FILED
United States Court of Appeals
Tenth Circuit

October 17, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSEPH PRINCE,

Defendant - Appellant.

No. 23-1225
(D.C. No. 1:22-CV-03152-RM &
1:18-CR-00300-RM-1)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **BRISCOE**, and **EID**, Circuit Judges.

Joseph Prince, a federal prisoner appearing pro se, seeks a certificate of appealability ("COA") to challenge the district court's denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. *See* 28 U.S.C. § 2253(c)(1)(B) (requiring a COA to appeal an order denying a § 2255 motion). Mr. Prince also requests leave to proceed *in forma pauperis* ("*ifp*"). Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we deny both requests and dismiss this matter.[1]

---

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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] Because Mr. Prince appears 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).

I. **BACKGROUND**

A. ***Factual History***

Mr. Prince worked as a "Beneficiary/Provider Relationships Specialist" for the Department of Veterans Affairs' (the "VA") Spina Bifida Health Care Benefits Program (the "Program"). ROA, Vol. I at 24-25. The Program provides medical coverage to persons born with spina bifida after their parents were exposed to Agent Orange in the Korean or Vietnam wars. Through the Program, the VA pays for beneficiaries to obtain home health aide services from approved providers. The home health aides must meet certain qualifications and be supervised by a registered nurse.

Mr. Prince enlisted his family and friends to set up and run sham home healthcare agencies that were not approved by the Program and did not employ registered-nurse supervisors. He recruited caregivers of spina bifida patients to work as health aides for the sham agencies, which then billed the VA for the home health aide services. Mr. Prince and his associates gave some of the compensation to the caregivers and pocketed the rest. When Mr. Prince's fraud was discovered, the sham agencies had billed the VA for at least $20,060,081.16 and the VA had paid $18,777,134.68.

B. *Procedural History*

1. **Trial, Sentencing, Direct Appeal**

Mr. Prince was indicted on 45 counts related to the fraudulent home health agencies and fraudulent billing.[2] Before trial, he filed a notice of disposition stating he had reached a proposed plea agreement with the Government and requesting a change of plea hearing. He then withdrew his request and asked the district court to reset his case for trial.[3] The case went to trial, and the jury found him guilty of all 45 counts.

When the district court sentenced Mr. Prince, it calculated a Sentencing Guidelines total offense level of 36, which included a four-level upward adjustment because "the defendant was convicted of a Federal health care offense involving a Government health care program" and the loss to the program was more than $20 million. U.S.S.G. § 2B1.1(b)(7). Under the Guideline commentary, a program's "loss" is the greater of the actual loss—the victim's financial harm—or the intended

[2] Mr. Prince was indicted on eleven counts of felony conflict of interest under 18 U.S.C. §§ 208(a) and 216(a)(2), ten counts of health care fraud and aiding and abetting under 18 U.S.C. §§ 1347 and 2, one count of conspiracy to commit an offense against the United States under 18 U.S.C. § 371, six counts of soliciting/receiving illegal gratuity under 18 U.S.C. § 201(c)(1)(B), six counts of soliciting/receiving an illegal kickback under 42 U.S.C. § 1320a-7b(b)(1)(A), eight counts of unlawful monetary transactions under 18 U.S.C. § 1957, and three counts of money laundering under 18 U.S.C. § 1956(a)(1)(B)(i).

[3] The reason for the withdrawal is not in the record.

loss—the amount of financial harm the defendant sought to cause, including unsuccessful attempts. *Id.* § 2B1.1 cmt. n.3(A).

For government healthcare fraud, intended loss is typically "the aggregate dollar amount of fraudulent bills submitted to the Government health care program." *Id.* § 2B1.1 cmt. n.3(F)(viii). Here, the actual loss was $18,777,134.68—the amount the VA paid—and the intended loss was $20,060,081.16—the amount billed to the VA. Mr. Prince did not challenge that the intended loss should be used to calculate loss. He argued instead that the district court should have deducted any value the VA received from the sham services.

The district court disagreed and found Mr. Prince's intended loss was more than $20 million, triggering the four-point upward adjustment to a total offense level of 36. With Mr. Prince's criminal history category of I, his Guidelines range was 188 to 235 months. Mr. Prince was sentenced to 192 months in prison followed by three years of supervised release. He was ordered to pay $18,777,134.68 in restitution to the VA.

Mr. Prince appealed, again challenging the district court's failure to deduct the value of the sham services from the amount billed to the VA. *United States v. Prince*, No. 20-1239, 2021 WL 2879010, at *2 (10th Cir. July 9, 2021). We affirmed his sentence. *Id.* at *3.

2. **Section 2255 Proceedings**

Mr. Prince filed a motion in the district court to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. The court denied his motion, holding most of his

claims were "wholly undeveloped." ROA, Vol. I at 154. But it considered whether his lawyers were ineffective for failing to properly advise him about whether he should plead guilty or for failing to challenge the district court's reliance on the Guideline commentary after *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

The district court rejected Mr. Prince's claim that he was not properly advised about his plea because the record refuted his allegations and because he did not "establish a reasonable probability that he would have pleaded guilty but for counsel's errors." The court also concluded Mr. Prince's attorneys were not ineffective for failing to raise a *Kisor* argument because they would have been among the first to do so. And it said he could not show prejudice because his sentence would still have been within the Guideline range.

II. DISCUSSION

Mr. Prince seeks a COA on his ineffective assistance of counsel claims. We deny his request.

A. *Legal Background*

1. COA Requirement and Standard of Review

To obtain a COA, Mr. Prince must make a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), by demonstrating "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues were adequate to deserve encouragement to proceed further," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations omitted). When assessing the district court's denial of a § 2255 motion, "we review the district

court's findings of fact for clear error and its conclusions of law de novo." *United States v. Rushin*, 642 F.3d 1299, 1302 (10th Cir. 2011).

2. **Ineffective Assistance of Counsel**

The Sixth Amendment right to counsel includes a right to effective representation. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). To establish ineffective assistance of counsel, a defendant must show (1) counsel's constitutionally deficient performance (2) prejudiced the defendant. *Id.* at 687-88. A defendant must show counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. To do so, the defendant must overcome a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance . . . [and] might be considered sound trial strategy." *Id.* at 689 (quotations omitted). A defendant establishes prejudice by showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. We "may address [these requirements] in either order and need not address both if the defendant has failed to satisfy one." *Frederick v. Quick*, 79 F.4th 1090, 1105 (10th Cir. 2023) (citing *Strickland*, 466 U.S. at 697).

B. ***Analysis***

Mr. Prince seeks a COA on two issues. First, he argues his successive pretrial attorneys[4] were ineffective for failing to explain to him that his sentence could be reduced for "acceptance of responsibility" if he pled guilty. Second, he asserts that his counsel at sentencing and on appeal was ineffective for failing to argue that the district court should not follow Guidelines commentary on § 2B1.1(1)(b)(7) after *Kisor*. Both claims lack merit, and we do not grant a COA.

1. **The Plea Process**

Mr. Prince contends his "counsel[] failed to fully and constitutionally advise him of the risk factors of proceeding to trial and the likely effect on his sentence if he ple[d] guilty." Aplt. Br. at 23. He argues he would have pled guilty if his counsel had "fully and competently explained" the availability of a sentence reduction for acceptance of responsibility. *Id.* at 25 n.19. As the district court noted, the record does not support this argument.

Mr. Prince initially pled not guilty. He filed a notice of disposition with the district court, which stated that "a disposition ha[d] been reached" and "request[ed] a change of plea hearing for the court to consider the proposed plea agreement." Dist. Ct. Doc. at 80. He discussed the plea agreement with counsel and asked the district

[4] Mr. Prince's public defender withdrew before trial and was replaced by CJA counsel. He asserts both were ineffective in advising him on a plea before trial.

court to extend his time to file a change of plea so they could confer further. He eventually declined to sign the plea agreement and stood for trial.

Mr. Prince now asserts his counsel was inadequate because counsel did not advise him that (1) "he could plead guilty or nolo contendere without . . . [a] 'plea agreement,'" Aplt. Br. at X; (2) a guilty plea "could likely [result in] a 3-point[] reduction in his offense level . . . for 'acceptance of responsibility,'" *id.* at XI; and (3) he would "*not* waive his right to raise *any* defenses at his sentencing" by pleading guilty, *id*. These arguments cannot be squared with the record.

As the district court noted in denying § 2255 relief, Mr. Prince was offered and reviewed a plea agreement. The court's local rules require plea agreements to be written using a form that includes "non-binding guideline calculations which require the parties to specify positions with respect to the acceptance [of responsibility] credit." ROA, Vol. I at 152. The same plea agreement form explains that after a plea, the defendant may raise defenses to the Guideline calculations at sentencing. *Id.* Mr. Prince was also provided with the plea agreements of three of his co-conspirators. Dist. Ct. Doc. at 121, Ex. 1044, 1086, 1169. The local rules required each of them to use the same form calling for the same information. Finally, Mr. Prince attended a pretrial hearing where the district court confirmed he had filed a notice of disposition stating he had reached a plea agreement with the Government but ultimately rejected the plea. ROA, Vol. V at 41-43.

In his brief to this court, Mr. Prince argues that the district court should not have denied his § 2255 motion because he did not review the written plea agreement.

Aplt. Br. at 25. But the record shows that Mr. Prince consulted with counsel, reviewed a written plea agreement, reviewed his co-conspirators' plea agreements, and attended a change of plea hearing where the district court confirmed that he withdrew from the proposed plea agreement. Reasonable jurists would not debate whether the district court correctly denied § 2255 relief on this claim.

2. **Sentencing and Direct Appeal**

Mr. Prince contends his counsel should have argued at sentencing and on direct appeal that the term "loss" in U.S.S.G. § 2B1.1 is unambiguous and therefore, under *Kisor*, Guideline commentary directing the court to use intended rather than actual loss does not warrant deference. Aplt. Br. at 16-19. He further asserts that counsel failed to use *Reyes-Vargas v. Barr*, 958 F.3d 1295 (10th Cir. 2020), to support his *Kisor* argument. *Id.* at 17. Finally, he insists he was prejudiced because there was a reasonable probability that, had counsel made a *Kisor* argument, his total offense level would have been reduced by one point.[5] *Id.* at 17, 21-22.

Our recent decision, *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023), precludes Mr. Prince's argument. There, we held that *Kisor* does not alter the holding in *Stinson v. United States*, 508 U.S. 36 (1993), that "commentary in the Guidelines Manual governs unless it [(1)] runs afoul of the Constitution or a federal

[5] This reduction would have generated a Guidelines range of 168 to 210 months. U.S.S.G. § 5A.

statute or [(2)] is plainly erroneous or inconsistent with the guideline provision it addresses." *Maloid*, 71 F.4th at 798.

Because we held in *Maloid* that *Kisor* does not apply to Guidelines commentary, Mr. Prince cannot show his attorney's performance was deficient, nor can he establish "a reasonable probability" that a *Kisor* argument would have prevailed at sentencing or on direct appeal. *Strickland*, 466 U.S. at 694. Reasonable jurists would not debate the district court's denial of this claim.

III. CONCLUSION

We deny Mr. Prince's request for a COA and dismiss this matter. Because he has not presented "a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal," we also deny his request to proceed *ifp*. *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991).[6]

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

[6] Mr. Prince argues we should remand because the district court denied his § 2255 motion before he filed a reply brief. Aplt. Br. at 14-16. We agree the district court should not have issued its opinion before Mr. Prince filed a reply brief or his time to do so expired. *See* Rule 5 of the Rules Governing Section 2255 Proceedings, Advisory Committee Notes, 2019 Amendments ("The moving party has a right to file a reply."). But any error is harmless because even with a reply, Mr. Prince could not succeed on his ineffective assistance of counsel claims. *See United States v. Hill*, 336 F. App'x 832, 834 (10th Cir. 2009) (unpublished) (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1).