

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

July 26, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT PATRICK KING,

Defendant - Appellant.

No. 23-5031
(D.C. Nos. 4:19-CV-00712-CVE-CDL &
4:18-CR-00123-CVE-1)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

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

Robert Patrick King, appearing pro se, seeks a certificate of appealability (“COA”) to challenge the district court’s denial of his 28 U.S.C. § 2255 motion. *See* 28 U.S.C. § 2253(c)(1)(B) (an appeal may not be taken from a final order denying relief under § 2255 unless the movant obtains a COA). Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss the appeal.

I.

In 2018, a grand jury returned an indictment charging King with sexual exploitation of a child, distribution of child pornography, and possession of child

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

pornography. King retained Neal Kirkpatrick to represent him, and Kirkpatrick filed various motions on King's behalf. The government contacted Kirkpatrick and offered a plea agreement in exchange for King pleading guilty to sexual exploitation of a child. Kirkpatrick shared the plea offer with King, and Kirkpatrick states that he reviewed each paragraph of the proposed plea agreement with King. Afterwards, King chose to accept the plea offer, and a change of plea hearing was scheduled.

At the hearing, the district court explained the consequences of accepting a plea agreement to King. King represented that he understood the plea agreement and was pleading guilty of his own free will. The district court reviewed all the possible consequences of King's guilty plea with him, advised King that the plea agreement contained a waiver of appellate and post-conviction rights, and examined the waiver's terms with him. The district court confirmed that King understood he was "knowingly and voluntarily agreeing to waive the right to collaterally attack [King's] conviction and sentence pursuant to 28[] U.S.C.[] Section 2255 except for claims of ineffective assistance of counsel?" R. Vol. I at 87. King responded affirmatively. The district court also ensured King understood that he was "expressly acknowledging that Mr. Kirkpatrick has explained your appellate and post-conviction rights, that you understand those rights, and that you are knowingly and voluntarily waiving those rights" *Id.* at 88. Again, King agreed. *Id.* Based on King's admissions and the full record of the change of plea hearing, the district court found that King had knowingly and voluntarily pled guilty to sexual exploitation of a child and accepted his guilty plea.

King later sought advice from Kirkpatrick about withdrawing his guilty plea. Kirkpatrick advised King against withdrawing his plea. Kirkpatrick subsequently filed a motion to withdraw as counsel of record because King was dissatisfied with Kirkpatrick's services and had filed a bar complaint against him. The district court granted Kirkpatrick's motion to withdraw and appointed Paul Hess as substitute counsel. Hess later filed a motion to withdraw from his representation of King. The district court granted the motion to withdraw and appointed Thomas Wright as substitute counsel. Wright also asked the court to accept the plea agreement and recommend to the Bureau of Prisons that King be placed in a facility with sex offender and drug abuse treatment.

At King's sentencing hearing in January 2019, the district court accepted the plea agreement, made the recommendations requested by Wright, and sentenced King to 20 years of imprisonment and 10 years of supervised release. The court also advised King that he had the right to appeal his conviction or sentence. Wright later filed notice that he had consulted with King and King did not wish to appeal.

Later in 2019, King filed a § 2255 motion asserting that: (1) Naval Criminal Investigative Service ("NCIS") agents violated the Posse Comitatus Act ("PCA") by investigating alleged crimes committed by a civilian on a military base; and (2) NCIS agents exceeded the scope of a search warrant by conducting an automobile search. The United States responded that King's plea agreement waived the right to seek collateral review of substantive claims. The district court held that King's plea agreement waived the right to raise substantive claims regarding illegal searches. However, the district court construed the § 2255 motion as broadly arguing that King's counsel was ineffective

for failing to file a motion to suppress raising his substantive illegal-search claims. Concerning the as-construed ineffective assistance claims, the district court found no reasonable attorney would have filed a motion to suppress and that King had not shown that his counsel was ineffective. Thus, the district court denied the § 2255 motion in an order and opinion and entered a separate judgment order on December 28, 2022.

On January 18, 2023, King filed a document in the district court titled “Formal Petition Seeking Certificate of Appealability with Consideration to Move Lower Court Denial to Circuit Court of Appeals and All Upon Constitutional Violations Including Fourth, Fifth, Sixth Amendments.” In the document, King requested a COA on his illegal search claims and that this Court consider a COA. In a January 19, 2023, order, the district court denied a COA. On March 22, 2023, King filed another document in the district court titled “Formal Appeal in Challenge to District Court Denial All Upon Violations of Defendant’s Constitutional to Civilian Privacy Citing Violation of the Posse Comitatus Act and Fourth, Fifth, Sixth, Eight Amendment.”

II.

a.

To obtain a COA, a criminal defendant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Whether to grant a COA is a “threshold question that should be decided without full consideration of the factual or legal bases adduced in support of the claims.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (cleaned up). To meet this threshold, the applicant must 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). “In evaluating whether an applicant has satisfied this burden, we undertake a preliminary, though not definitive, consideration of the legal framework applicable to each of the claims.” *United States v. Parker*, 720 F.3d 781, 785 (10th Cir. 2013) (cleaned up). King is a pro se movant, so we construe his briefing liberally. *See United States v. Griffith*, 928 F.3d 855, 864 n.1 (10th Cir. 2019) (cleaned up).

b.

Although the district court docketed King’s March 22, 2023, document as a notice of appeal, we construe King’s January 18, 2023, “Formal Petition Seeking Certificate of Appealability” as the functional equivalent of a notice of appeal from the district court’s December 28, 2022, order and opinion. *See Martin v. Rios*, 472 F.3d 1206, 1207 (10th Cir. 2007) (motion for certificate of appealability treated as functional equivalent of notice of appeal); *Fleming v. Evans*, 481 F.3d 1249, 1253–54 (10th Cir. 2007) (application for certificate of appealability treated as functional equivalent of notice of appeal). Treated as the practical equivalent of a notice of appeal, King’s “Formal Petition Seeking Certificate of Appealability” is timely filed as to the December 28, 2022, order denying his § 2255 motion. *See Fed. R. App. 4(a)(1)(B)*.¹

c.

¹ The “Formal Appeal” that King filed in the district court appears to be presented as an appellate brief.

To determine whether a criminal defendant has waived his appellate rights in an enforceable plea agreement, we consider “(1) whether the disputed appeal falls within the scope of the waiver of appellate rights; (2) whether the defendant knowingly and voluntarily waived his appellate rights; and (3) whether enforcing the waiver would result in a miscarriage of justice as we define herein.” *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc). We review “plea agreements and appeal waivers in light of the defendant’s reasonable understanding at the time of the guilty plea, and strictly construe[] the scope of an appellate waiver in favor of the defendant.” *United States v. Novosel*, 481 F.3d 1288, 1291 n.1 (10th Cir. 2007) (cleaned up).

Turning to the first *Hahn* factor, the claims King raised in his § 2255 motion fall within the scope of his waiver of post-conviction rights. In his plea agreement, King agreed to “waive[] the right to collaterally attack the conviction and sentence pursuant to 28 U.S.C. § 2255, except for claims of ineffective assistance of counsel.” R. Vol. I at 92. The main claims King raised in his § 2255 motion are plainly substantive claims that are not based on allegations of ineffective assistance of counsel, and claims directly concerning allegedly illegal searches by NCIS agents fall within the scope of the post-conviction waiver. However, some of King’s original § 2255 claims can reasonably be construed as ineffective assistance of counsel claims that are not subject to the post-conviction waiver. Regarding the second *Hahn* factor, the record clarifies that King knowingly and voluntarily waived his appellate rights during his change of plea hearing in the district court. “When determining whether a waiver of appellate rights is knowing and voluntary, we especially look to two factors. First, we examine whether the language

of the plea agreement states that the defendant entered the agreement knowingly and voluntarily.” *Hahn*, 359 F.3d at 1325. “Second, we look for an adequate Federal Rule of Criminal Procedure 11 colloquy.” *Id.* The district court reviewed the entire waiver of appellate and post-conviction rights with King at the change of plea hearing, and he stated that he fully understood what rights he was waiving by pleading guilty. The plea agreement does not use technical or complex language, and King hasn’t claimed that he did not understand the post-conviction waiver’s terms. The district court fulfilled its obligations under Rule 11. The last *Hahn* factor addresses whether enforcing the waiver would result in a miscarriage of justice. King agreed to a standard waiver of post-conviction rights that is always used in the Northern District of Oklahoma, and King’s counsel reasonably advised him to change his plea under the agreement. The post-conviction waiver was not illegal nor based on any impermissible factors, and a miscarriage of justice will not result from its enforcement. Thus, the district court correctly dismissed King’s substantive claims challenging searches of his property subject to the waiver.

d.

Liberally construing King’s § 2255 motion, he could be arguing that Kirkpatrick was ineffective for failing to file a motion to suppress raising his substantive claims. King contends NCIS agents were not permitted to conduct a criminal investigation of a civilian on a military base under the PCA and that agents exceeded a search warrant’s scope by searching an automobile located at his residence. “The two-prong test established in *Strickland v. Washington* . . . determines whether a defendant’s counsel

was ineffective. To prevail on an ineffectiveness claim, a defendant must show both that his counsel's performance was substandard and that he was prejudiced by that substandard performance." *Osborn v. Shillinger*, 997 F.2d 1324, 1328 (10th Cir. 1993). A criminal defendant can satisfy the test's first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984). However, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" *Id.* at 689. "[R]egardless of counsel[']s performance, failure to show prejudice defeats [an] ineffectiveness claim." *Osborn*, 997 F.2d at 1328. To meet the test's second prong, King "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." *Strickland*, 466 U.S. at 694.

Kirkpatrick did not provide ineffective assistance of counsel by failing to file a motion to suppress raising the potential claims King identified. While the PCA prohibits the deployment of federal military personnel for use in civil law enforcement activities, *see* 18 U.S.C. § 1385, military personnel are not required to overlook criminal activities committed by civilians implicated in an investigation of possible criminal violations by members of the military, and civilians may be briefly detained until they can be referred for prosecution by civilian law enforcement. *See Applewhite v. United States Air Force*, 995 F.2d 997, 1001 (10th Cir. 1993). Additionally, the remedy for a PCA violation is to hold the person who violated the PCA criminally liable, not exclude evidence. *See*

United States v. Vaxima, Inc., No. 17-4277, 2022 WL 595655, at *5 (4th Cir. Feb. 28, 2022), *cert. denied*, 143 S. Ct. 204 (2022). King’s allegations do not suggest that NCIS agents were initially targeting civilians, and he was not prosecuted by military officials. Thus, King cannot show that Kirkpatrick’s failure to file a motion to suppress raising the PCA had any effect on the outcome of the proceedings. Turning to King’s automobile search claim, his vague assertions fail to establish that anything was seized from an automobile or that such evidence was relevant to the criminal charges against him. King has not shown that any reasonable attorney would have had a basis to file a motion to suppress based on the alleged seizure of evidence from an automobile. Thus, King’s ineffective assistance of counsel claims fail, and reasonable jurists would not debate otherwise.

III.

We DENY a COA and DISMISS the appeal.

Entered for the Court

Allison H. Eid
Circuit Judge