

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

May 5, 2006

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,

Respondent-Appellee,

v.

LAVELLE HENDERSON,

Petitioner-Appellant.

No. 05-3340

District of Kansas

(D.C. Nos. 05-CV-3110-RDR and
01-CR-40020-RDR)

ORDER*

Before **HARTZ, SEYMOUR, and McCONNELL**, Circuit Judges.

Lavelle Henderson, a federal prisoner proceeding *pro se*, seeks a certificate of appealability (COA) that would allow him to appeal from the district court's order denying his habeas corpus petition under 28 U.S.C. § 2255. *See* 28 U.S.C. § 2253(c)(1)(B). Because we conclude that Mr. Henderson has failed to make "a substantial showing of the denial of a constitutional right," we deny his request for a COA, and we dismiss the appeal. *Id.* § 2253(c)(2).

*This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.

Background

Mr. Henderson was convicted by a jury on one count of engaging in a continuing criminal enterprise pursuant to 21 U.S.C. § 848 and one count of engaging in a money laundering conspiracy pursuant to 18 U.S.C. §§ 1956(h) and 1957(a). The district court imposed an automatic life sentence pursuant to 21 U.S.C. § 848(b). Mr. Henderson filed a direct appeal and, subsequently, sought to vacate his sentence pursuant to 28 U.S.C. § 2255. This Court affirmed his conviction and sentence on direct appeal, *see United States v. Henderson*, No. 02-3426, 78 Fed. App'x 91 (10th Cir. Oct. 15, 2003) (unpublished), and the district court denied his motion to vacate his sentence under § 2255. Mr. Henderson then sought a COA from the district court, which was denied.

Discussion

The denial of a motion for relief under § 2255 may be appealed only if the district court or this Court first issues a COA. 28 U.S.C. § 2253(c)(1)(B). A COA will issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” *Id.* § 2253(c)(2). In order to make such a showing, a petitioner must demonstrate that “reasonable jurists could debate whether . . . 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 his request for a COA, Mr. Henderson makes eight arguments, which we construe liberally. Two of those arguments amount to claims of ineffective assistance of counsel, and another two challenge the constitutionality and length of the sentence. Mr. Henderson also alleges a *Brady* violation and a denial of due process. Finally, he challenges the constitutionality of his indictment and the sufficiency of the evidence against him. We consider each argument in turn.

A. Ineffective Assistance of Counsel

To support a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance "'fell below an objective standard of reasonableness' and that the unreasonably deficient performance resulted in prejudice." *Lucero v. Kerby*, 133 F.3d 1299, 1323 (10th Cir. 1998) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 691–92 (1984)). Prejudice is shown when a defendant establishes "that there [was] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Mr. Henderson claims that he was denied effective assistance of counsel for two reasons.

First, Mr. Henderson claims that his attorney failed to adequately challenge the district court's decision to amend the indictment. Mr. Henderson does not explain how his attorney's objection, properly raised at trial, was inadequate, but even if the objection to the amendment was somehow deficient, it did not result in

prejudice. Generally, to be amended an indictment must be resubmitted to a grand jury, unless the amendment is merely a matter of form. *Unites States v. Gammill*, 421 F.2d 185, 186 (10th Cir. 1970). The district court may amend the dates in an indictment so long as the date is not an essential element of the offense charged. *Id.* (“A defective allegation of time is a matter of form if time is not an essential element of the offense and if the indictment charges facts showing that the offense was committed within the period of the statute of limitations.”); *see also United States v. Leichtnam*, 948 F.2d 370, 376–77 (7th Cir. 1991) (holding that an indictment need not be resubmitted when an amendment merely narrows the charges to “something less than what the grand jury charged” but which is “still a criminal offense and one that the grand jury clearly set out in its indictment”).

In this case, the district court allowed an amendment to the indictment that changed the starting dates of the alleged continuing criminal enterprise, resulting in a shorter period than the grand jury originally charged. Under Count 1, the alleged starting date of the enterprise was changed from April 1, 1992 to January 1, 1994 and the alleged beginning date of the first predicate act was changed from April 14, 1992 to January 1, 1994. This change was merely a matter of form, however, as the temporal scope of a conspiracy is not an “essential” or “material” element of the charge. *United States v. Cina*, 699 F.2d 853, 859 (7th Cir. 1983).

The amendment narrowed the charges against Mr. Henderson, but the amended indictment still charged him with a criminal offense clearly set out in the original indictment. Moreover, even if the indictment had not been amended, there was sufficient evidence to convict Mr. Henderson on all counts because the jury found that Mr. Henderson had committed six other predicate acts, which were unamended and sufficient to convict Mr. Henderson of the conspiracy charge. Mr. Henderson therefore suffered no prejudice as a result of any deficiency in his attorney's challenge to the amendment.

Mr. Henderson next charges that he was denied effective assistance of counsel on his direct appeal because his counsel failed to contend that the government knowingly used perjured testimony in its case against him. As discussed below in Section C, Mr. Henderson has not demonstrated that the government knowingly used perjured testimony. Mr. Henderson therefore has not demonstrated that there is a reasonable probability that he would have prevailed on direct appeal had his attorney raised the perjury issue, and he suffered no prejudice as a result of his attorney's performance.

B. Violation of Brady v. Maryland

Mr. Henderson contends that, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution withheld evidence that LaPreasha Wynne, an ex-girlfriend of Mr. Henderson who testified against him, was incarcerated for six

months from October 1993 to March 1994. He contends that this evidence is exculpatory impeachment evidence because Ms. Wynne testified at trial that she was involved with Mr. Henderson as part of the continuing criminal enterprise during this period. Based on a review of Ms. Wynne's testimony, however, it is clear that Mr. Henderson was not prejudiced by any failure to disclose the fact of Ms. Wynne's incarceration. *Brady* violations only occur when "the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). In this case, evidence of the incarceration was not necessarily exculpatory. At trial, Ms. Wynne never testified as to the specific dates of her trips she took to transport cocaine for Mr. Henderson, but she agreed generally that she made trips in 1994 and the beginning of 1995. She never specifically told the jury that she made trips during late 1993 or early 1994. Her testimony therefore was consistent with Mr. Henderson's assertion that she was incarcerated only until March 1994. Even if evidence of the incarceration would have undermined testimony by other witnesses concerning Ms. Wynne's (subsequently retracted) statement to police about 1992 and 1993 drug trips, withholding that evidence could not have prejudiced the verdict because the amended indictment only charged Mr. Henderson for conduct after January 1, 1994. Moreover, in a case where the government produced a litany of witnesses to testify about Mr.

Henderson's drug trafficking, Ms. Wynne was easily the least effective. She testified that she did not know whether Mr. Henderson was in the courtroom, that she did not know whether her previous statement to the police was truthful, and that some of her previous accounts of Mr. Henderson's drug trafficking activities were entirely fabricated. On cross-examination, she admitted to lying under oath about her trips to California and to telling at least six inconsistent versions of her story to various police and court officers. Yet another piece of impeachment evidence against Ms. Wynne would have made no difference in the verdict. Mr. Henderson has therefore failed to make a substantial showing of the denial of a constitutional right by reason of a *Brady* violation.

C. Perjured Testimony

Next, Mr. Henderson argues that the prosecution knowingly proffered perjured testimony. The prosecution's knowing solicitation of, or failure to correct, perjured testimony violates the defendant's due process rights and will be grounds for a new trial "if the false testimony could in any reasonable likelihood have affected the judgment of the jury." *United States v. Vaziri*, 164 F.3d 556, 563 (10th Cir. 1999) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). In this case, however, Mr. Henderson has failed to demonstrate that any witness committed perjury, let alone that the government solicited perjured testimony. In

some cases Mr. Henderson has affirmatively misrepresented the trial testimony, while in others the alleged perjury goes to irrelevant facts.

For example, Mr. Henderson claims that one witness, Michael Reece, committed perjury by testifying that he bought cocaine from Mr. Henderson “every day of the year from 1988 to 1991.” Appellant’s Br. 22. Mr. Henderson asserts, without providing any evidence, that Mr. Reece was in fact incarcerated during 19 months of that period. Yet even if we assume that Mr. Reece was indeed incarcerated before 1991, and made the further assumption that the prosecution solicited that perjury, Mr. Henderson has failed to show that the perjury had a reasonable likelihood of affecting the judgment of the jury. Mr. Reece’s testimony about 1988 to 1991 simply served as background information about the relationship between Mr. Reece and Mr. Henderson, and concerned events that predated the period charged in the indictment by more than three years. That testimony had no material effect on the outcome of the case.

As another example, Mr. Henderson claims that one of two prosecution witnesses, Michael Reece or Heather Reece, must have committed perjury because their testimony was inconsistent. According to Mr. Henderson, Heather Reece testified that the enterprise was distributing \$3,000 to \$5,000 worth of cocaine per day, while Michael Reece testified that “if anyone said that, it would be a lie.”

Id. Setting aside the fact that witnesses frequently disagree in their interpretation

and recollection of events, and that tension between witnesses' testimony does not prove subornation of perjury by the prosecution, the testimony is not actually inconsistent. During the portion of the testimony cited by Mr. Henderson, Michael Reece said that anyone who imputed certain daily drug quantities to the enterprise would be lying, and that the enterprise never took in \$5,000 to \$8,000 per day. He never disagreed with a figure of \$3,000 to \$5,000 per day.

Mr. Henderson cites another half-dozen picayune examples and concludes with the extravagant claim that "every one of the government's witnesses committed perjury with the full knowledge of the prosecutor." *Id.* It is as if Mr. Henderson has pored over the trial transcript, hunting for minor inconsistencies between the stories of prosecution witnesses and casting each one as an instance of deliberate prosecution misconduct. To the contrary, we find no evidence of perjury or the solicitation of perjury by the prosecution, and therefore hold that Mr. Henderson has failed to make a substantial showing of the denial of a constitutional right on those grounds.

D. Issues Not Raised Below

Next, Mr. Henderson raises four issues for the first time on appeal, as part of a supplemental brief entitled "Motion to Amend and/or Supplement an Original Pleading (Movant's Initial 28 U.S.C. § 2255 and Subsequent Application for a Certificate of Appealability) Pursuant to [Fed. R. Civ. P.] 15(a) and (d) in the

Interest of Justice so as to Obtain a Fair and Just Result Under the Federal Rules of Habeas Procedure.” This motion sets forth four new grounds for relief: (1) that the indictment was constitutionally defective, (2) that Mr. Henderson’s sentence was unreasonable, (3) that the district court erred in certain sentencing calculations, and (4) that the evidence was insufficient to support the continuing criminal enterprise conviction. Because Mr. Henderson raised none of these issues before the district court, we decline to consider them as part of the application for a COA.

Contrary to the title of Mr. Henderson’s motion, this Court may not grant leave to amend or supplement an original § 2255 petition under Rule 15. Mr. Henderson had an opportunity to raise all of these claims before the district court, and it was the sole province of that court, acting in accordance with Rule 15(a) or 15(d), to grant leave to amend or supplement the original petition. *See* Fed. R. Civ. P. 1 (“These rules govern the procedure in the United States district courts in all suits of a civil nature . . .”). We may not authorize Mr. Henderson to retroactively amend his “initial” petition to cover a host of new issues. We therefore deny Mr. Henderson’s motion to amend or supplement his original pleadings, and treat all of the new issues raised in his brief as not preserved.

Federal appellate courts only rarely consider an issue not passed upon below. *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 720 (10th Cir. 1993). In

this case, Mr. Henderson “does not argue on appeal that any special circumstance requires us to address [his] contention despite lack of preservation below.”

United States v. Windrix, 405 F.3d 1146, 1156 (10th Cir. 2005). We therefore do not consider his remaining claims.

Conclusion

Accordingly, we **DENY** Lavelle Henderson’s motion to amend or supplement his initial petition, **DENY** his request for a COA, and **DISMISS** this appeal.

Entered for the Court,

Michael W. McConnell
Circuit Judge