant has met his burden in overcoming the presumption of public access. The Motion describes in

significant detail Defendant's assistance with a homicide investigation. Public release of the information could have life-threatening repercussions. The Motion to Seal is granted.

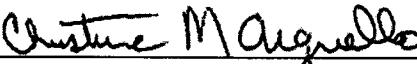
III. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (Doc. # 265) is DENIED;
2. Defendant's Motion for Appointment of Private Investigator (Doc. # 278) is DENIED;
3. Defendant's Request to Supplement Correct Name of Investigator (Doc. # 288) is DENIED AS MOOT;
4. Defendant's Motion for Evidentiary Hearing (Doc. # 289) is DENIED AS MOOT;
5. Defendant's Motion for Reduction of Sentence under Rule 35(b) (Doc. # 284) is DENIED;
6. Defendant's Motion to Seal (Doc. # 284) is GRANTED. The Clerk of Court is directed to keep Doc. # 285 at Level 1 Restriction; and
7. Defendant's Motion for Evidentiary Hearing with Oral Arguments (Doc. # 286) is DENIED AS MOOT.

DATED: October 6, 2017

BY THE COURT:



CHRISTINE M. ARGUELLO
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02740-CMA
Criminal Action No. 13-cr-00491-CMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MIKEAL GLENN STINE,

Defendant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed.R.Civ.P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order Denying 28 U.S.C. § 2255 Petition and Rule 35(b) Motion (Doc. No. 290) of Judge Christine M. Arguello entered on October 6, 2017, it is

ORDERED that Defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 (Doc. No. 265) is DENIED. It is

FURTHER ORDERED that Defendant's Motion for Appointment of Private Investigator (Doc. No. 278) is DENIED. It is

FURTHER ORDERED that Defendant's Request to Supplement Correct Name of Investigator (Doc.No. 288) is DENIED AS MOOT. It is

FURTHER ORDERED that Defendant's Motion for Evidentiary Hearing (Doc. No. 289) is DENIED AS MOOT. It is

FURTHER ORDERED that Defendant's Motion for Reduction of Sentence under Rule 35(b) (Doc. No. 284) is DENIED. It is

FURTHER ORDERED that Defendant's Motion to Seal (Doc. No. 284) is GRANTED. It is

FURTHER ORDERED that Defendant's Motion for Evidentiary Hearing with Oral Arguments (Doc. No. 286) is DENIED AS MOOT.

DATED: October 6, 2017.

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

s/S.West
S.West, Deputy Clerk