

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30655



A True Copy
Certified order issued Aug 08, 2018

John W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

MALCOLM BOLDEN, also known as Little Mac Bolden,

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Louisiana

O R D E R:

Malcolm Bolden, federal prisoner # 33792-034, seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence for conspiracy to distribute heroin, in violation of 21 U.S.C. § 846, and aiding and abetting the distribution of heroin resulting in the death of Kevin Ryan, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2. He also moves for leave to proceed in forma pauperis (IFP).

Bolden argues for the first time in his COA motion that his guilty plea was based on a promise or benefit—a reduction of his sentence in return for providing information—that the Government “could not give,” that his sentence was higher than he agreed, and that all of the evidence provided by federal investigators was hearsay. Additionally, Bolden newly contends in his

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COA motion that counsel was ineffective because (1) counsel refused to withdraw the plea after he told counsel that he had not agreed that the 300-month sentences would run concurrently and had instead agreed to a sentence “of 300 collective months”; and (2) counsel failed to investigate hearsay evidence provided by the Government. We decline to consider issues raised for the first time Bolden’s COA motion. *See Henderson v. Cockrell*, 333 F.3d 592, 605 (5th Cir. 2003).

Bolden also argues that his guilty plea was involuntary because counsel misled him or applied unfair pressure by rushing him to take the plea due to the victim’s family’s political connections. He contends that counsel was ineffective for failing to investigate a witness, Devin Clark, or the victim Ryan’s toxicology report. Bolden also contends that the toxicology report revealed that Ryan died from polysubstance abuse approximately 12 hours after the alleged heroin purchase, and he questions how the Government could know what happened before or after the victim’s heroin purchase from Bolden. Additionally, he contends that Clark was responsible for Ryan’s death.

To obtain a COA, Bolden must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). “A petitioner satisfies this standard by demonstrating 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.

Bolden has not met this standard. Regarding his claim that his plea was involuntary, Bolden assented at his colloquy that he understood the meaning and consequences of his plea, including the possible sentence he could receive,

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and he does not allege any facts that show that he accepted the plea against his will. *See United States v. Pearson*, 910 F.2d 221, 223 (5th Cir. 1990).

To make out his claim of ineffective assistance of counsel, Bolden would have to show (1) that his counsel's performance was deficient, and (2) his counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, he must 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." *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) (citation and quotation marks omitted).

Even assuming that Bolden could make a showing of constitutionally deficient performance based on his attorney's failure to investigate the witness Clark and the toxicology report, he cannot show prejudice because these sources ultimately support the conclusion that the heroin that Bolden provided Ryan was the but-for cause of his death. Although the toxicology report listed polysubstance toxicity as the cause of death, the heroin need only have been a "but-for" cause of death to support Bolden's conviction under § 841(b)(1)(C). *See Burrage v. United States*, 571 U.S. 204, 218–19 (2014). A person's conduct is the "but-for" cause of a result if the result would not have occurred without the conduct. *Id.* "A particular result can be caused by multiple necessary factors—multiple but-for causes—yet one of those single factors will still be considered a but-for cause so long as the result would not have occurred in its absence." *United States v. Ruiz-Hernandez*, 890 F.3d 202, 212 (5th Cir. 2018) (citing *Burrage*, 571 U.S. at 218–19). Bolden's guilty plea conviction under § 841(b)(1)(C) is supported by the information in these sources, including (1) Clark's description of Ryan's "normal" condition before injecting the heroin and

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Ryan's passing out within two minutes after the injection; (2) Clark's statement that he did not see Ryan take any other drugs in the hours before and after he injected the heroin; (3) Ryan's death several hours after he injected the heroin; and (4) the toxicology report's finding that drugs, including heroin, caused Ryan's death. Because these sources would not have strengthened his defense, Bolden cannot demonstrate that reasonable jurists would conclude that, but for his attorney's allegedly deficient investigation, Bolden would have insisted on proceeding to trial.

Accordingly, Bolden's motion for a COA and his motion for leave to proceed IFP are DENIED.

/s/ James L. Dennis
JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA

CRIMINAL ACTION

VERSUS

NO. 14-059

MALCOLM BOLDEN

SECTION "N" (3)

ORDER AND REASONS

Considering the “Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody” (Rec. Doc. 437), filed by defendant-petitioner, Malcolm Bolden;

IT IS ORDERED that the Motion is **DENIED** for the reasons fully set forth in the government’s memorandum in opposition to the Motion. (*See* Rec. Doc. 488). Specifically, the Court finds that Bolden knowingly, intelligently, and voluntarily entered into a plea agreement that included, under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, a stipulated sentence of 300 months imprisonment.

In addition, Bolden has failed to show that his counsel’s assistance was ineffective. To prevail on such a claim, a petitioner must demonstrate that (1) his counsel’s performance was deficient, and (2) his counsel’s deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To be considered deficient, counsel’s performance must fall below the standard of “reasonably effective assistance.” *Id.* Furthermore, that deficiency must create “a reasonable probability that . . . the result of the proceeding would have been different.” *Id.*

In this case, neither requirement has been met. In fact, with his client facing the possibility of a life sentence, counsel successfully negotiated a sentence of 300 months – a term of imprisonment that Bolden, under oath, agreed was appropriate. And, even assuming *arguendo* a deficiency, Bolden has not shown that his counsel’s assistance (*i.e.*, decisions not to object to the

PSR, not to subpoena or consider certain records, and not to raise autopsy results)¹ resulted in any prejudice, let alone prejudice to the degree that would cause this Court to question the outcome of the plea proceedings. This finding is particularly true in light of the circumstances of Bolden's guilty plea, which was made pursuant to an agreement under Rule 11(c)(1)(C). Ultimately, Bolden assented in open court to the length of the very sentence to which he now challenges. Accordingly, the Court refuses to vacate, set aside, or correct Bolden's bargained-for sentence.

New Orleans, Louisiana, this 26th day of June 2017.



KURT D. ENGELHARDT
United States District Judge

¹ These allegations are listed as grounds one through four in the Motion. Some of these things, counsel may have done had Bolden proceeded to trial, which Bolden chose not to do. As to the others, counsel likely made a strategic decision not to raise at sentencing.

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