

No. 17-5831

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Feb 07, 2018

DEBORAH S. HUNT, Clerk

JAMES EDWARD LYKINS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

O R D E R

James Edward Lykins, a federal prisoner currently represented by counsel,¹ appeals a district court judgment denying his motion to vacate, set aside, or correct his sentence filed pursuant to 28 U.S.C. § 2255. This court construes Lykins's timely notice of appeal as an application for a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1).

In October 2004, Lykins pleaded guilty to conspiracy to manufacture and distribute methamphetamine and was sentenced to sixty months of imprisonment followed by five years of supervised release. *See United States v. Lykins*, 544 F. App'x 642 (6th Cir. 2013). In August 2009, Lykins was released from federal custody and began his term of supervised release. In September 2011, his probation officer, John D'Alessandro, received an anonymous letter suggesting that he "check on" Lykins. At the same time, the Pendleton County sheriff, Craig Peoples, had been investigating Lykins and his wife for possible involvement with methamphetamine manufacturing and had just received notification that Lykins's wife had

¹ On the date he filed Lykins's appeal, counsel also filed a motion to withdraw as counsel. The district court denied the motion without prejudice to counsel renewing his motion to withdraw should this court grant a COA.

purchased a methamphetamine precursor. Upon discovering their mutual concern, D'Alessandro and Peoples traveled to Lykins's home together on October 12, 2011.

When they arrived, Lykins permitted both of them to enter, and Peoples smelled an odor that he recognized as a fuel used to manufacture methamphetamine and informed D'Alessandro of this. Based on his suspicion of drug manufacturing, supported by Peoples's detection of the odor and the information that Lykins's wife had recently purchased the precursor, D'Alessandro decided to conduct a full search rather than a cursory "plain view" search, as was permitted under the terms of Lykins's supervised release. This search led to the discovery of extensive evidence of methamphetamine manufacturing and a .38-caliber revolver.

After a jury trial, Lykins was convicted of manufacturing methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He was sentenced to 262 months of imprisonment for the drug count to be served concurrently with a prison term of 120 months for the firearm conviction, and to six years of supervised release.

This court affirmed Lykins's conviction and sentence, rejecting his arguments that: (1) the district court erroneously denied his motion to suppress the evidence obtained from the search; (2) the district court erroneously permitted evidence of a prior conviction to be admitted into evidence under Federal Rule of Evidence 404(b); (3) he was prejudiced by the district court's mention of his motion to suppress when it instructed the jury that the legality of the search was not open for consideration; and (4) the district court was required to instruct the jury on the lesser included offense of simple possession of methamphetamine.

In August 2014, Lykins filed his pro se § 2255 motion to vacate, presenting eleven grounds for relief: (1) counsel performed ineffectively by failing to object to the "contradictory testimony" of D'Alessandro and Peoples and by inadequately cross-examining these witnesses; (2) the government failed to prove an unbroken chain of custody of the seized items; (3) the government tampered with the evidence, and the evidence from his search was co-mingled with evidence from an unrelated search; (4) the sentencing court failed to explain certain special conditions of his supervised release that were imposed for his 2004 conviction; (5) his Fifth Amendment rights were violated when the officers failed to give him warnings under *Miranda v.*

Arizona, 384 U.S. 436 (1966) during the search; (6) Peoples testified both as an expert and a fact witness without the requisite cautionary jury instructions about his dual testimony; (7) the district court erroneously permitted evidence of his 2004 plea agreement; (8) the district court abused its discretion by notifying the jury that it had denied Lykins's motion to suppress; (9) the district court permitted a warrantless search in violation of his Fourth Amendment rights and improperly admitted into evidence the fruits of the illegal search; (10) the district court erred in failing to separate Peoples's expert testimony from his fact testimony; and (11) he established cause and prejudice for any procedural default that the district court may find.

In a motion to supplement his brief, Lykins argued that he should not have been considered a career offender under USSG § 4B1.2 after the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551, 2557-59 (2015). The court appointed Lykins counsel, granted him leave to amend his motion to add the *Johnson* claim, and ordered briefing. The court otherwise rejected all of Lykins's claims. After the court ordered further briefing on the *Johnson* claim, it recognized that the Supreme Court, in *Beckles v. United States*, 137 S. Ct. 886 (2017), had since decided that the residual clause of USSG § 4B1.2(b) was not unconstitutionally vague, unlike the residual clause in the Armed Career Criminal Act, 18 U.S.C. § 924(e). *See Johnson*, 135 S. Ct. at 2557-59. Therefore, the court concluded that the sentencing court had properly sentenced Lykins as a career offender after finding that his prior conviction of wanton endangerment was a qualifying violent felony. The court then denied the § 2255 motion in full and denied a COA.

To obtain a COA, Lykins must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Insofar as his claims were rejected on the merits, he must show 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 denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition 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).

Claims Litigated on Direct Appeal

The district court determined that Lykins's claims enumerated as one, eight, and nine had already been presented and resolved in this court's decision affirming his conviction and sentence. A § 2255 motion may not be used to relitigate issues that were denied on direct appeal except in extraordinary circumstances, such as when there has been an intervening change in the law. See *Wright v. United States*, 182 F.3d 458, 467 (6th Cir. 1999).

On direct appeal, this court reviewed the testimony in detail, deferring to the district court's determination that D'Alessandro's testimony was credible and supported the district court's decision to deny Lykins's motion to suppress. The court then rejected Lykins's claim that any inconsistencies between the testimony by D'Alessandro and Peoples undermined a finding of probable cause. This court determined that the district court had abused its discretion when it revealed to the jury its denial of the suppression motion but concluded that the error was harmless because the district court had instructed that only D'Alessandro's credibility was at issue and not whether D'Alessandro had probable cause to search the residence.

These claims regarding the officers' testimony and the suppression motion were litigated and resolved in Lykins's direct appeal, and Lykins offers nothing new to support his claim that counsel was ineffective for failing to object to the "contradictory" testimony by D'Alessandro and Peoples. Moreover, Lykins presented no change in the law regarding these claims. Because Lykins has not alleged that any extraordinary circumstances exist to overcome the rule prohibiting relitigating issues raised on appeal, no reasonable jurist could debate the district court's denial of claims one, eight, and nine.

Lykins's seventh claim—that the district court erroneously permitted evidence of his 2004 plea agreement—was addressed and rejected by this court on direct appeal as well. This court determined that the evidence in Lykins's 2004 plea regarding his prior involvement in the manufacture of methamphetamine was properly admitted under Federal Rule of Evidence 404(b)

to prove his intent to manufacture the substance in this case and his knowledge of that process. This court also determined that the prejudicial effect of introducing the prior bad acts did not outweigh their probative value and that the district court's limiting instruction also supported the district court's decision to allow the evidence. Therefore, this claim does not deserve encouragement to proceed further. *See Miller-El*, 537 U.S. at 327.

Chain of Custody

In claims two and three, Lykins challenged the government's chain of custody of the seized evidence and accused the government of tampering with the evidence and possibly supplementing the evidence with contraband from an unrelated drug case. As the district court explained, Peoples's testimony unequivocally established that the evidence was properly secured and logged in. In addition, a Kentucky forensic specialist testified regarding the testing, marking, sealing, and initializing of the drug evidence, and an ATF agent testified about the receipt of the gun and ammunition that were seized. Lykins presented no evidence to support his bare allegation that the seized items had been mishandled or that the government tampered with or supplemented the evidence. Thus, reasonable jurists would not debate the district court's resolution of these two claims.

Conditions of Supervised Release

Lykins argued in ground four that the district court failed to adequately explain its reasons for imposing special conditions of supervised release when he was sentenced in 2004. As the district court found, this claim involved his first conviction and sentence and was unrelated to his current motion attacking his 2012 conviction and sentence. Therefore, reasonable jurists would not debate the district court's resolution of claim four.

Failure to Give *Miranda* Warning

In claim five, Lykins stated that the officers violated his Fifth Amendment rights when they failed to give him a *Miranda* warning at the time they searched his home. The district court determined that Lykins had procedurally defaulted this claim by failing to challenge the admissibility of his statements prior to trial. Moreover, Lykins failed to show any cause for the default or prejudice arising from it. In the alternative, the district court denied the claim on the

merits because Lykins was not arrested or prevented from leaving his residence during the search, and there was no display of force that would imply he was being detained.

As Lykins acknowledged in his § 2255 motion, a defendant is entitled to *Miranda* warnings only if he is interrogated while in police custody. *See Oregon v. Mathiason*, 429 U.S. 492, 494-95 (1977). In determining whether an interrogation is custodial, this court considers “(1) the location of the interview; (2) the length and manner of the questioning; (3) whether there was any restraint on the individual’s freedom of movement; and (4) whether the individual was told that he or she did not need to answer the questions.” *United States v. Hinojosa*, 606 F.3d 875, 883 (6th Cir. 2010). A reasonable person in Lykins’s situation would not have felt unable to terminate questioning. Therefore, Lykins was not in custody for *Miranda* purposes. *See Thompson v. Keohane*, 516 U.S. 99, 112 (1995). As a result, reasonable jurists would not debate the district court’s resolution of claim five.

Dual Testimony by Peoples

In claims six and ten, Lykins challenged the district court’s decision to allow Peoples to testify both as to facts and as an expert witness regarding his experience as an investigator in the area of methamphetamine manufacturing without proper jury instructions and without sufficiently defining the two types of testimony during the trial. The district court determined that Lykins had procedurally defaulted this claim and failed to present cause for this failure or prejudice to this case as a result.

The district court also rejected this claim on the merits. As the court explained, Peoples was not categorically prohibited from testifying as both a fact witness and an expert witness trained and certified on clandestine meth labs and methods of manufacturing the substance. *See United States v. Pritchett*, 749 F.3d 417, 430 (6th Cir. 2014). In this case, Peoples testified as to his experience and was then presented with another line of questioning about the search of the residence on October 12, 2011. This “clear demarcation” in Peoples’s testimony met the requirement of assuring that the jury would “give proper weight to each type of testimony.” *Id.* (quoting *United States v. Lopez-Medina*, 461 F.3d 724, 743 (6th Cir. 2006)). Moreover, the jury was given the Sixth Circuit’s Pattern Instruction on opinion testimony, “so the jurors had the tools for properly evaluating” Peoples’s opinion. *Id.* Finally, Lykins presents nothing to show

that this dual testimony affected his “substantial rights or the fairness, integrity, or public reputation of the judicial proceedings.” *Id.* Therefore, reasonable jurists would not debate the district court’s resolution of these two claims.

Claim of Showing Cause and Prejudice

Lykins claimed in ground eleven that he could show cause and prejudice if the court should determine that he had procedurally defaulted any claim. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The district court noted that Lykins presented this argument as a general proposition, arguing that his trial counsel’s performance “was so deficient and egregiously so serious that counsel was not functioning as the ‘counsel’ guaranteed by the Sixth Amendment.” However, Lykins failed to relate this claim to any particular issue or facts presented in his motion and cited only the general cause-and-prejudice standard for determining whether a habeas claim may be considered on the merits. Reasonable jurists would not debate the district court’s conclusion that Lykins’s general argument failed to show the requisite prejudice to excuse Lykins’s default of any issues as determined by the district court. *See Johnson v. Bradshaw*, 493 F. App’x 666, 669 (6th Cir. 2012).

Sentencing Under the Career Offender Guideline

The district court properly determined that *Beckles* dispensed with Lykins’s claim that he could not be considered a career offender under USSG § 4B1.2(a) based on his prior conviction of wanton endangerment. *See Beckles*, 137 S. Ct. at 895. Therefore, for the reasons stated by the district court in its second and final order denying the motion to vacate, reasonable jurists would not debate the district court’s resolution of this claim.

Accordingly, Lykins’s request for a COA is **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk