

* APPENDIX "A" *

Order

Michigan Supreme Court
Lansing, Michigan

January 5, 2017

Robert P. Young, Jr.,
Chief Justice

154313

Stephen J. Markman
Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 154313
COA: 330551
Wayne CC: 97-004958-FH;
97-005554-FH

HENRY A. RICHARDSON,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the June 15, 2016 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).



p1212

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 5, 2017

Clerk

* APPENDIX "B" *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HENRY RICHARDSON,

Petitioner,

Case No. 17-cv-10950

v.

HON. MARK A. GOLDSMITH

MYRON L. BATTS,

Respondent.

OPINION AND ORDER
SUMMARILY DENYING THE PETITION FOR WRIT OF HABEAS CORPUS,
DECLINING TO ISSUE A CERTIFICATE OF APPEALABILITY, AND DENYING
LEAVE TO APPEAL IN FORMA PAUPERIS

Petitioner Henry Richardson, currently confined at the Federal Correctional Institution in Memphis, Tennessee, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (Dkt. 1), challenging his 1998 convictions for possession of less than fifty grams of cocaine, Mich. Comp. Laws § 333.7401(2)(a)(iv); and possession of less than twenty-five grams of cocaine, Mich. Comp. Laws § 333.7403(a)(5). For the reasons stated below, the Court summarily denies the petition for a writ of habeas corpus with prejudice.

I. BACKGROUND

Petitioner pled guilty in the Wayne County Circuit Court to possession with intent to deliver less than fifty grams of cocaine in Case # 97-00554-01-FH, and to possession of less than twenty-five grams of cocaine in Case # 97-004958-01-FH. On October 27, 1998, Petitioner was sentenced to lifetime probation on the possession with intent to deliver less than fifty grams of cocaine conviction, and three years' probation for the possession of cocaine conviction. By his own admission, Petitioner has been discharged from these sentences and is no longer in custody for these convictions. A review of the Wayne County Circuit Court docket sheets shows that

Petitioner was discharged from probation in both cases on May 26, 2004, after having been found to have violated the terms of his probation.¹

Subsequent to his discharge from probation, Petitioner pleaded guilty in federal court to (i) possession of more than 50 grams of cocaine base with intent to distribute in violation of 21 U.S.C. § 841(a)(1), as well as aiding and abetting in violation of 18 U.S.C. § 2; (ii) possession of more than 500 grams of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), as well as aiding and abetting in violation of 18 U.S.C. § 2; and (iii) possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A), as well as aiding and abetting in violation of 18 U.S.C. § 2. Petitioner was sentenced to 300 months on the two federal cocaine charges, and he received a consecutive 60-month sentence on the firearms charge. See United States v. Richardson, No. 2:06-CV-20676 (E.D. Mich.).

In 2015, Petitioner filed a post-conviction motion for relief from judgment in the state trial court, in which he challenged his two 1998 state-court convictions. The trial court denied the motion. People v. Richardson, No. 97-004958-01-FH, 97-00554-01-FH (Wayne Cty. Cir. Ct. July 15, 2015). The Michigan appellate courts denied Petitioner leave to appeal. People v. Richardson, No. 330551 (Mich. Ct. App. June 15, 2016), leave denied, 888 N.W.2d 99 (Mich. 2017).

Petitioner seeks a writ of habeas corpus on the following grounds:

- i. “The petitioner’s guilty plea was based on illegal sentences rendering the guilty plea involuntary and the judgment void in violation of due process.”

¹ The Court obtained some of the information for Petitioner’s two cases from the Wayne County Circuit Court website, www.cmspublic.3rdcc.org, of which the Court is able to take judicial notice. See, e.g., Graham v. Smith, 292 F. Supp. 2d 153, 155 n.2 (D. Me. 2003). The Michigan Department of Corrections’ Offender Tracking Information System (“OTIS”), www.mdccweb.state.mi.us/otis2/otis2.html, of which this Court is also permitted to take judicial notice, see Ward v. Wolfenbarger, 323 F. Supp. 2d 818, 821 n.3 (E.D. Mich. 2004), indicates that Petitioner is not in prison, on parole, or on probation with the Michigan Department of Corrections for any state convictions.

- ii. "Counsel provided ineffective assistance by having Petitioner agree to illegal sentences in violation of the Petitioner's Sixth Amendment right to effective [assistance of] counsel."

Pet'r Br. at 5, 11.

II. ANALYSIS

The Court denies the habeas petition because the Court lacks jurisdiction over the petition, due to the fact that Petitioner is no longer in custody for his two 1998 state-court convictions.

The language of 28 U.S.C. §§ 2241(c)(3) and 2254(a) requires that a habeas petitioner be "in custody" under the conviction or sentence under attack at the time that a habeas petition is filed in the federal court. See Maleng v. Cook, 490 U.S. 488, 490-491 (1989). A habeas petitioner is no longer "in custody," for purposes of a conviction imposed, after the sentence on that conviction has fully expired. Id. at 492-493; see also Clemons v. Mendez, 121 F. Supp. 2d 1101, 1102 (E.D. Mich. 2000). The "in custody" requirement is jurisdictional. See Foster v. Booher, 296 F.3d 947, 949 (10th Cir. 2002).

Petitioner acknowledges that his sentences on his two 1998 drug convictions have expired, but he seeks to challenge them on the ground that the convictions have been used to enhance his sentence on his subsequent federal convictions.

In Lackawanna County District Attorney v. Coss, the Supreme Court held that, once a state conviction is no longer open to direct or collateral attack in its own right because the petitioner failed to pursue those remedies while they were available (or because he or she did so unsuccessfully), the conviction may be regarded as conclusively valid. 532 U.S. 394, 403-404 (2001). Therefore, if that conviction is later used to enhance a criminal sentence, a habeas petitioner generally may not challenge the enhanced sentence through a petition under § 2254 on the ground that the prior conviction was unconstitutionally obtained. Id.

However, the Supreme Court recognized an exception to the general rule for § 2254 petitions for challenges to an enhanced sentence on the basis that the prior conviction used to enhance the sentence was unconstitutionally obtained, where there was a failure to appoint counsel for the petitioner in violation of the Sixth Amendment, as set forth in Gideon v. Wainwright, 372 U.S. 335 (1963). Id. at 404. The Supreme Court noted that the “‘failure to appoint counsel for an indigent [is] a unique constitutional defect . . . ris[ing] to the level of a jurisdictional defect,’ which therefore warrants special treatment among alleged constitutional violations.” Lackawanna, 532 U.S. at 404 (quoting Custis v. United States, 511 U.S. 485, 496 (1994)). In other words, when “an otherwise qualified § 2254 petitioner can demonstrate that his current sentence was enhanced on the basis of a prior conviction that was obtained where there was a failure to appoint counsel in violation of the Sixth Amendment, the current sentence cannot stand and habeas relief is appropriate.” Id.

In the present case, Petitioner does not allege that the Wayne County Circuit Court failed to appoint counsel to represent him in his two drug cases. Petitioner acknowledges that counsel was appointed for him, but he claims that trial counsel was ineffective. Although Petitioner claims that his trial counsel was ineffective, this is not akin to the failure by the trial court to appoint counsel for Petitioner. Because Petitioner was represented by counsel when he pled guilty to the two cocaine charges, his case does not fall within the exception set out in Lackawanna. See Kerr v. Hedrick, 89 F. App’x 962, 963 (6th Cir. 2004) (holding that the Lackawanna exceptions did not apply because the petitioner had counsel when he pled guilty and the Michigan court system provides a forum for defendant to challenge their convictions).

The Court realizes that a three-judge plurality in Lackawanna recognized that there might be other exceptions to this rule, in situations where the subsequent federal habeas petition is “the first and only forum available for review of the prior conviction.” Lackawanna, 532 U.S. at 405-406. Specifically, the plurality acknowledged two exceptions: (i) where a state court, without

justification, refuses to rule on a constitutional claim that has been properly presented; and (ii) where a defendant subsequently obtains “compelling evidence that he is actually innocent.” Id.

In the present case, Petitioner has failed to show that the state courts refused to rule on constitutional claims that he had properly presented to them for review. Nor has Petitioner presented this Court with compelling evidence that he is actually innocent of the two drug convictions to which he pled guilty. In any event, Petitioner had an available forum for review of his two 1998 drug convictions, in that he sought post-conviction relief in the state courts. Accordingly, the second Lackawanna exception does not apply. Kerr, 89 F. App’x at 963.

Petitioner is no longer serving a sentence for his 1998 convictions for possession with intent to deliver less than fifty grams of cocaine or possession of less than twenty-five grams of cocaine. Because Petitioner’s sentences have been served on these convictions, he is no longer in custody for these convictions and, therefore, the Court lacks subject-matter jurisdiction over his habeas petition with respect to those convictions. See Steverson v. Summers, 258 F.3d 520, 523 (6th Cir. 2001).

III. CONCLUSION

For the reasons stated above, the Court summarily denies the petition for writ of habeas corpus.

The Court also denies a certificate of appealability to Petitioner. In order to obtain a certificate of appealability, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). When a district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claims, a certificate of appealability should issue, and an appeal of the district court’s order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner 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. Slack v. McDaniel, 529 U.S. 473,

484 (2000). When a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed further. In such a circumstance, no appeal would be warranted. Id. “The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Rules Governing § 2254 Cases, Rule 11(a), 28 U.S.C. foll. § 2254; see also Strayhorn v. Booker, 718 F. Supp. 2d 846, 875 (E.D. Mich. 2010).

The Court denies Petitioner a certificate of appealability, because reasonable jurists would not find it debatable whether this Court was correct in determining that Petitioner failed to meet the “in custody” requirement for maintaining a habeas action with respect to his convictions. See, e.g., Finkelstein v. Spitzer, 155 F.3d 131, 133 (2d Cir. 2006). The Court further denies Petitioner leave to appeal in forma pauperis, because any appeal would be frivolous. Dell v. Straub, 194 F. Supp. 2d 629, 659 (E.D. Mich. 2002).

SO ORDERED.

Dated: May 17, 2017
Detroit, Michigan

s/Mark A. Goldsmith
MARK A. GOLDSMITH
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on May 17, 2017.

s/Karri Sandusky
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HENRY RICHARDSON,

Petitioner,

Civil Action No.
17-cv-10950

v.

HONORABLE MARK A. GOLDSMITH

MYRON L. BATTS,

Respondent,

JUDGMENT

The above entitled matter having come before the Court on a Petition for Writ of Habeas Corpus, Honorable Mark A. Goldsmith, a United States District Court Judge, presiding, and in accordance with the Memorandum Opinion and Order entered on May 17, 2017.

IT IS ORDERED that the Petition for Writ of Habeas Corpus is DENIED WITH PREJUDICE.

IT IS FURTHER ORDERED that a Certificate of Appealability is DENIED.

IT IS FURTHER ORDERED that petitioner is DENIED Leave to Appeal In Forma Pauperis.

Dated at Detroit, Michigan, this 17th, day of May, 2017.

DAVID J. WEAVER
CLERK OF THE COURT

By: s/Karri Sandusky
DEPUTY COURT CLERK

APPROVED:

s/Mark A. Goldsmith
MARK A. GOLDSMITH
UNITED STATES DISTRICT JUDGE

Dated: May 17, 2017

Court of Appeals, State of Michigan

ORDER

People of MI v Henry A Richardson

Kurtis T. Wilder
Presiding Judge

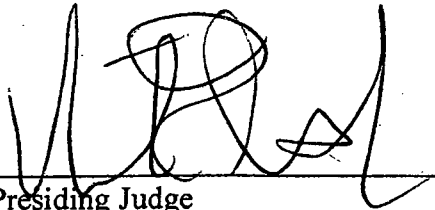
Docket No. 330551

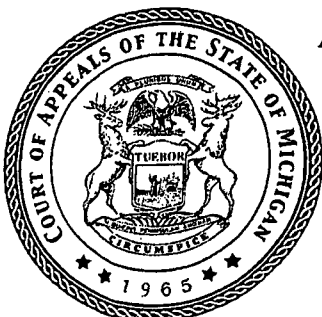
Kirsten Frank Kelly

LC No. 97-004958 FH; 97-005554 FH

Karen M. Fort Hood
Judges

The Court orders that the delayed application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred in denying the motion for relief from judgment.

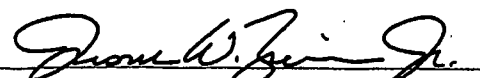

Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUN 15 2016

Date


Chief Clerk

* APPENDIX "C" *

STATE OF MICHIGAN
THIRD CIRCUIT COURT
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Case No. 97-05554-01, 97-04958-01
Hon. Shannon N. Walker

v

HENRY RICHARDSON,
Defendant.

OPINION

For reasons more fully explained below, the Court will deny defendant's motion for relief from judgment.

On July 17, 1998 defendant was convicted by guilty plea of one count of possession of cocaine less than 25 grams, **MCL 333.7403A5** (case # 97-4958-01). On March 27, 2000 defendant was convicted by guilty plea of one count of possession with intent to deliver cocaine, **MCL 333.74012a4**, (case # 97-05554-01.) Defendant was sentenced to a term of 6 months imprisonment for the possession conviction in case # 97-004958 and a term of one year imprisonment and life time probation for the possession conviction in case # 97-0554-01. Convictions to run concurrently. Defendant's motions to withdraw guilty plea were returned unfiled on October 5, 2009 and January 4, 2010 for noncompliance with **MCR 6.500 et seq.** Defendant now files a motion for relief from judgment pursuant to **MCR 6.500 et seq.** The Prosecution has not filed a response.

In order to advance an allegation in a motion for relief from judgment that could have been made in a prior appeal or motion, defendant must demonstrate "good cause" for failure to raise the grounds on appeal and actual prejudice resulting from the alleged irregularities that support the claim of relief, pursuant to **MCR 6.508(D)(3)(b)**. The cause and prejudice standards are based on precedent from the United States Supreme Court.¹ A court may not grant relief, if the defendant alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction of the sentence or in a prior motion for relief from

¹ *Wainwright v Sykes*, 433 US 72; 97 S Ct 2497; 53 LEd 2d 594 (1977)

judgment; unless defendant demonstrates good cause for the failure to previously raise the grounds and actual prejudice from the alleged irregularities that support the claim.²

The federal courts have recognized certain claims, which are sufficient for establishing good cause. Government interference, the inability to obtain a factual basis for the claim, and ineffective assistance of appellate counsel, are all sufficient, if adequately supported, to satisfy the good cause prong.

Specifically, defendant alleges 1) his guilty pleas were involuntary and in violation of due process wherein the Court violated its authority when it imposed concurrent sentences, and 2) ineffective assistance of trial counsel.

Guilty Plea—Sentencing

Defendant avers that his pleas violate due process because the Court violated its authority when it imposed concurrent sentencing, which was false information and the guilty plea was based on this false information and therefore was not knowing and voluntary.³ A plea of guilty is valid if it is entered voluntarily and intelligently,⁴ as determined under the totality of the circumstances.⁵ The Government bears the burden of showing that the Movant's plea was voluntary, intelligent and knowing.⁶ To meet constitutional muster, the totality of the circumstances must reflect that the defendant was informed of all the direct consequences of his plea.⁷ The distinction between direct and collateral consequences turns on whether the result flowing from the plea is definite, immediate and automatic.⁸ The maximum possible sentence is a direct consequence of the plea.⁹ MCR 6.508(D)(3)(b)(ii) requires that in order for a plea to be withdrawn, the defect must be of such that it renders the plea an involuntary one to the degree that it would be manifestly unjust to allow the conviction to stand.

Further, before a plea of guilty may be accepted, the trial judge shall personally address the defendant and inform him of and determine that he understand (i) the general nature of the charge to which the plea is offered; (ii) the sentence which may be imposed and the possibility of other sentence consequences; (iii) that his plea of guilty waives his right to a trial and to certain constitutional and other rights incident to a trial and - place on the record; (iv) a factual basis for the plea; and (v) any plea agreement.¹⁰ A guilty plea conviction will not be reversed if the judge engages in the required colloquy.¹¹

² MCR 6.508(D)(3); *People v. Brown*, 196, Mich App 153; 492 NW2d 770 (1992), *People v Watroba*, 193 Mich App 124; 483 NW2d 441 (1992)

³ Defendant's motion for relief from judgment.

⁴ *Bousley v United States*, 523 U.S. 614, 618; 118 S.Ct. 1604; 140 L.Ed.2d 828 (1998),

⁵ *Brady v United States*, 397 U.S. 742, 749; 90 S.Ct. 1463; 25 L.Ed.2d 747 (1970)

⁶ *Stumpf v Mitchell*, 367 F.3d 594, 600 (6th Cir. 2004), *rev'd in part on other grounds by Bradshaw v Stumpf*, 545 U.S. 175; 125 S.Ct. 2398; 162 L.Ed.2d 143 (2005)

⁷ *Brady, supra*, 397 U.S. at 755

⁸ *King v Dutton*, 17 F.3d 151, 154-55 (6th Cir.1994)

⁹ *Hart v Marion Corr. Inst.*, 927 F. 2d 256 (6th Circuit 1991)

¹⁰ *Guilty Plea Cases*, 395 Mich 122; 235 NW2d 132 (1975)

¹¹ *Id*

In this case, the record reflects compliance with the aforementioned standard. Moreover, defendant asserts that consecutive sentencing was required by law and that the court erred when it imposed concurrent sentencing is incorrect. This Court disagrees. A sentence is invalid when it is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of law, or when it conforms to local sentencing policy rather than individualized facts. A sentence is invalid if it is based on inaccurate information.¹²

This Court finds that even if the sentencing Court had been aware that consecutive sentencing was required, this consideration would not have affected the length of the sentences in the present case.¹³ Because it was clear that the court would not have sentenced defendant any differently had it known that his sentences were to run consecutively, resentencing is unnecessary and will merely waste the court's time and resources.¹⁴ As such, withdrawal of defendant's plea on this basis is denied and defendant's claim is without merit.

Ineffective Assistance of Counsel

Defendant next claims that he was denied the effective assistance of counsel where counsel failed to advise defendant that mandatory consecutive sentencing was required. Defendant proffers that due to this error his guilty plea is invalid, subject to withdrawal and the basis of a new trial.

The United States and Michigan Constitution's guarantee the right to effective assistance of counsel.¹⁵ For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial.¹⁶ As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances.¹⁷ As for prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹⁸

However, defendant cannot succeed on this claim. Based on the analysis previously presented in this opinion any objection or motion by trial counsel would have been futile. Counsel is not required to make a futile objection.¹⁹ As such, defendant's claim is without merit.

¹² *People v Miles*, 454 Mich. 90, 96; 559 NW2d 299 (1997)

¹³ *People v Mapp*, 224 Mich App 431, 432; 569 NW2d 523 (1997)

¹⁴ *Id.*

¹⁵ US Const, Am VI; Const 1963, art 1, § 20

¹⁶ *Strickland v Washington*, 466 U.S. 668, 687; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984); *People v Pickens*, 446 Mich. 298, 303; 521 N.W.2d 797 (1994)

¹⁷ *People v Mitchell*, 454 Mich. 145, 156; 560 N.W.2d 600 (1997)

¹⁸ *Id.* at 167

¹⁹ *People v Darden*, 230 Mich App at 605 (1998)

Under the above circumstances, this Court concludes that there was no defect in the proceedings and the standard of having rendered the plea involuntary as required by MCR 6.508(D)(3)(b)(ii) has not been met. Defendant has failed to establish entitlement to relief and defendant's claim is without merit. Defendant has failed to show actual prejudice and has likewise not shown "good cause" pursuant to MCR 6.508(D)(3). Therefore, for all the reasons stated, defendant's Motion for Relief from Judgment is hereby DENIED.

DATED: JUL 15 2015



CIRCUIT COURT JUDGE

STATE OF MICHIGAN
THIRD CIRCUIT COURT
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Case No. 97-05554-01, 97-04958-01
Hon. Shannon N. Walker

v

HENRY RICHARDSON,
Defendant.

ORDER

AT A SESSION OF SAID COURT HELD IN THE FRANK
MURPHY HALL OF JUSTICE ON JUL 15 2015

JUDGE SHANNON NICOL WALKER

PRESENT: HONORABLE _____
Circuit Court Judge

For the reasons stated in the foregoing Opinion, **IT IS HEREBY ORDERED** that
Defendant's Motion for Relief from Judgment is hereby **DENIED**.



CIRCUIT COURT JUDGE

STATE OF MICHIGAN
THIRD CIRCUIT COURT
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Case No. 97-05554-01, 97-04958-01
Hon. Shannon N. Walker

v

HENRY RICHARDSON,
Defendant.

OPINION

For reasons more fully explained below, the Court will deny defendant's motion for relief from judgment.

On July 17, 1998 defendant was convicted by guilty plea of one count of possession of cocaine less than 25 grams, **MCL 333.7403A5** (case # 97-4958-01). On March 27, 2000 defendant was convicted by guilty plea of one count of possession with intent to deliver cocaine, **MCL 333.74012a4**, (case # 97-05554-01.) Defendant was sentenced to a term of 6 months imprisonment for the possession conviction in case # 97-004958 and a term of one year imprisonment and life time probation for the possession conviction in case # 97-0554-01. Convictions to run concurrently. Defendant's motions to withdraw guilty plea were returned unfiled on October 5, 2009 and January 4, 2010 for noncompliance with **MCR 6.500 et seq.** Defendant now files a motion for relief from judgment pursuant to **MCR 6.500 et seq.** The Prosecution has not filed a response.

In order to advance an allegation in a motion for relief from judgment that could have been made in a prior appeal or motion, defendant must demonstrate "good cause" for failure to raise the grounds on appeal and actual prejudice resulting from the alleged irregularities that support the claim of relief, pursuant to **MCR 6.508(D)(3)(b)**. The cause and prejudice standards are based on precedent from the United States Supreme Court.¹ A court may not grant relief, if the defendant alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction of the sentence or in a prior motion for relief from

¹ *Wainwright v Sykes*, 433 US 72; 97 S Ct 2497; 53 LEd 2d 594 (1977)

judgment; unless defendant demonstrates good cause for the failure to previously raise the grounds and actual prejudice from the alleged irregularities that support the claim.²

The federal courts have recognized certain claims, which are sufficient for establishing good cause. Government interference, the inability to obtain a factual basis for the claim, and ineffective assistance of appellate counsel, are all sufficient, if adequately supported, to satisfy the good cause prong.

Specifically, defendant alleges 1) his guilty pleas were involuntary and in violation of due process wherein the Court violated its authority when it imposed concurrent sentences, and 2) ineffective assistance of trial counsel.

Guilty Plea—Sentencing

Defendant avers that his pleas violate due process because the Court violated its authority when it imposed concurrent sentencing, which was false information and the guilty plea was based on this false information and therefore was not knowing and voluntary.³ A plea of guilty is valid if it is entered voluntarily and intelligently,⁴ as determined under the totality of the circumstances.⁵ The Government bears the burden of showing that the Movant's plea was voluntary, intelligent and knowing.⁶ To meet constitutional muster, the totality of the circumstances must reflect that the defendant was informed of all the direct consequences of his plea.⁷ The distinction between direct and collateral consequences turns on whether the result flowing from the plea is definite, immediate and automatic.⁸ The maximum possible sentence is a direct consequence of the plea.⁹ MCR 6.508(D)(3)(b)(ii) requires that in order for a plea to be withdrawn, the defect must be of such that it renders the plea an involuntary one to the degree that it would be manifestly unjust to allow the conviction to stand.

Further, before a plea of guilty may be accepted, the trial judge shall personally address the defendant and inform him of and determine that he understand (i) the general nature of the charge to which the plea is offered; (ii) the sentence which may be imposed and the possibility of other sentence consequences; (iii) that his plea of guilty waives his right to a trial and to certain constitutional and other rights incident to a trial and - place on the record; (iv) a factual basis for the plea; and (v) any plea agreement.¹⁰ A guilty plea conviction will not be reversed if the judge engages in the required colloquy.¹¹

² MCR 6.508(D)(3); *People v. Brown*, 196 Mich App 153; 492 NW2d 770 (1992), *People v Watroba*, 193 Mich App 124; 483 NW2d 441 (1992)

³ Defendant's motion for relief from judgment.

⁴ *Bousley v United States*, 523 U.S. 614, 618; 118 S.Ct. 1604; 140 L.Ed.2d 828 (1998),

⁵ *Brady v United States*, 397 U.S. 742, 749; 90 S.Ct. 1463; 25 L.Ed.2d 747 (1970)

⁶ *Stumpf v Mitchell*, 367 F.3d 594, 600 (6th Cir. 2004), *rev'd in part on other grounds by Bradshaw v Stumpf*, 545 U.S. 175; 125 S.Ct. 2398; 162 L.Ed.2d 143 (2005)

⁷ *Brady, supra*, 397 U.S. at 755

⁸ *King v Dutton*, 17 F.3d 151, 154-55 (6th Cir. 1994)

⁹ *Hart v Marion Corr. Inst.*, 927 F. 2d 256 (6th Circuit 1991)

¹⁰ *Guilty Plea Cases*, 395 Mich 122; 235 NW2d 132 (1975)

¹¹ *Id*

In this case, the record reflects compliance with the aforementioned standard. Moreover, defendant asserts that consecutive sentencing was required by law and that the court erred when it imposed concurrent sentencing is incorrect. This Court disagrees. A sentence is invalid when it is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of law, or when it conforms to local sentencing policy rather than individualized facts. A sentence is invalid if it is based on inaccurate information.¹²

This Court finds that even if the sentencing Court had been aware that consecutive sentencing was required, this consideration would not have affected the length of the sentences in the present case.¹³ Because it was clear that the court would not have sentenced defendant any differently had it known that his sentences were to run consecutively, resentencing is unnecessary and will merely waste the court's time and resources.¹⁴ As such, withdrawal of defendant's plea on this basis is denied and defendant's claim is without merit.

Ineffective Assistance of Counsel

Defendant next claims that he was denied the effective assistance of counsel where counsel failed to advise defendant that mandatory consecutive sentencing was required. Defendant proffers that due to this error his guilty plea is invalid, subject to withdrawal and the basis of a new trial.

The United States and Michigan Constitution's guarantee the right to effective assistance of counsel.¹⁵ For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial.¹⁶ As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances.¹⁷ As for prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹⁸

However, defendant cannot succeed on this claim. Based on the analysis previously presented in this opinion any objection or motion by trial counsel would have been futile. Counsel is not required to make a futile objection.¹⁹ As such, defendant's claim is without merit.

¹² *People v Miles*, 454 Mich. 90, 96; 559 NW2d 299 (1997)

¹³ *People v Mapp*, 224 Mich App 431, 432; 569 NW2d 523 (1997)

¹⁴ *Id.*

¹⁵ US Const, Am VI; Const 1963, art 1, § 20

¹⁶ *Strickland v Washington*, 466 U.S. 668, 687; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984); *People v Pickens*, 446 Mich. 298, 303; 521 N.W.2d 797 (1994)

¹⁷ *People v Mitchell*, 454 Mich. 145, 156; 560 N.W.2d 600 (1997)

¹⁸ *Id.* at 167

¹⁹ *People v Darden*, 230 Mich App at 605 (1998)

Under the above circumstances, this Court concludes that there was no defect in the proceedings and the standard of having rendered the plea involuntary as required by MCR 6.508(D)(3)(b)(ii) has not been met. Defendant has failed to establish entitlement to relief and defendant's claim is without merit. Defendant has failed to show actual prejudice and has likewise not shown "good cause" pursuant to MCR 6.508(D)(3). Therefore, for all the reasons stated, defendant's Motion for Relief from Judgment is hereby DENIED.

DATED: JUL 15 2015



CIRCUIT COURT JUDGE

STATE OF MICHIGAN
THIRD CIRCUIT COURT
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

Case No. 97-05554-01, 97-04958-01
Hon. Shannon N. Walker

v

HENRY RICHARDSON,
Defendant.

ORDER

AT A SESSION OF SAID COURT HELD IN THE FRANK
MURPHY HALL OF JUSTICE ON JUL 15 2015

JUDGE SHANNON NICOL WALKER

PRESENT: HONORABLE _____
Circuit Court Judge

For the reasons stated in the foregoing Opinion, **IT IS HEREBY ORDERED** that
Defendant's Motion for Relief from Judgment is hereby **DENIED**.



CIRCUIT COURT JUDGE

* APPENDIX "D" *

No. 17-1710

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Nov 22, 2017

DEBORAH S. HUNT, Clerk

HENRY ALLEN RICHARDSON,

Petitioner-Appellant,

v.

MYRON L. BATTS,

Respondent-Appellee.

ORDER

Henry Allen Richardson, a federal prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. This court construes Richardson's notice of appeal as an application for a certificate of appealability. He has moved for leave to proceed in forma pauperis.

In 1997, Richardson pleaded guilty in state court to possessing cocaine and possessing marijuana, and, in 1998, Richardson pleaded guilty to delivery or manufacture of cocaine. In October 1998, the trial court sentenced him to six months in jail and three years of probation for each of the possession convictions and to lifetime probation for the other conviction. In May 2004, all of Richardson's sentences of probation were terminated. In 2007, Richardson pleaded guilty in federal court to drug and firearm charges, and the district court sentenced him to 300 months in prison based in part on one of his prior state drug convictions. In 2015, Richardson unsuccessfully challenged his prior state drug convictions in state court.

In 2017, Richardson filed a § 2254 petition that challenged his prior state drug convictions. He argued that the convictions were invalid because the sentence that he received was improper under Michigan law and that his counsel rendered ineffective assistance by having him agree to the illegal sentence. The district court denied the petition and declined to issue a

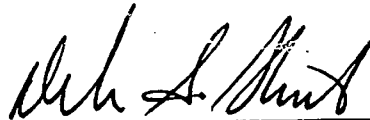
certificate of appealability, concluding that it lacked jurisdiction over Richardson's petition because he was no longer in custody for the state convictions when he filed the petition.

To obtain a certificate of appealability, a habeas corpus petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where a district court has rejected a claim on procedural grounds, the petitioner must show both that jurists of reason would find the district court's procedural ruling debatable and that jurists of reason would find it debatable whether the petition states a valid constitutional claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists would not debate the district court's determination that it lacked jurisdiction over Richardson's petition because, given that Richardson's sentence for his prior state convictions expired in May 2004, he was no longer in custody for those convictions when he filed his § 2254 petition in 2017. *See Steverson v. Summers*, 258 F.3d 520, 522 (6th Cir. 2001). And Richardson cannot successfully challenge the prior convictions as part of an attack on his enhanced federal sentence because he has not shown that his prior convictions were obtained in the absence of counsel, that the state courts refused to rule on a properly presented constitutional claim, or that he is actually innocent of the state offenses. *See id.* at 524-25.

Accordingly, Richardson's application for a certificate of appealability is **DENIED**, and his motion for leave to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

* APPENDIX "E" *