FILED
United States Court of Appeals
Tenth Circuit

October 21, 2021

Christopher M. Wolpert
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LAURA LEE SORSBY,

Defendant - Appellant.

No. 20-3249
(D.C. Nos. 2:20-CV-02350-JWL &
2:15-CR-20052-JWL-2)
(D. Kan.)

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**ORDER DENYING CERTIFICATE OF APPEALABILITY***

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

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Defendant Laura Lee Sorsby seeks a certificate of appealability (COA) to appeal the dismissal by the United States District Court for the District of Kansas of her motion for relief under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(B) (requiring a COA to appeal denial of a § 2255 motion). We deny a COA and dismiss the appeal.

After a grand jury returned a superseding indictment charging Ms. Sorsby with one count of conspiracy to commit wire fraud, *see* 18 U.S.C. § 1349, and three counts of wire fraud, *see* 18 U.S.C. § 1343, she reached a plea agreement with the

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

government. She would plead guilty to an information charging her with one count of misprision of felony, *see* 18 U.S.C. § 4, and in return the government would move to dismiss the conspiracy and wire-fraud counts charged in the superseding indictment. They also agreed under Federal Rule of Criminal Procedure 11(c)(1)(C) that a 24-month term of imprisonment, a one-year term of supervised release, and a restitution obligation of $8,362,200 was the appropriate sentence for Ms. Sorsby. On July 17, 2019, the district court accepted the plea agreement, imposed the agreed-upon sentence, and dismissed all counts against her in the superseding indictment.

A year later, Ms. Sorsby had a change of heart. On July 16, 2020, she filed a pro se motion under 28 U.S.C. § 2255 seeking to set aside her guilty plea and have the charges dismissed. Because one of her allegations was that trial counsel had failed to timely file an appeal despite her request that he do so, the district court appointed an attorney to represent her for the limited purpose of pursuing that allegation. Ms. Sorsby later withdrew that allegation, and on December 14, 2020, the district court denied her § 2255 motion and declined to grant a COA. Ms. Sorsby timely filed a notice of appeal, which we construe as a request for a COA. *See* Fed. R. App. P. 22(b)(2). We granted district-court counsel's motion to withdraw and appointed counsel to represent Ms. Sorsby before this court, but counsel could discern no nonfrivolous issues on appeal, filed an *Anders* brief, *see Anders v. California*, 386 U.S. 738 (1967), and moved to withdraw. Ms. Sorsby then filed her own brief.

A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires the applicant to show that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). In other words, the applicant must show that the district court's resolution of the constitutional claim was either "debatable or wrong." *Id*. If the application was denied on procedural grounds, the applicant faces a double hurdle. Not only must the applicant make a substantial showing of the denial of a constitutional right, but she must also show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id*. "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id*.

Ms. Sorsby's claim for relief is based largely on allegations of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, Ms. Sorsby must show both that her counsel's performance was deficient—"that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment"—and that "the deficient performance prejudiced [her] defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In conducting this analysis, "a court must indulge a strong presumption that counsel's

conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id*. at 689 (internal quotation marks omitted). Further, to establish that a defendant was prejudiced by counsel's deficient performance, she "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. "Failure to make the required showing of *either* deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id*. at 700 (emphasis added). If an ineffectiveness claim is premised on defense counsel's alleged failure to raise an issue, we reject the claim if the issue is meritless. *See Hawkins v. Hannigan*, 185 F.3d 1146, 1152 (10th Cir. 1999).

Ms. Sorsby's brief to this court is disorganized, rambling, and devoid of legal analysis. As best we can discern (liberally construing her pro se pleading, *see Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)), she raises the following issues:

First, Ms. Sorsby claims that trial counsel rendered ineffective assistance by pressuring her to plead guilty to misprision of felony. She alleges that trial counsel did not sufficiently advise her about the content of the plea agreement and the presentence report; that counsel did not explain the nature of the offense to which she pleaded guilty; that counsel ignored that she was innocent of the charges that would be dismissed as consideration for her guilty plea; and that counsel unreasonably

failed to request a delay in her change-of-plea hearing because she was in a "worn-down mental and physical state" arising from a family medical emergency and a tight travel schedule. Am. Aplt. Br. at 10. The district court found these challenges to the voluntariness of the plea "flatly contradicted by the record." R., Vol. I at 671. The district court also ruled that Ms. Sorsby had not shown or even alleged the requisite prejudice—that is, that she would not have pleaded guilty were it not for the alleged failures by counsel.

The district court's findings are fully supported by the record. Ms. Sorsby affirmed to the court that she was "able to concentrate and think clearly" at the hearing when she entered her plea, *id.* at 232; that she fully read and discussed with counsel the terms and consequences of the plea agreement; that the factual basis for her plea provided in the plea agreement fairly, completely, and accurately described her conduct; that her counsel had never implied that she needed to plead guilty; and that her counsel had informed her about her right to proceed to trial.

Ms. Sorsby contends that she affirmed her understanding of the plea and its consequences at the hearing only because defense counsel instructed her to do so. But the record reflects Ms. Sorsby's genuine attentiveness and independence at the plea hearing—on several occasions she asked for clarification when she was confused, she asked the court to repeat something when she had been distracted, and she requested and obtained changes to the language of the factual basis of her plea shortly before the hearing. In light of Ms. Sorsby's conduct and statements at the hearing, the district court was completely justified in rejecting her later assertions. *See Blackledge*

*v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). The court could therefore reject these claims of ineffective assistance both because she had not shown any failure of her attorney to properly assist her and because the court had provided any essential information that her attorney had omitted.

Second, Ms. Sorsby argues that her counsel acted incompetently in refusing to honor her request to move to withdraw her plea. The district court did not explicitly address this argument. But its disposition of her challenge to her plea establishes that a motion to withdraw her plea would have been a futile gesture. In light of her clear admission of guilt and the finding that her plea was knowing and voluntary, it would have taken substantial credible evidence of some lapse in the process to justify permitting withdrawal of the plea. *See* Fed. R. Crim. P. 11(d)(2)(B) (requiring "fair and just reason for requesting the withdrawal" before granting withdrawal of an accepted plea); *United States v. Dominguez*, 998 F.3d 1094, 1103 (10th Cir. 2021) (setting forth factors relevant to the fair-and-just-reason analysis). But Ms. Sorsby has not come close to providing such evidence. A claim of ineffective assistance of counsel cannot be predicated on the failure to pursue a meritless motion or objection. *See Hawkins*, 185 F.3d at 1152.

Third, Ms. Sorsby argues that defense counsel provided ineffective assistance by failing to challenge the superseding indictment for lack of jurisdiction because the

case had to be brought in Switzerland. An attorney for Ms. Sorsby *did*, however, move to dismiss the superseding indictment for lack of jurisdiction, but the district court ruled that the motion was premature because its validity would depend on the evidence at trial. There was thus no possible ineffective assistance of counsel on this ground before Ms. Sorsby pleaded to the information. Although the possibility of a jurisdictional defense to the charges in the indictment could affect a defendant's willingness to enter into a plea agreement, Ms. Sorsby has made no claim that her attorney failed to properly inform her about the jurisdictional issue.

Fourth, Ms. Sorsby argues that her counsel was inadequate in failing to investigate, produce, present to the court, or challenge evidence relating to the wire-fraud and conspiracy charges. She names several persons as possible witnesses who could provide exculpatory evidence. But to support a claim that she was prejudiced by her attorneys' ineffectiveness in gathering or producing evidence, she would need to identify what specific evidence her counsel could have obtained and how it would have been exculpatory. *See Hatch v. Oklahoma*, 58 F.3d 1447, 1457 (10th Cir. 1995) (habeas petitioner must "state what exculpatory evidence an adequate investigation would have discovered" and "how this evidence would have affected the outcome"). This she has failed to do.

Fifth, Ms. Sorsby asserts that her counsel was ineffective because he failed to dispute the stipulated restitution amount. But "a federal prisoner cannot challenge the restitution portion of [her] sentence using 28 U.S.C. § 2255, because the statute affords relief only to prisoners claiming a right to be released from custody." *United*

*States v. Bernard*, 351 F.3d 360, 361 (8th Cir. 2003) (defendant sentenced to 54 months' imprisonment and restitution exceeding $27 million sought to challenge restitution order in § 2255 motion); *see also United States v. Satterfield*, 218 F. App'x 794, 796 (10th Cir. 2007) (citing *Bernard* and concluding, "Mr. Satterfield cannot challenge the amount of restitution awarded by way of a § 2255 motion, however, because he is not 'claiming the right to be released' from custody based on his claim."); *cf. Erlandson v. Northglenn Mun. Ct.*, 528 F.3d 785, 788 (10th Cir. 2008) ("[T]he payment of restitution or a fine, absent more, is not the sort of 'significant restraint on liberty' contemplated in the 'custody' requirement of the federal habeas statutes." (internal quotation marks and citations omitted)). It does not matter that the challenge to the restitution award is based on an ineffective-assistance claim. *See, e.g.*, *United States v. Thiele*, 314 F.3d 399, 401–02 (9th Cir. 2002) (defendant not permitted to "collaterally attack his restitution order in a § 2255 motion" even though he "couched his restitution claim in terms of ineffective assistance of counsel"); *Smullen v. United States*, 94 F.3d 20, 25 (1st Cir. 1996) ("[A] person in custody cannot bring an ineffective assistance of counsel claim challenging a fine because that person is not 'claiming a right to release' from custody.").

Ms. Sorsby's remaining claims allege various violations of her rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments. But in her plea agreement she waived the right to seek relief on appeal or in postconviction proceedings for any claims except ineffective assistance of counsel and prosecutorial misconduct. Thus, the only claims she could raise under § 2255 other than ineffective-assistance claims

were claims of prosecutorial misconduct. Her prosecutorial-misconduct claims, however, appear to be ones that could have been raised on appeal, and "Section 2255 motions are not available to test the legality of matters which should have been raised on direct appeal." *United States v. Cook*, 997 F.2d 1312, 1320 (10th Cir. 1993). "A defendant's failure to present an issue on direct appeal bars [her] from raising the issue in [her] § 2255 motion, unless [she] can show cause excusing [her] procedural default and actual prejudice resulting from the errors of which [she] complains, or can show that a fundamental miscarriage of justice will occur if [her] claim is not addressed." *Id.* at 1320. The district court determined that Ms. Sorsby's claims other than ineffective assistance of counsel were procedurally barred for failure to raise them on direct appeal and that she had not shown either cause and prejudice or a fundamental miscarriage of justice that would overcome the procedural bar. She has likewise not shown in this court a ground for overcoming the procedural bar.

No reasonable jurist could debate the district court's resolution of Ms. Sorsby's claims. We **GRANT** appellate counsel's motion to withdraw, **DENY** a COA, and **DISMISS** the appeal.

Entered for the Court

Harris L Hartz
Circuit Judge