FILED
United States Court of Appeals
Tenth Circuit

October 1, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SAMUEL GARCIA-ESCALERA,

Defendant - Appellant.

No. 21-5003
(D.C. Nos. 4:18-CV-00013-CVE-CDL
and 4:13-CR-00229-CVE-1)
(N.D. Oklahoma)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HOLMES**, **KELLY**, and **McHUGH**, Circuit Judges.

Samuel Garcia-Escalera is serving a 300-month sentence on drug, firearm, and witness tampering convictions. Proceeding pro se,[1] he seeks a certificate of appealability ("COA") to challenge the district court's denial of his motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Mr. Garcia-Escalera alleges his trial attorney provided ineffective assistance in violation of the Sixth Amendment. He further

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* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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 Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Because Mr. Garcia-Escalera proceeds pro se, "we liberally construe his filings, but we will not act as his advocate." *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

alleges the district court's refusal to provide him with sealed records, discovery, an attorney, and an evidentiary hearing for his § 2255 proceedings violated the Fifth Amendment. We deny his request and dismiss the matter.

I. BACKGROUND

On the morning of January 8, 2013, the Tulsa Police Department executed a search warrant at 12427 East 27th Street. Officers recovered methamphetamine, digital scales, and drug notations at the residence. They also arrested the two occupants—Todd Diaz and Courtney Riley. A cooperative Mr. Diaz provided information about his drug supplier "Pancho,"[2] directing officers to Pancho's residence located at 476 South 78th East Avenue. Officer Mackenzie then prepared an affidavit for a search warrant for the residence, relying on the information from Mr. Diaz. A state court magistrate signed the warrant.

On the afternoon of January 8, 2013, officers executed the warrant at 476 South 78th East Avenue and found over $4,000 in the pockets of a pair of pants, marijuana, a loaded semi-automatic handgun and ammunition, cellular telephones, keys and title to a Chrysler 300 vehicle, a Mexican identification card, and drug notations. Officers arrested Mr. Garcia-Escalera, who was present in the residence. He denied the money taken from the pockets belonged to him, denied he ever went by the name "Poncho" or "Pancho," and denied cell phones or drugs would be found anywhere in the residence.

[2] The nicknames "Pancho" and "Poncho" are used interchangeably throughout the record.

On December 2, 2013, a grand jury returned an indictment charging Mr. Garcia-Escalera with various drug and firearm offenses. Attorney Marna Franklin was appointed to represent him. Ms. Franklin filed several pretrial motions, seeking to suppress seized evidence and statements Mr. Garcia-Escalera made to police after his arrest, and requesting a pretrial hearing to determine the admissibility of his alleged co-conspirators' statements. The district court denied these motions. Ms. Franklin also requested funding—and additional funding once the original allocation was depleted—to hire a private investigator to interview witnesses and investigate certain claims made by Mr. Garcia-Escalera. Around this time, the court also entered a protective order preventing Ms. Franklin from disseminating certain materials to Mr. Garcia-Escalera, including grand jury transcripts and witness statements.

On April 14, 2014, the Government filed a second superseding indictment that added three counts arising out of Mr. Garcia-Escalera's solicitation of persons to kidnap and murder potential witnesses. The district court bifurcated the trial of the drug and firearm charges from the conspiracy and solicitation charges, and a jury found Mr. Garcia-Escalera guilty of all drug and firearm charges. Mr. Garcia-Escalera then agreed to a plea deal on the remaining charges. He pleaded guilty to attempting to intimidate or persuade three witnesses from testifying at his criminal trial, and the Government dismissed the conspiracy and solicitation charges.

At sentencing, the district court overruled Mr. Garcia-Escalera's objections to the presentence report ("PSR") but granted, in part, his motion for a downward variance. The district court then sentenced Mr. Garcia-Escalera to a 300-month term of imprisonment.

After Ms. Franklin filed a timely notice of appeal for Mr. Garcia-Escalera, the district court permitted her to withdraw as counsel on appeal. This court rejected Mr. Garcia-Escalera's appeal, and the Supreme Court denied his petition for a writ of certiorari.

Before filing his § 2255 motion, Mr. Garcia-Escalera filed a Motion for Disclosure of Grand Jury Transcripts [Dkt. # 269] and a Motion for Modification to the Protective Order [Dkt. # 270]. Mr. Garcia-Escalera claimed he needed these documents to draft his § 2255 motion. The district court denied the motions. It first noted Mr. Garcia-Escalera "has no basis" to request the court provide him these documents because the district could not verify the motion was not frivolous until it was filed. Dkt. # 272 at 2. It then noted that even if there were a § 2255 motion on file, "[t]he documents that defendant requests are grand jury transcripts, witness statements, interview notes, and phone records that are not part of the Court file, and the Court cannot produce the documents to defendant." *Id.* Finally, the court stressed "this would not be an appropriate case to provide defendant copies of grand jury transcripts under any circumstances" given the "significant safety concerns raised" by his prior charges of solicitation and conspiracy and his guilty plea of attempting to intimidate or persuade witnesses from testifying. *Id.* at 3.

Mr. Garcia-Escalera then filed the instant § 2255 motion, alleging, among other clams not pursued on appeal, that Ms. Franklin provided ineffective assistance of counsel. The motion was accompanied by an affidavit from Mr. Garcia-Escalera describing alleged exculpatory evidence he maintains Ms. Franklin did not investigate or present at trial. The Government supplemented its response to the § 2255 motion with an

affidavit from Ms. Franklin, and cited the affidavit in its response to the § 2255 motion. In his Reply Brief, Mr. Garcia-Escalera claimed "almost all of the 'facts' in Attorney Franklin's [affidavit] refer to matters which are NOT available to Mr. Garcia-Escalera due to the Court's protective orders." ROA at 1404. As a result, Mr. Garcia-Escalera requested further discovery and an evidentiary hearing.

The district court denied Mr. Garcia-Escalera's § 2255 motion and his additional discovery requests. Mr. Garcia-Escalera timely appealed this ruling.

II. DISCUSSION

"[T]here can be no appeal from a final order in a § 2255 proceeding unless a circuit justice or judge issues a certificate of appealability." *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016). "A certificate of appealability may issue 'only if the applicant has made a substantial showing of the denial of a constitutional right.'" *Id*. (quoting 28 U.S.C. § 2253(c)(2)). 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." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)).

Mr. Garcia-Escalera alleges two constitutional infirmaries: (1) a Sixth Amendment violation, claiming his trial counsel acted ineffectively by failing to investigate or present allegedly exculpatory evidence to the jury, and (2) a Fifth Amendment violation, arguing the district court erred by refusing him access to certain sealed records and discovery, and

refusing to hold an evidentiary hearing on his § 2255 motion. We turn to these claims now.

A. Ineffective Assistance

An ineffective assistance of counsel claim is a mixed question of law and fact we review de novo. *United States v. Holloway*, 939 F.3d 1088, 1097 (10th Cir. 2019). We analyze ineffective assistance of counsel claims using the approach set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). Under *Strickland*, "a defendant must show both that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense." *Holloway*, 939 F.3d at 1102 (internal quotation marks omitted). Mr. Garcia-Escalera provides three reasons why his counsel's assistance was ineffective. None can overcome the "strong presumption that counsel provided effective assistance." *Id.* at 1103 (quotation marks omitted).

1. Alibi Defense

Seeking a COA, Mr. Garcia-Escalera claims his counsel "could have but did not investigate and timely present an alibi defense . . . based on proof that he was at a casino from the evening of January 7, 2013 [through] the morning of January 8, 2013."[3] Aplt. Br. at 17. The record reflects that Ms. Franklin did investigate certain claims; she

[3] Mr. Garcia-Escalera refers to his alternate explanation for possessing $4,000 when the search warrant was executed as his "alibi" defense. ROA at 1431 n.4. Even if Ms. Franklin was deficient by not presenting this evidence to the jury, the district court correctly notes this deficiency was not prejudicial. As the district court stated, "the evidence presented at trial established that the drug conspiracy continued over several months, and defendant's allegations about the source of the money in his possession on January 8, 2013 would have had limited exculpatory value." *Id.* at 1438.

obtained funds to hire an investigator and supplemental funds for further investigation. The record does not indicate what particular claims were investigated.

Ms. Franklin's affidavit states she specifically directed the investigator to examine Mr. Garcia-Escalera's purported alibi defense. She further indicates, however, that this defense "could not be established through investigative efforts," noting "Mr. Garcia-Escalera could not provide me with an identifiable person of who he was with: no last name no phone number, no address, or work information. I believe my investigator made efforts to identify the person, but without success." ROA at 1386. The district court credited this affidavit over the bare allegations lodged in Mr. Garcia-Escalera's motion, noting "there is no inconsistency between defendant's and Franklin's account of the events, and Franklin states that she was aware of defendant's allegations concerning the source of the money." ROA at 1438.

Importantly, Mr. Garcia-Escalera's affidavit does not claim Ms. Franklin failed to investigate this claim. This conclusory allegation is made only in his § 2255 motion and in his appellate brief. The district court's ruling on this issue was therefore not, as Mr. Garcia-Escalera maintains, "primarily based on the lower court's evaluation as to the relative credibility of conflicting affidavits." Aplt. Br. at 37. Indeed, Mr. Garcia-Escalera's affidavit lends support to Ms. Franklin's affidavit by corroborating that Ms. Franklin knew about the alibi defense during the investigatory period and lacked sufficient information to identify any persons accompanying him. *See* ROA at 1343, 1346 (stating Mr. Garcia-Escalera went to a casino with his friend Rogelio and he "encouraged

[Ms. Franklin] to speak with Rogelio [and] see if she could secure the copy of video surveillance from Osagio Casino").

Mr. Garcia-Escalera fails to offer any evidence contradicting Ms. Franklin's affidavit and cannot demonstrate Ms. Franklin's performance was deficient. *See Holloway*, 939 F.3d at 1103 ("[W]e start by presuming, absent a showing to the contrary, that an attorney's conduct is objectively reasonable because it could be considered part of a legitimate trial strategy.") (quotation marks omitted); *see also Burt v. Titlow*, 571 U.S. 12, 23 (2013) ("[T]he absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance'") (alteration in original) (quoting *Strickland*, 466 U.S. at 689).

Accordingly, we deny Mr. Garcia-Escalera a COA on this issue.

2. Identity as Pancho

Mr. Garcia-Escalera next claims his counsel "could have but did not investigate and timely present exculpatory evidence demonstrating that he was not and had never been known as 'Poncho' or 'Pancho.'" Aplt. Br. at 17. Mr. Garcia-Escalera's affidavit states he shared a holding cell with Mr. Diaz, during which time Mr. Diaz admitted that Mr. Garcia-Escalera was not the same 'Pancho' who supplied Mr. Diaz with drugs. Mr. Garcia-Escalera's affidavit further states he conveyed this information to Ms. Franklin, asked her to locate another cellmate who participated in the conversation that had taken place with Mr. Diaz, and also instructed her to ask certain acquaintances if they knew him as Pancho. The record does not indicate whether Mr. Garcia-Escalera's

claim about the conversation with his cellmate was investigated by Ms. Franklin, but the information was not presented at trial.

As the district court notes, however, Ms. Franklin "repeatedly raised" the argument that Mr. Garcia-Escalera was not Pancho "during many stages of the proceedings." ROA at 1439. For example, during the suppression hearing, Ms. Franklin pressed Officer Mackenzie as to his efforts to corroborate Mr. Diaz's statements suggesting Mr. Garcia-Escalera was Pancho. And she objected to the PSR on grounds that Mr. Garcia-Escalera denied he used the name Poncho or Pancho. Yet, even assuming Ms. Franklin's performance was deficient for not presenting the cellmate conversation to reinforce Mr. Garcia-Escalera's claim that he was not Pancho, this presumptively deficient performance did not prejudice the defense.

For a deficiency to be sufficiently prejudicial under *Strickland*, a defendant "must establish that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Byrd v. Workman*, 645 F.3d 1159, 1168 (10th Cir. 2011) (internal quotation marks omitted). "A 'reasonable probability is a probability sufficient to undermine confidence in the outcome' of the trial." *Id.* (quoting *Strickland*, 466 U.S. at 694). This does not require Mr. Garcia-Escalera to prove the deficiency "more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. But "mere speculation is not sufficient to satisfy this burden." *Byrd*, 645 F.3d at 1168.

Here, the record does not suggest Ms. Franklin's failure to present the information contained in Mr. Garcia-Escalera's affidavit undermined confidence in the outcome of the trial. As the district court noted when overruling Ms. Franklin's objection to the PSR,

"various witnesses testified at trial to knowing the defendant as 'Poncho.'" ROA at 1188. Further, Mr. Garcia-Escalera could have testified about this conversation with Mr. Diaz at trial. He instead chose not to testify after a colloquy with the district court. *Id.* at 1071.

We deny COA on this issue.

3. Impeachment of Cristin Wood

Finally, Mr. Garcia-Escalera claims his counsel "could have but did not use the testimony of private investigator Cullen who interviewed Cristin Wood [which] would have demonstrated that Cristin Wood made statements out of court that contradicted her in court testimony." Aplt. Br. at 17. This claim is meritless, as Ms. Wood did not testify at trial. Ms. Franklin's failure to raise a meritless issue does not render her ineffective. *See Sperry v. McKune*, 445 F.3d 1268, 1275 (10th Cir. 2006).

As a result, we deny COA on this issue.

B. Due Process

Mr. Garcia-Escalera argues the district court violated his Fifth Amendment rights by (1) "denying [him] access to critically important sealed testimony, documents and an attorney," and (2) not granting an evidentiary hearing and instead "deciding disputed facts based on the court's perception as to the most persuasive of conflicting affidavits." Aplt. Br. at 23. A movant "seeking a COA must demonstrate that a procedural ruling barring relief is itself debatable among jurists of reason; otherwise, the appeal would not 'deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 777 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The district court's rulings that Mr. Garcia-

Escalera contests would be reviewed for abuse of discretion during a merits appeal[4] and, in this scenario, the Supreme Court has accepted a formulation of "the COA question" as "whether a reasonable jurist could conclude that the District Court abused its discretion." *Id.* Here, no reasonable jurist could conclude the district court abused its discretion.

1. Sealed Documents and Discovery

According to Mr. Garcia-Escalera, the district court denied him access to information critical to his defense, thereby violating his Due Process rights. The district court denied these requests after finding "the record conclusively demonstrates that defendant is not entitled to relief under § 2255 and there are no disputed issues of fact warranting discovery." ROA at 1447 n. 6. This conclusion is not an abuse of discretion, given this court reached the same finding on the only substantive issue Mr. Garcia-Escalera deemed appealable—his claim Ms. Franklin acted ineffectively by failing to investigate or present allegedly exculpatory evidence. *See* Aplt. Br. at 34.

Mr. Garcia-Escalera's statement that he "was crippled by his lack of access to the sealed documents upon which both the prosecutor and [Ms. Franklin's affidavit] were allegedly relying in their opposition to his Section 2255 motion" is overstated. Aplt. Br.

[4] *See United States v. Herring*, 935 F.3d 1102, 1107 (10th Cir. 2019) ("[W]hen a district court refuses to grant an evidentiary hearing . . . we ask whether the defendant's allegations, if proved, would entitle him to relief, an inquiry we conduct de novo" and, if so, "we then determine whether the denial of the evidentiary hearing constituted an abuse of discretion"); *King v. Fleming*, 899 F.3d 1140, 1147 (10th Cir. 2018) ("We review for an abuse of discretion the district court's denial of additional discovery."); *United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013) ("We review for an abuse of discretion the district court's decisions regarding whether to seal or unseal documents.").

at 21. As discussed *supra* Part II.A, Mr. Garcia-Escalera's affidavit did not contradict Ms. Franklin's, meaning no material facts were disputed. Moreover, his ineffective assistance of counsel claim can be, and was, resolved on the record. The district court did not abuse its discretion in finding that Mr. Garcia-Escalera did not need grand jury testimony or Ms. Franklin's records to litigate his § 2255 claims.[5] Nor did it abuse its discretion by refusing to appoint counsel to review the sealed material on Mr. Garcia-Escalera's behalf.

We deny a COA on this issue.

2. Conflicting Affidavits and an Evidentiary Hearing

Mr. Garcia-Escalera next contends the district court violated his Due Process rights by weighing conflicting affidavit testimony and refusing to hold an evidentiary hearing. Initially, we reject Mr. Garcia-Escalera's claim that the district court resolved this case by weighing conflicting affidavits. As discussed, the conflict Mr. Garcia-Escalera advances is not reflected in the affidavits presented to the district court.

Moreover, the district court did not abuse its discretion by denying Mr. Garcia-Escalera an evidentiary hearing. The district court denied the hearing after concluding "Defendant also fails to identify what evidence or testimony is likely to be developed at an evidentiary hearing." ROA at 1447 n.6. The district court is correct that Mr. Garcia-Escalera does not clarify what facts he plans to develop at the hearing. That failure

[5] Mr. Garcia-Escalera's post-trial motions and affidavits do not state whether he contacted Ms. Franklin and requested the investigatory materials he seeks.

provides a sufficient ground for the district court to deny Mr. Garcia-Escalera's request for an evidentiary hearing. *See United States v. Moya*, 676 F.3d 1211, 1214 (10th Cir. 2012) ("District courts are not required to hold evidentiary hearings in collateral attacks without a firm idea of what the testimony will encompass and how it will support a movant's claim.") (quotation marks omitted).

An evidentiary hearing is also unnecessary "'where the issues raised by the motion were conclusively determined either by the motion itself or by the files and records in the trial court.'" *United States v. Fields*, 949 F.3d 1240, 1246 (10th Cir. 2019) (quoting *Machibroda v. United States*, 368 U.S. 487, 494–95 (1962)). Again, Mr. Garcia-Escalera's claims were conclusively resolved on the record because he did not allege facts demonstrating his counsel was ineffective.

Thus, a hearing was unnecessary and we deny COA on this issue. *See id.*; *see also Moya*, 676 F.3d at 1214 (holding it was not an abuse of discretion to deny an evidentiary hearing based on conclusory allegations in a § 2255 motion).

III. CONCLUSION

For the foregoing reasons we **DENY** Mr. Garcia-Escalera's request for a COA and **DISMISS** this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge