FILED
United States Court of Appeals
Tenth Circuit

June 29, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ARNOLD DEVONNE BUTLER,

Defendant - Appellant.

No. 23-8000
(D.C. Nos. 1:22-CV-00139-SWS &
2:19-CR-00100-SWS-1)
(D. Wyo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

Arnold Devonne Butler, a federal prisoner proceeding pro se,[1] seeks a certificate of appealability (COA) to appeal the district court's order denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. He also moves to proceed *in forma pauperis* ("*ifp*"). We deny Mr. Butler's COA request and dismiss this matter. We grant his *ifp* motion.

---

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] "[W]e liberally construe pro se filings," but "we do not assume the role of advocate." *Yang v. Archuleta*, 525 F.3d 925, 927 (10th Cir. 2008) (internal quotation marks omitted).

I. BACKGROUND

In its order denying the § 2255 motion, the district court summarized the evidence presented at Mr. Butler's criminal trial as follows:

> On May 14, 2019, Mr. Butler was driving a flatbed towing truck transporting a Ford Fusion. Based on a potential load securement violation, Wyoming Highway Patrol Trooper Gebaurer ("Trooper Gebaurer") pulled over the vehicle. After Mr. Butler gave several conflicting answers to Trooper Gebaurer's questions, he ordered Mr. Butler to pull ahead to the port of entry and asked dispatch to send a drug sniffing dog. The dog alerted on the Ford Fusion and a search of the vehicle revealed over twenty-six kilograms of drugs. The Wyoming Highway Patrol also seized Mr. Butler's cell phone, which showed communications between Mr. Butler and known drug trafficker G.L. . . . G.L. testified at trial that Mr. Butler had transported drugs for him and his cousin, Armando Tabarez, seven or eight times previously.

R., Vol. 1 at 101 (citations omitted). Mr. Butler was charged with possession with intent to distribute and conspiracy to distribute methamphetamine, heroin, cocaine, and fentanyl. The jury found him guilty on all charges, and this court upheld his convictions on appeal. *See United States v. Butler*, No. 20-8037, 2021 WL 5445468, at *1 (10th Cir. Nov. 22, 2021).

Mr. Butler then filed a § 2255 motion, asserting several ineffective assistance of counsel claims. The district court denied the motion. Mr. Butler now seeks a COA to appeal the court's order denying relief under § 2255.

II. **DISCUSSION**

A. ***Legal Background***

"The issuance of a COA is a jurisdictional prerequisite to an appeal from the denial of an issue raised in a § 2255 motion." *United States v. Gonzalez*, 596 F.3d 1228, 1241 (10th Cir. 2010); *see also* 28 U.S.C. § 2253(c)(1)(B). To obtain a COA, Mr. Butler must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2). For claims the district court addressed on the merits, he must show "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).

To establish ineffective assistance of counsel, a defendant must meet the two-prong test the Supreme Court announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Meadows v. Lind*, 996 F.3d 1067, 1074 (10th Cir. 2021). "First, the defendant must show his counsel's performance fell 'below an objective standard of reasonableness' and, second, 'the deficient performance prejudiced the defense.'" *Id.* (quoting *Strickland*, 466 U.S. at 687-88). "If the defendant cannot establish either of these prongs, his ineffective-assistance claim fails." *Id.*

B. ***Application***

In his COA application, Mr. Butler argues that his counsel was constitutionally ineffective for (1) informing him that if he testified, he would be given a two-point sentence enhancement for obstruction of justice; (2) failing to subpoena a key witness;

and (3) failing to elicit sufficient testimony from Trooper Chatfield to show the trooper committed perjury.

1. **Advice on Testifying**

On the first issue, the district court determined Mr. Butler failed to establish deficient performance. He alleged that his attorney's advice about a potential sentence enhancement for testifying was a result of counsel's "misinterpretation of the law/guidelines," and "caused defendant to refrain from exercising his Sixth Amendment" right to testify. R., Vol. 1 at 7. The district court explained, however, that Mr. Butler failed to allege how his attorney misinterpreted the guidelines or even identify which guideline counsel allegedly misinterpreted. The court thus concluded Mr. Butler could not establish deficient performance under *Strickland*.

The district court further said "[t]here is also nothing in the caselaw to suggest a counsel's misinterpretation of the sentencing guidelines is a valid basis for finding the deprivation of the right to testify." *Id.* at 110. And the court noted that Mr. Butler's statements in court regarding his decision not to testify did not suggest that his counsel was coercive or refused to call him to testify.

In his COA application, Mr. Butler continues to assert that he chose not to testify based on counsel's advice that his sentence would be enhanced if he took the stand. He argues the district court did not "refute that counsel gave such advice," but instead "only tries to minimize the impact of counsel doing so." COA Appl. at 3. He contends counsel's advice was "constitutionally deficient, well below the norms/standard outlined

in STRICKLAND." *Id.* And he concludes that "[j]urists of reason would find these issue(s) debatable if not wrong." *Id.* This cursory argument does not address the district court's analysis or show why reasonable jurists would debate the district court's resolution of this claim.

2. **Witness Subpoena**

The district court also concluded that Mr. Butler had not shown counsel performed deficiently by failing to subpoena Gerald Humphrey, explaining that Mr. Humphrey had voluntarily agreed to testify. In his COA application, Mr. Butler acknowledges that Mr. Humphrey "did indeed plan to appear voluntarily, however unforeseen circumstances (illness) hindered him from appearing." *Id.* at 4. Although Mr. Butler argues his counsel should have subpoenaed Mr. Humphrey, he has failed to establish that reasonable jurists could debate the district court's rejection of this claim.

3. **Trooper Chatfield**

Finally, Mr. Butler complains about counsel's failure to elicit sufficient testimony from Trooper Chatfield about a prior traffic stop that led to a previous prosecution and conviction.

Before trial, the government gave notice of its intent to offer evidence of Mr. Butler's prior drug convictions under Rule 404(b) of the Federal Rules of Evidence.[2]

[2] Rule 404(b) evidence concerns "Other Crimes, Wrongs, or Acts" and provides that "Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). But Rule 404(b) evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation,

Counsel for Mr. Butler objected to the admission of any testimony about the prior convictions, and the court narrowed the scope of the permissible inquiry, including testimony from Trooper Chatfield. Because of defense counsel's objection, Trooper Chatfield's testimony was limited. He testified that he stopped Mr. Butler on Interstate 80 on April 1, 1998, and searched Mr. Butler's car. During that search Trooper Chatfield said he "found a brick underneath the back seat" that "turned out to be cocaine." R., Vol. 1 at 119 (internal quotation marks omitted). Mr. Butler was convicted of possession with intent to distribute cocaine after the 1998 traffic stop.

Mr. Butler contends Trooper Chatfield committed perjury because he testified in this case to discovering drugs during the traffic stop when in fact a "Mr. Dow" discovered them the next day.[3] The drugs were then "tested and attributed" to Mr. Butler. COA Appl. at 4. Mr. Butler argues that his attorney should have elicited Trooper Chatfield's complete account of the timeline of the discovery of the drugs from the 1998 traffic stop to show that Trooper Chatfield's testimony was "perjurious." *Id.*

---

plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2).

[3] To give context to Mr. Butler's allegations, the district court recounted additional facts about the 1998 traffic stop. It explained that after Trooper Chatfield discovered the brick (but before it could be removed), Mr. Butler took off in his car, and a high-speed pursuit occurred. At one point, another officer observed Mr. Butler's car in the vicinity of a grocery store. The next day a private citizen—Mr. Dow—discovered a maroon stocking cap behind the grocery store that contained a brick of cocaine wrapped in cellophane.

In resolving this argument, the district court explained that Mr. Butler's counsel objected to the introduction of evidence regarding the 1998 traffic stop, which led the court to limit the scope of Trooper Chatfield's testimony. The court concluded that counsel's decision to object was a "strategic choice committed to the sound discretion of trial counsel." R., Vol. 1 at 122 (internal quotation marks omitted). Although Mr. Butler now appears to argue he would have benefitted from having more rather than less testimony from Trooper Chatfield about the 1998 traffic stop, the district court determined that counsel's strategic decision to object "does not amount to constitutionally ineffective assistance of counsel." *Id.* at 123. Mr. Butler has failed to show that reasonable jurists would debate the district court's decision denying relief on this claim.

III. **CONCLUSION**

We deny a COA and dismiss this matter. We grant Mr. Butler's motion for leave to proceed *ifp* on appeal.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge