UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4791

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GARY D'ANGELO MCDUFFIE,

Defendant - Appellant.

No. 19-7560

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

GARY D'ANGELO MCDUFFIE,

Defendant - Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (1:99-cr-00203-LMB-1; 1:16-cv-00775-LMB)

Submitted: May 21, 2020 Decided: May 26, 2020

Before AGEE and QUATTLEBAUM, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed in part and dismissed in part by unpublished per curiam opinion.

Geremy C. Kamens, Federal Public Defender, Frances H. Pratt, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Alexandria, Virginia, for Appellant. G. Zachary Terwilliger, United States Attorney, Daniel Taylor Young, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Gary D'Angelo McDuffie appeals from the amended criminal judgment against him and seeks a certificate of appealability on the district court's partial denial of McDuffie's authorized successive 28 U.S.C. § 2255 (2018) motion. Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), indicating she has identified no meritorious issues for appeal but identifying as potential issues for review whether: (1) McDuffie's conviction for post office robbery, in violation of 18 U.S.C. § 2113(a) (2018), remains a crime of violence under 18 U.S.C. § 924(c)(3) (2018) after *Johnson v. United States*, 135 S. Ct. 2551 (2015); and (2) the district court abused its discretion when it refused to resentence McDuffie after vacating one of McDuffie's convictions for using a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c) (2018). McDuffie has filed a pro se supplemental brief in which he appears to challenge the continued § 924(c) predicate status of his conviction for conspiracy to commit robbery, in violation of 18 U.S.C. § 371 (2018), which supported another of McDuffie's § 924(c) convictions.[*] We affirm in part and dismiss in part.

When a hybrid appeal such as McDuffie's is before the court, we have explained that, "[i]f the petitioner seeks to appeal the order by raising arguments relating to the district court's decision whether to grant relief on his § 2255 petition, he is appealing 'the final order in a proceeding under § 2255' and therefore must obtain a [certificate of

[*] The district court correctly determined that McDuffie's conspiracy conviction was no longer a proper § 924(c) predicate and vacated that conviction.

appealability] under [28 U.S.C.] § 2253 [(2018)]." *United States v. Hadden*, 475 F.3d 652, 666 (4th Cir. 2007). "If, on the other hand, the petitioner seeks to appeal matters relating to the propriety of the *relief* granted, he is appealing a new criminal sentence and therefore need not comply with § 2253's [certificate of appealability] requirement." *Id.* Thus, we have jurisdiction over McDuffie's challenge to the court's refusal to conduct a resentencing after it vacated McDuffie's § 924(c) conviction premised on conspiracy to commit robbery. However, as to any arguments McDuffie raises pertaining to the district court's denial of relief on his habeas claims, McDuffie must establish his entitlement to a certificate of appealability before we may review the merits of the court's dismissal.

In Appeal No. 19-4791, McDuffie challenges the amended criminal judgment against him, which the district court entered after partially granting McDuffie's § 2255 motion by vacating one of his § 924(c) convictions. Although McDuffie complains that the district court erred when it refused to conduct a full resentencing after vacating the § 924(c) conviction, a district court "has broad discretion in crafting relief on a § 2255 claim." *United States v. Chaney*, 911 F.3d 222, 225 (4th Cir. 2018). Accordingly, while a district court "is *authorized* to conduct a resentencing in awarding relief under § 2255," it is "not *required*, in resolving every § 2255 motion, to conduct a resentencing." *Hadden*, 475 F.3d at 668.

As this court has expressly observed, a successful § 2255 proceeding must only result in "the vacatur of the prisoner's unlawful sentence . . . and one of the following: (1) the prisoner's release, (2) the grant of a future new trial to the prisoner, (3) or a new sentence, be it imposed by (a) a resentencing or (b) a corrected sentence." *Id*. at 661; *see*

also 28 U.S.C. § 2255(b) (providing that, after a district court concludes a sentence is unlawful because the underlying conviction was unlawful, "the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate"). Thus, "the goal of § 2255 review is to place the defendant in exactly the *same* position he would have been had there been no error in the first instance." *Hadden*, 475 F.3d at 665 (internal quotation marks omitted). We have reviewed the record and discern no abuse of discretion in the district court's decision to reimpose the same prison term without the sentence for the vacated conviction and, thus, affirm in Appeal No. 19-4791.

Turning, then, to Appeal No. 19-7560, to the extent McDuffie seeks to challenge the district court's decision to deny, in part, his habeas claims, an appeal from that order may not be taken unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). We have reviewed the record and conclude

that McDuffie has failed to make a substantial showing of the denial of a constitutional right.

In accordance with *Anders*, we have reviewed the entire record and have found no meritorious grounds for appeal. We therefore deny a certificate of appealability and dismiss in Appeal No. 19-7560, and we affirm the amended corrected judgment and the court's orders denying resentencing in Appeal No. 19-4791. This court requires that counsel inform McDuffie, in writing, of his right to petition the Supreme Court of the United States for further review. If McDuffie requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on McDuffie. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid in the decisional process.

AFFIRMED IN PART,
DISMISSED IN PART