

No. 17-1535

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL WINANS, JR.,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

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FILED
Oct 20, 2017
DEBORAH S. HUNT, Clerk

O R D E R

Michael Winans, Jr., a federal prisoner proceeding through counsel, moves this court for a certificate of appealability to pursue his appeal of a district court judgment denying his motion to vacate, set aside, or correct his sentence filed under 28 U.S.C. § 2255.

In 2012, pursuant to a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement, Winans pleaded guilty to one count of wire fraud, in violation of 18 U.S.C. § 1343. The charge arose from an investment fraud scheme in which Winans created a private trust and falsely represented that the trust was investing in crude oil bonds in Saudi Arabia. The plea agreement provides that, through this scheme, Winans defrauded at least 1,000 victims out of more than eight million dollars over the course of eleven months.

The district court sentenced Winans to 165 months in prison, which was within the range of 151-188 months that was contemplated by the plea agreement. Winans was also ordered to pay \$4,796,522 in restitution. Winans appealed, and this court dismissed his appeal based on the appeal waiver in Winans's plea agreement. *United States v. Winans*, 748 F.3d 268, 272 (6th Cir. 2014).

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In 2015, Winans filed the instant § 2255 motion to vacate, set aside, or correct his sentence. He claims that: (1) his trial counsel was ineffective for various reasons; (2) the government violated its duty under *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose exculpatory information during sentencing and violated its duty under *Kastigar v. United States*, 406 U.S. 441 (1972), when it used information provided by Winans pursuant to a grant of partial immunity; and (3) he was sentenced based on “grossly inaccurate information.” The district court denied the motion and declined to issue a certificate of appealability, reasoning that all of Winans’s claims lacked merit.

Winans now seeks a certificate of appealability from this court. He reiterates his first and third claims—i.e., that his trial counsel was ineffective in numerous respects and that he was sentenced based on inaccurate information. He also claims that he is entitled to an evidentiary hearing to further establish that his plea was not knowing and voluntary because it was the product of ineffective assistance of counsel. Because Winans did not raise his second claim in his motion for a certificate of appealability, it is waived on appeal. *See Jackson v. United States*, 45 F. App’x 382, 385 (6th Cir. 2002) (per curiam).

A certificate of appealability may be granted “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). That standard is met when the movant demonstrates “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*, 537 U.S. at 327.

Winans’s first ground for relief claims ineffective assistance of trial counsel. To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry requires the defendant to “show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. In the context of a guilty plea, as is the case here, the prejudice inquiry requires the defendant to

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“show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Winans first claims that his counsel was ineffective because counsel gave him “bad advice” to plead guilty and thus his guilty plea was involuntary. Specifically, Winans claims that counsel advised him to accept a plea agreement that overstates the amount of losses he caused and the number of victims he affected, and contains a guidelines range that is twice as high as the correct range. Winans argues that the amount of losses is under \$2.5 million—not \$8 million as it states in the plea agreement—because he repaid \$6.5 million to investors. And he maintains that the number of victims is less than 250, as it states in the worksheets attached to the plea agreement. Had the plea agreement accurately represented these figures, Winans argues, his resulting guidelines range would have been lower.

To be valid, a guilty plea must be made intelligently and voluntarily, which requires the defendant to have “sufficient awareness of the relevant circumstances and likely consequences.” *Brady v. United States*, 397 U.S. 742, 748 (1970). The validity of a guilty plea must be determined from the “totality of the circumstances.” *Abdus-Samad v. Bell*, 420 F.3d 614, 631 (6th Cir. 2005) (citing *Brady*, 397 U.S. at 747, 749). When a habeas petitioner challenges his plea, “the [government] generally satisfies its burden [to show that the plea was voluntary and intelligent] by producing a transcript of the [district] court proceeding,” and “[t]he factual findings of a [district] court that the plea was proper generally are accorded a presumption of correctness.” *Garcia v. Johnson*, 991 F.2d 324, 326 (6th Cir. 1993).

Winans’s allegation that he did not voluntarily enter his plea is belied by the transcript of his plea hearing, which indicates that Winans pleaded guilty of his own free will. The transcript reflects that Winans understood the charge to which he was pleading guilty and the consequences of his plea, including, among other things, the maximum term of imprisonment that could be imposed and the likelihood that he would have to pay restitution. Winans, moreover, acknowledged that he discussed the charge and sentencing consequences with his attorney, that

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he reviewed and discussed the plea agreement, including the attached worksheets, with his attorney, and that his attorney had answered each and every question regarding the charge, sentencing consequences, plea agreement, and his overall case. Winans then affirmed that he was satisfied with the advice of his attorney. He also affirmed that no one pressured or forced him to plead guilty and twice acknowledged that he was pleading guilty freely and voluntarily and by his own choice because he was in fact guilty of the crime charged. Winans's affidavit, in which he alleges, among other things, that he "[r]eluctantly" signed the plea agreement fifteen minutes before the hearing despite telling his attorney that he wanted to go to trial is insufficient to overcome Winans's sworn statements in court that demonstrate the voluntariness of his plea. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (explaining that "[s]olemn declarations [during a plea hearing] carry a strong presumption of verity").

Winans's statements at the plea hearing also demonstrate that he knew he was stipulating to an amount of losses of \$8 million and at least 250 victims. The district court twice recited the factual basis of Winans's plea agreement, including the fact that Winans "obtained over \$8 million from more than 1,000 victim investors." Winans agreed each time that the district court's recitation of those figures was correct. Winans also acknowledged the guidelines range of 151 to 188 months, as stated in the plea agreement, and indicated that he understood the advisory nature of the guidelines. Rather than challenge the figures or guidelines range contained in the plea agreement at the plea hearing, Winans agreed to them and, as set forth above, knowingly and voluntarily pleaded guilty of his own free will. And it was not unreasonable for counsel to recommend that Winans accept the plea agreement on those terms, which was, according to counsel, the "best deal" the government would offer. The government offered evidence that the amount of losses was between \$11.5 million and \$22 million—much greater than the \$8 million stated in the plea agreement. Jurists of reason therefore could not disagree with the district court's conclusion that Winans entered his guilty plea knowingly and voluntarily and that counsel was not ineffective in advising Winans to accept the plea agreement.

Next, Winans claims that he was sentenced on incorrect information and that the incorrect information is attributable to the ineffective assistance of counsel. Winans relies upon *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016), in which the Supreme Court held that a defendant who raises an unpreserved claim regarding the miscalculation of his guidelines range is not required to provide additional evidence to show that the error affected his substantial rights, and argues that he is entitled to be resentenced because his counsel's ineffective assistance led to an improper calculation of the amount of losses he caused, which ultimately resulted in a higher sentence.

This ineffective-assistance claim, similar to the preceding ineffective-assistance claim, is foreclosed by Winans's knowing and voluntary guilty plea, pursuant to which he stipulated that the amount of losses was "over \$8 million." Nevertheless, his counsel did not perform deficiently by failing to challenge this figure at sentencing, as doing so may have run afoul of the plea agreement (i.e., by refuting a figure contained in the plea agreement to which Winans agreed to be bound). Moreover, raising a challenge may have caused the government to recalculate the amount of losses, which could have yielded an even higher amount and, consequently, a higher sentence. Indeed, the government indicated at sentencing that there may be additional victims who would come forward and claim losses, and the government argued in the district court that the total amount of losses "was likely more than the \$8 million the government and Winans stipulated to in the [plea] agreement." Reasonable jurists therefore could not debate the district court's conclusion that counsel did not perform deficiently in failing to challenge the amount of losses during sentencing.

Nor could reasonable jurists debate the district court's conclusion that, even if counsel had performed deficiently, Winans did not show that he was prejudiced as a result. The district court did not choose a sentence based solely on the amount of losses that Winans caused. Rather, the district court indicated that it imposed a 165-month sentence based on, among other things, consideration of the factors set forth in 18 U.S.C. § 3553(a), including the nature and circumstance of Winans's offense and the need for adequate deterrence to criminal conduct that

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perpetrates fraud on the public. The district court also considered statements from some of the victims, including two who were present at sentencing who explained how they and their families suffered as a result of Winans's fraudulent scheme. In view of these considerations, Winans has not shown that there is a reasonable probability that, even if his counsel challenged the amount of losses—and was successful in decreasing the amount of losses—he would have received a lower sentence or would have instead chosen to go to trial. *See Hill*, 474 U.S. at 59.

Next, Winans claims that his counsel was ineffective because he failed to challenge the restitution calculations. In particular, he claims that the amount of restitution that the district court ordered he pay—\$4,796,522—is significantly higher than the figure he calculates—\$1,471,325—based on his removal from the restitution list the victims who sought restitution but had never invested with him or who had received more money back than they had invested. He argues that counsel should have challenged the restitution amount contained in the presentence report on this basis.

Winans's claim is again foreclosed by his knowing and voluntary guilty plea. His plea agreement provides clear notice that he would be required to pay restitution and that "[t]he victims, and the full amounts of restitution in this case, are to be determined." Winans acknowledged this provision during his plea hearing and indicated that he understood that he would have to pay restitution to the victims and that restitution was "agreeable" to him. Although Winans claims that his counsel should have challenged the restitution amount at sentencing, Winans himself failed to object to the restitution amount despite being asked directly by the district court if he wished to object to, add to, correct, or delete anything in the presentence report—including the restitution amount. Moreover, the amount of restitution ordered by the district court was based on a list of 612 victims who provided the government with the amounts that they lost, which is in accordance with the plea agreement's mandate that the district court "shall order restitution to *every identifiable victim* of defendant's offense." Winans therefore has not made a substantial showing of the denial of a constitutional right by his counsel's failure to challenge the restitution amount at sentencing. *See United States v. Herder*,

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551 F. App'x 257, 258 (6th Cir. 2014) (finding no deficient performance in counsel's failure to object to imposition of restitution when defendant's plea agreement provided for such a sanction); *Niewenhuis v. United States*, No. 13-2631 (6th Cir. May 19, 2014) (finding that trial counsel's failure to object to restitution at sentencing did not constitute ineffective assistance because the defendant's plea agreement informed him that he was required to pay restitution in an amount yet to be determined).

Finally, because reasonable jurists could not debate the district court's rejection of Winans's claims based on the existing record, the district court did not abuse its discretion in ruling without an evidentiary hearing. *See Hodges v. Colson*, 727 F.3d 517, 541 (6th Cir. 2013) (district court's failure to hold an evidentiary hearing is reviewed for an abuse of discretion); *Muniz v. Smith*, 647 F.3d 619, 625 (6th Cir. 2011) ("A district court is not required to hold an evidentiary hearing if the record 'precludes habeas relief.'" (quoting *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007))).

Accordingly, the court **DENIES** the application for a certificate of appealability.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written over a horizontal line.

Deborah S. Hunt, Clerk