

No. 17-3022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL H. VOLKMAN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA.

Respondent-Appellee.

))))))))))

ORDER

FILED
Aug 14, 2017
DEBORAH S. HUNT, Clerk

Paul H. Volkman, a federal prisoner proceeding pro se, appeals a district court order denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. This court construes Volkman's notice of appeal as an application for a certificate of appealability. Fed. R. App. P. 22(b). Volkman has also filed a motion to proceed in forma pauperis and two supplemental pleadings.

Volkman was sentenced to four consecutive terms of life imprisonment and a consecutive sentence of five years of imprisonment after being convicted of conspiring to unlawfully distribute a controlled substance, four counts of maintaining a place for distribution of controlled substances, seven counts of unlawful distribution of a controlled substance that did not lead to death, four counts of unlawful distribution of a controlled substance that did lead to death, and possessing a firearm in furtherance of a drug trafficking crime. Volkman appealed, and this court affirmed his sentence and convictions after the Supreme Court remanded the case for further consideration in light of *Burrage v. United States*, 134 S. Ct. 881 (2014). *United States v. Volkman*, 797 F.3d 377, 383 (6th Cir. 2015). Volkman then sought a petition for a writ of certiorari, which the Supreme Court denied. *Volkman v. United States*, 136 S. Ct. 348 (2015). Volkman has now filed a § 2255 motion, claiming that he received ineffective assistance of trial

No. 17-3022

- 2 -

and appellate counsel; the appellate panel failed to comply with the Supreme Court's order remanding the case; the federal courts lack subject matter jurisdiction; and he is entitled to resentencing because of the district court's failure to comply with Federal Rule of Criminal Procedure 32.

A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court's denial is on the merits, "[t]he 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 the district court's denial is based on a procedural ruling, the petitioner must demonstrate that "jurists of reason would find it debatable whether the [motion] 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.*

Reasonable jurists would not debate the district court's denial of Volkman's ineffective-assistance claims. To prove ineffective assistance of counsel, a petitioner must show that his attorney's performance was objectively unreasonable and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "[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 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Generally, prejudice means "a reasonable probability" that "but for such conduct the outcome of the proceedings would have been different." *Williams v. Anderson*, 460 F.3d 789, 800 (6th Cir. 2006).

No. 17-3022

- 3 -

Volkman first argues that he received ineffective assistance of trial counsel when counsel failed to present the defense of entrapment by estoppel and the affirmative defense that his medical practice complied with Ohio's Intractable Pain Treatment Act. Specifically, Volkman asserts that because he complied with Ohio's Intractable Pain Treatment Act there was insufficient evidence in support of his conspiracy and distribution convictions. Volkman is unable to show prejudice by counsel's alleged failure to raise these insufficient-evidence arguments because this court explicitly determined that there was sufficient evidence in support of Volkman's convictions. *Volkman*, 797 F.3d at 390-98. Accordingly, reasonable jurists would not debate the district court's resolution of these claims.

Volkman also argues that he received ineffective assistance of trial counsel when counsel failed to move for a mistrial after prejudicial instances of judicial misconduct. Specifically, Volkman asserts that the district court knowingly induced a witness to commit perjury; refused to admit impeachment evidence that a patient was actually alive and had not died; used coerced admissions and unsubstantiated indictment allegations in jury deliberations after a pre-trial ruling to the contrary; failed to voir dire the jury regarding prescription drug abuse; failed to allow cross-examination of the expert witness's qualifications; and failed to grant a directed verdict in his favor when the prosecution failed to show that he profited from the sale of drugs. Because Volkman only makes conclusory and perfunctory allegations of ineffective assistance and judicial misconduct, he has failed to rebut the presumption that counsel's actions were reasonable under the circumstances. *See Strickland*, 466 U.S. at 689. Accordingly, reasonable jurists would not debate the district court's resolution of this claim.

Finally, Volkman argues that he received ineffective assistance of appellate counsel when counsel refused to communicate, failed to submit a revised argument on remand, failed to obtain the entire trial record, and failed to raise insufficient evidence claims. Although the failure to raise an issue on appeal can amount to ineffective assistance, appellate counsel does not have an obligation to raise every possible claim that a client may have and counsel's performance is presumed to be effective. *McFarland v. Yukins*, 356 F.3d 688, 710 (6th Cir. 2004). Only when

No. 17-3022

- 4 -

the issues ignored by appellate counsel “are clearly stronger than those presented, will the presumption of effective assistance of [appellate] counsel be overcome.” *Fautenberry v. Mitchell*, 515 F.3d 614, 642 (6th Cir. 2008) (alteration in original) (quoting *Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002)). Volkman is unable to rebut the presumption that appellate counsel acted reasonably because he has not pointed to any specific instances showing a total breakdown in communication between him and appellate counsel, he has failed to identify any prejudicial remarks by the prosecution necessitating procurement of the entire trial record, and his claims of insufficiency of the evidence were rejected by this court on direct appeal, *United States v. Volkman*, 736 F.3d 1013, 1024-29 (6th Cir. 2013), and on remand, *Volkman*, 797 F.3d at 390-98. Accordingly, reasonable jurists would not debate the district court’s resolution of these claims.

Reasonable jurists would not debate the denial of Volkman’s claim that the appellate panel of this court failed to comply with the Supreme Court’s order remanding the case for further consideration in light of *Burrage*. Despite Volkman’s assertions to the contrary, this court determined that the district court properly gave the jury a “but-for” causation instruction as required under *Burrage*. *Id.* at 392 n.2. Because a § 2255 motion cannot be used to relitigate an issue raised on direct appeal absent highly unusual circumstances, reasonable jurists would not debate the district court’s resolution of this claim. See *DuPont v. United States*, 76 F.3d 108, 110 (6th Cir. 1996).

Reasonable jurists would not debate the denial of Volkman’s claim that the federal courts lack subject matter jurisdiction. Specifically, Volkman asserts that there is insufficient evidence showing that he violated the Controlled Substances Act. Despite Volkman’s assertions to the contrary, a jury convicted him of conspiring to distribute and unlawfully distributing controlled substances, and this court determined that there was sufficient evidence in support of his convictions. *Volkman*, 797 F.3d at 384, 390-98. Accordingly, reasonable jurists would not debate the district court’s resolution of this claim.

No. 17-3022

- 5 -

Volkman argues that the district court failed to comply with Federal Rule of Criminal Procedure 32. This claim has been procedurally defaulted because it could have been raised on direct appeal. *See Massaro v. United States*, 538 U.S. 500, 504 (2003); *Vanwinkle v. United States*, 645 F.3d 365, 369 (6th Cir. 2011). Because Volkman has failed to demonstrate either cause and prejudice or actual innocence, this claim does not deserve encouragement to proceed further. *See Regalado v. United States*, 334 F.3d 520, 528 (6th Cir. 2003).

Accordingly, we **DENY** the application for a certificate of appealability and **DENY** the motion to proceed in forma pauperis as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

No. 17-3022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL H. VOLKMAN,
Petitioner-Appellant,

V.

UNITED STATES OF AMERICA,
Respondent-Appellee.

)
)
)
)
)
)
)
)
)
)

FILED
Dec 13, 2017
DEBORAH S. HUNT, Clerk

ORDER

Before: COLE, Chief Judge; MERRITT and BOGGS, Circuit Judges.

Paul H. Volkman petitions for rehearing en banc of this court's order entered on August 14, 2017, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court, none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Wm. L. Hunt

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PAUL H. VOLKMAN,
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

Case No. 1:07-CR-60-3
(1:16-cv-907)

Senior Judge Sandra Beckwith

ORDER

This matter is before the Court on Petitioner's §2255 Motion to Vacate, Set Aside, or Correct Sentence (Doc. No. 532) and his Amended §2255 Motion (Doc. No. 543). The Court has reviewed and considered the filings of Petitioner and the detailed response of the Government (Doc. No. 542 and 545). The Court concurs with the Government's arguments. Therefore, the Defendant's pending motions are DENIED.

SO ORDERED.

DATED: December 2nd, 2016


Sandra S. Beckwith, Senior Judge
United States District Court

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

Paul H. Volkman,
Petitioner

v.

Case No. 1:07-cr-60-3 & 1:16-cv-907

United States of America,
Respondent

JUDGMENT

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that petitioner's motion to vacate, set aside or correct sentence and amended §2255 motion are **DENIED**.

Date: December 2, 2016

Richard W. Nagel, Clerk

By: s/Mary C. Brown
Mary C. Brown, Deputy Clerk

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