Appendix

Recieved on 8-28-24

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted August 15, 2024
Decided August 22, 2024

Before

AMY J. ST. EVE, *Circuit Judge*

JOSHUA P. KOLAR, *Circuit Judge*

No. 24-1458

TRAVIS TUGGLE,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Central District of Illinois.

No. 23-cv-2040

James E. Shadid,
Judge.

ORDER

Travis Tuggle has filed a notice of appeal from the denial of his motion under 28 U.S.C. § 2255 and an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

Recived on the 5th of Feb issued on Jan 22

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

TRAVIS TUGGLE,	)	
	)	
Petitioner-Defendant,	)	
	)	
v.	)	Case Nos. 16-cr-20070
	)	23-cv-2040
UNITED STATES,	)	
	)	
Respondent-Plaintiff.	)	

ORDER

Before the Court is Petitioner Travis Tuggle's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. 155). Petitioner claims he received ineffective assistance of counsel litigating his motion to suppress and at sentencing. For the reasons below, the Court DENIES Petitioner's § 2255 Motion and DECLINES to issue a certificate of appealability.

I. BACKGROUND

Tuggle is currently serving a 360-month imprisonment sentence for methamphetamine trafficking offenses. Tuggle's criminal activities were detected by law enforcement through an expansive investigation of a large-scale drug trafficking network active in several central Illinois counties between 2013 and 2016 called "Operation Frozen Tundra." As part of the investigation, the government installed three cameras on public property that viewed Tuggle's home in Mattoon, Illinois. Two cameras were affixed to poles in an alley and a third was on a pole a block away. These cameras were installed without a warrant and, as relevant for the current motion, the parties do not dispute that law enforcement did not receive a permit from the local

government to affix the cameras to the poles. They captured about eighteen months of footage between 2014 and 2016, and recorded footage around the clock.

Evidence from the videos provided substantial support for Tuggle's eventual indictment October 2016. On August 1, 2017, Tuggle was charged in a two-count superseding indictment with conspiracy to distribute and possess with intent to distribute methamphetamine, in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(A) and maintaining a drug-involved premises in violation of 21 U.S.C. § 856. Doc. 41. On July 6, 2018, Tuggle filed a Motion to Suppress, arguing that evidence obtained from pole camera footage outside his residence constituted an impermissible warrantless search and should be suppressed. Doc. 50. The Court denied the motion on July 25, 2018, and entered a written order on July 31, 2018. Doc. 53. Tuggle filed two additional motions to suppress, essentially asking the Court to reconsider its prior ruling, which the Court declined to do. *See,* Docs. 74, 89, 90.

On August 8, 2019, Tuggle was charged in a superseding indictment with conspiracy to possess with intent to distribute and to distribute controlled substances, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A)(viii), and maintaining a premises for the purpose of distributing methamphetamine, a Schedule II controlled substance, in violation of 21 U.S.C. §§ 856(a)(1) and (b). Second Superseding Indictment, Doc. 85. On September 20, 2019, Tuggle entered a conditional plea of guilty to both counts of the Second Superseding Indictment, reserving his right to appeal the Court's denials of his motions to suppress. *See* Sept. 20, 2019 Minute Entry; Notice of Conditional Plea, Doc. 103.

Prior to Tuggle's guilty plea, the government had filed a Notice pursuant to 21 U.S.C. § 851, notifying Tuggle of its intent to seek an enhanced sentence due to his prior conviction of a "serious drug felony." Amended Notice, Doc. 91. Specifically, Tuggle has a 2010 Illinois

conviction for manufacture/delivery of cocaine. *Id.* Due to this prior conviction, his minimum statutory sentence was enhanced from ten years to fifteen years; the maximum statutory sentence was life imprisonment with or without the enhancement. 21 U.S.C. § 841(b)(1)(A). Notably, the enhancement had no impact on his advisory sentencing guidelines range.

A sentencing hearing was held February 18, 2020. The United States Probation Office prepared a Revised Presentence Investigation Report in advance of sentencing. PSR, Doc. 112. Due to a finding that the drug quantity involved was 20.31 kilograms of Ice Methamphetamine, Tuggle's base offense level was 38. *Id.* ¶58. After resolving objections at the sentencing hearing his advisory sentencing guidelines range was 360 months to life imprisonment on Count 1ss, and 240 months of imprisonment on Count 2ss. S.Tr. 23. His statutory sentencing range was determined to be fifteen years to life imprisonment on Count 1ss, 21 U.S.C. § 841(b)(1)(A), and up to twenty years on Count 2ss, 21 U.S.C. § 856(b). *See* PSR ¶110.

Highlighting the scope of the criminal activity and large quantity of methamphetamine involved—45 pounds—the government asked for a sentence of 360 months of imprisonment. S.Tr. 25–30. Tuggle's counsel argued in mitigation and suggested a sentence of 240 months of imprisonment would be sufficient for both counts. S.Tr. 31–36. The Court sentenced Tuggle to 360 months of imprisonment on Count 1ss and 240 months of imprisonment on Count 2ss to be served concurrently. *See* Judgment, Doc. 119.

Tuggle promptly appealed, again arguing that the use of the pole cameras on a public utility pole without a warrant the Fourth Amendment. *United States v. Tuggle*, 4 F.4th 505 (7th Cir. 2021). The Seventh Circuit affirmed this Court's ruling on the issue. *Id.* Tuggle then sought review by the Supreme Court. The Supreme Court denied his petition for writ of certiorari on February 22, 2022. *Tuggle v. United States*, 142 S. Ct. 1107 (2022).

Petitioner signed this Motion to Vacate, Correct, or Set Aside Sentence pursuant to 28 U.S.C. § 2255, Doc. 155, on February 21, 2023, and affirmed that he mailed his motion on the same day.[1] The Motion was received and filed by the Court on March 1, 2023. The government filed a response in opposition. Doc. 158. And Tuggle has filed a reply. Doc. 160. After careful review, this Order now follows.

II. LEGAL STANDARD

Section 2255, "the federal prisoner's substitute for habeas corpus," *Brown v. Rios,* 696 F.3d 638, 640 (7th Cir. 2012), permits a prisoner incarcerated pursuant to an Act of Congress to request that his sentence be vacated, set aside, or corrected if "the sentence was imposed in violation of the Constitution or laws of the United States, or . . . the court was without jurisdiction to impose such sentence, or . . . the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Relief under § 2255 is appropriate for "an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Harris v. United States*, 366 F.3d 593, 594 (7th Cir. 2004) (quotation marks omitted). While a § 2255 Motion is not a substitute for a direct appeal or to raise arguments that could have been raised on direct appeal but were not, a "failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255." *Massaro v. United States*, 538 U.S. 500, 509 (2003).

Tuggle's motion argues that he received ineffective assistance of counsel. The Sixth Amendment guarantees criminal defendants effective assistance of counsel. *Strickland v.*

[1] While the government has reserved the right to argue timeliness of the motion should an evidentiary hearing be ordered, the Court notes that a close inspection of the envelop Tuggle used to mail his motion shows a post-marked date of "Feb 21, 2023" Doc. 155 at 39. While the electronically filed envelop is not easy to read, the Court finds that below the second stamp on the top row of stamps, the post-marked date is readable.

Washington, 466 U.S. 668, 684–86 (1984). Under *Strickland's* two-part test, a petitioner must show both that his attorney's performance was deficient and that he was prejudiced as a result. *Vinyard v. United States*, 804 F.3d 1218, 1225 (7th Cir. 2015). Courts, however, must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 690. A petitioner must also prove that he has been prejudiced by his counsel's representation by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Absent a sufficient showing of both cause and prejudice, a petitioner's claim must fail. *United States v. Delgado,* 936 F.2d 303, 311 (7th Cir. 1991).

III. DISCUSSION

A. Motion to Suppress

Tuggle first argues that his counsel was ineffective in litigating his motion to suppress because he should have argued that "the Government infringed upon the petitioner[']s reasonable expectation of privacy in violation of the petitioner['] [F]ourth [A]mendment right against unreasonable [s]searches and [s]eizures." Doc. 155-2 at 6. As detailed above, Tuggle's counsel did bring a motion to suppress regarding the pole camera evidence. This claim has been thoroughly litigated and the Court's previous denials of Tuggle's motions to suppress were affirmed by the Seventh Circuit, where the Seventh Circuit held that "the extensive pole camera surveillance in this case did not constitute a search under the current understanding of the Fourth Amendment." *Tuggle*, 4 F.4th at 529.

The only new argument Tuggle adds is that his attorney could have also argued that law enforcement violated two Mattoon, Illinois city ordinances when placing the pole cameras that recorded his drug suppliers' visit to his home. The Seventh Circuit's opinion in his case did

repeatedly note that the use of the pole cameras was permitted because they were "located where officers were lawfully entitled to be." *Tuggle*, 4 F.4th at 511 ("In short, the government's use of a technology in public use, while occupying a place it was lawfully entitled to be, to observe plainly visible happenings, did not run afoul of the Fourth Amendment."). But, Tuggle's challenge here is not that officers would not have been entitled to stand where the poles were and observe, but rather that the affixing of the cameras violated local laws. Accordingly, his argument does not undermine the Seventh Circuit's holding.

Moreover, as Courts have routinely held, the Fourth Amendment inquiry cannot and does not turn on local laws or rules. *See, e.g., Virginia v. Moore*, 553 U.S. 164, 172 (2008) ("[T]he Fourth Amendment's meaning [does] not change with local law enforcement practices—even practices set by rule.") (quotation marks omitted); *United States v. Noriega*, 676 F.3d 1252, 1263 n.4 (11th Cir. 2012) (violation of local oral search warrant rules immaterial to federal Fourth Amendment suppression inquiry); *United States v. Bach*, 310 F.3d 1063, 1066 (8th Cir. 2002) ("It also appears that the state officers executing the search violated Minnesota Statute section 626.13. Even so, such a violation would not warrant suppression of the evidence gained because federal courts in a federal prosecution do not suppress evidence that is seized by state officers in violation of state law, so long as the search complied with the Fourth Amendment."); *United States v. McCray*, No. 1:15-CR-212-WSD/AJB, 2017 WL 9472888, at *13 (N.D. Ga. June 15, 2017), (collecting cases holding that "a violation of state law in procuring a warrant or conducting a search is immaterial to whether a federal court must suppress evidence."). While these cases largely addressed the reasonableness of a search, seizure, or arrest, as opposed to whether an individual has been searched, the same principles apply. It cannot be the case that a mounting pole cameras in one town is a search and it is not a search in another town merely

because one town requires permits prior to affixing anything to the poles. "Fourth Amendment protections are not 'so variable' and cannot 'be made to turn upon such trivialities.'" *Virginia*, 553 U.S. at 172.

Even if there exists a possibility that a near uniformity in local laws across the country could inform the analysis of whether one had a reasonable expectation of privacy in a certain situation, the local ordinances cited by Tuggle are not relevant. He argues that a local ordinance required law enforcement to get a permit before installing surveillance cameras. Doc. 155 at. 5. However, whether law enforcement obtained a permit before installing surveillance cameras could have no logical impact on whether a person would have a reasonable expectation of privacy from being viewed from a public place.

Accordingly, Tuggle's counsel's performance was not deficient, nor was Tuggle prejudiced by counsel's failure to raise this claim.

B. 21 U.S.C. § 851 Enhancement

Tuggle's second argument is that his counsel was ineffective for failing to challenge the § 851 sentencing enhancement he received because his predicate Illinois cocaine trafficking conviction does not qualify as a serious drug felony. The parties agree that after *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020), Tuggle's prior convictions would no longer have triggered the statutory sentencing enhancement that enhanced his statutory minimum sentence from ten years to fifteen years. Notably, Tuggle was sentenced on February 18, 2020, and promptly appealed. On July 20, 2020, while Tuggle's appeal was still pending, the Seventh Circuit entered its opinion in *Ruth*. The parties' dispute is whether his trial or appellate attorney was ineffective for failing to raise the argument that was successful in *Ruth*. Again, Tuggle must

show both that his counsel was deficient and that the deficient performance prejudiced his defense. *Strickland*, 466 U.S. at 687.

1. Deficient Performance

On the first prong, the Court finds that the current record is insufficient to determine whether counsel was deficient. Since briefing concluded in the case, the Seventh Circuit decided a similar issue in *Coleman v. United States*, 79 F.4th 822, 832 (7th Cir. 2023). In *Coleman,* the petitioner's sentence had been enhanced to a mandatory life sentence at his sentencing in 2013. *Id.* at 825. The Seventh Circuit held that "it would have been objectively unreasonable for [the petitioner's] defense counsel to have not even *considered* a categorical challenge to the government's reliance on prior Illinois cocaine convictions to enhance [the petitioner's] sentence." *Id.* at 832 (emphasis in original); *see also White v. United States*, 8 F.4th 547, 556 (7th Cir. 2021) (finding that "[t]he 'basis and authority' for *Ruth* were in place since 1990, when the Supreme Court first laid out the categorical approach in *Taylor v. United States*, 495 U.S. 575, 600 (1990), and when the relevant portions of the Illinois and federal drug statutes had taken their current form."). The Seventh Circuit emphasizes that the enhancement in that case resulted in a *mandatory* life sentence, but noted that "[o]f course, if counsel did consider the argument but had credible strategic reasons for not raising it, that would be a different question." *Coleman,* 79 F.4th at 832.

By the time of Tuggle's sentencing, a challenge to his statutory sentencing enhancement would have been obvious as well. Moreover, as *Ruth* was decided when Tuggle's appeal was still pending, Tuggle's appellate counsel's performance would have been deficient if he did not *consider* challenging the statutory sentencing enhancement on appeal as well. Unlike *Coleman*, however, there are likely more obvious strategic reasons that counsel may have had for not

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ORDER

On consideration of the petition for rehearing and petition for rehearing en banc, no judge in regular active service has requested a vote on the petition for rehearing en banc and the judges on the original panel have voted to deny rehearing. It is, therefore, **ORDERED** that the petition for rehearing and petition for rehearing en banc is **DENIED**.