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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

No CV 09-3521 VRW
CR 07-371 MJJ

Plaintiff,

ORDER

v

FREDERICK LIM JOHNSON,

Defendant.

Defendant Frederick Lim Johnson moves to vacate, set aside or correct his sentence pursuant to USC § 2255, claiming ineffective assistance of counsel ("IAC"). For the reasons set forth herein, the court DISMISSES Johnson's motion.

I

On June 12, 2007, a grand jury indicted Johnson for being a felon in possession of a firearm in violation of 18 USC § 922(g)(1). CR Doc #15. Johnson entered a plea of not guilty, and on August 17, 2008, a jury found Johnson guilty. CR Doc ##17, 56. Because Johnson had three previous violent felonies, he faced a mandatory minimum prison sentence of 15 years. CR Doc #71, see

1 18 USC § 924(e)(1). Johnson's previous record included multiple
2 convictions for armed bank robbery. Doc #71 at 4. The United
3 States Sentencing Guidelines called for a sentence in the range of
4 188 to 235 months. Doc #76.

5 Before sentencing, Johnson, represented by Randall Gary
6 Knox, moved for judgment of acquittal or for a new trial arguing,
7 inter alia, that the court erred or defense counsel was ineffective
8 in excluding testimony of pre-arrest law enforcement surveillance.
9 CR Doc #54. Pursuant to an in limine motion, the court had
10 initially excluded evidence that Johnson was under surveillance
11 prior to May 30, 2007, the day Johnson was arrested. Doc #87 at 4.
12 During trial, the court ruled that defense counsel's questioning on
13 cross examination opened the door to admission of the previously
14 excluded surveillance testimony on redirect examination. CR Doc
15 ##54, 83, 87 at 4. The court denied Johnson's motion for acquittal
16 or for a new trial and entered judgment against him. Johnson
17 received a sentence of 235 months in custody, followed by five
18 years of supervised release. CR Doc #75, 76.

19 Along with the above-referenced motion for judgment of
20 acquittal or for a new trial, Knox moved to withdraw as counsel.¹
21 CR Doc ##54, 55. The motion stated that Johnson had "lost
22 confidence" in Knox; Knox's accompanying declaration and portions
23 of the transcript were sealed. Id. On December 3, 2007, Knox was
24 replaced by James Phillip Vaughns. Doc #67.

25 _____
26 ¹ For reasons not clear from the record, Knox was Johnson's third
27 attorney. His first attorney, a federal public defender, was replaced
28 on June 1, 2007 by an attorney appointed under the Criminal Justice
Act ("CJA")(CR Doc #5), who was in turn replaced by Knox a few weeks
later. CR Doc #22.

1 On January 31, 2008, Johnson filed a timely appeal. CR
2 Doc #77. By memorandum dated May 29, 2009, the court of appeals
3 affirmed the district court. CR Doc #90. Specifically, it found
4 that all surveillance evidence admitted at trial was proper. Id.
5 It also found that “[d]efense counsel’s performance at trial was
6 not ineffective,” and that defense counsel’s strategy on cross
7 examination was valid. Id. On July 10, 2009, the court denied
8 Johnson’s petition for rehearing en banc as untimely and issued its
9 mandate. CR Doc #91. On October 5, 2009, the United States
10 Supreme Court denied Johnson’s petition for writ of certiorari. CR
11 Doc #97.

12 On July 31, 2009, Johnson filed a timely § 2255 motion.
13 CR Doc #95. Johnson asserts he received IAC from both his trial
14 attorney and his attorney on appeal. Id. He claims that trial
15 counsel improperly failed to object to opinion testimony offered by
16 law enforcement witnesses that, while under surveillance, he was
17 casing and preparing to rob a bank. Id. He further claims that
18 appellate counsel should have raised a claim of error for
19 inadmissible opinion testimony and an IAC claim. Id.

20
21 II

22 Johnson was sentenced by Judge Martin J Jenkins in
23 federal court in the Northern District of California. CR Doc# 75.
24 “A prisoner ‘in custody’ under sentence of a federal court who
25 wishes to attack collaterally the validity of his conviction or
26 sentence must do so by way of a motion to vacate, set aside or
27 correct the sentence under 28 USC § 2255 before the judge who
28 imposed the sentence.” Socha v United States, 2001 US Dist LEXIS

1 17444 at *1 (ND Cal 2001) (Walker, J). Rule 4(a) of the Rules
2 Governing Section 2255 Proceedings for the United States District
3 Courts ("Section 2255 Rules") provides: "[i]f the appropriate judge
4 is not available, the clerk must forward the motion to a judge
5 under the court's assignment procedure." The undersigned judge
6 properly decides this motion pursuant to Rule 4(a).

7 Further, the judge must dismiss the motion "[i]f it
8 plainly appears from the motion, any attached exhibits, and the
9 record of prior proceedings that the moving party is not entitled
10 to relief * * *." Rule 4(b), Section 2255 Rules, see United States
11 v Mejia-Mesa, 153 F3d 925, 931 (9th Cir 1998) ("district court may
12 deny a section 2255 motion without an evidentiary hearing only if
13 the movant's allegations, viewed against the record, either do not
14 state a claim for relief or are so palpably incredible or patently
15 frivolous as to warrant summary dismissal."

16
17 III

18 In his § 2255 motion, Johnson asserts that both his trial
19 attorney and his appellate attorney provided IAC. CR #95.
20 Johnson's claims are without merit.

21 "An ineffective assistance claim has two components: A
22 petitioner must show [1] that counsel's performance was deficient,
23 and [2] that the deficiency prejudiced the defense." Wiggins v
24 Smith, 539 US 510, 521 (2003) (citing Strickland v Washington, 466
25 US 668, 687 (1984). To establish deficient performance by counsel,
26 "petitioner must demonstrate that counsel's representation 'fell
27 below an objective standard of reasonableness.'" Wiggins, 539 US
28 at 521 (quoting Strickland, 466 US at 688). To establish

1 prejudice, "petitioner must show that 'there is a reasonable
2 probability that, but for counsel's unprofessional errors, the
3 result of the proceeding would have been different.'" Williams v
4 Taylor, 163 F3d 860, 866 (4th Cir 1998) (quoting Strickland, 466 US
5 at 694). For ineffective assistance of appellate counsel, this
6 means that Johnson must prove that there is a reasonable
7 probability that, but for counsel's unprofessional errors, he would
8 have prevailed on appeal. Miller v Keeney, 882 F2d 1428, 1434 (9th
9 Cir 1989).

10 In determining whether counsel's performance was
11 deficient, the Supreme Court has "declined to articulate specific
12 guidelines for appropriate attorney conduct and instead ha[s]
13 emphasized that '[t]he proper measure of attorney performance
14 remains simply reasonableness under prevailing professional
15 norms.'" Wiggins, 539 US at 521 (quoting Strickland, 466 US at
16 688). "In any ineffectiveness case, a particular decision * * *
17 must be directly assessed for reasonableness in all the
18 circumstances, applying a heavy measure of deference to counsel's
19 judgments." Id at 521-22. The defendant must "overcome the
20 presumption that, under the circumstances, the challenged action
21 might be considered sound [] strategy." Strickland, 466 US at 689
22 (internal quotation marks omitted).

23
24 A

25 Johnson's claim of IAC at trial has already been
26 litigated in the court of appeals and was found to be meritless.
27 CR Doc #90. Claims presented and rejected on direct appeal may not
28 be litigated again in a § 2255 motion. United States v Scrivner,

1 189 F3d 825, 828 (9th Cir 1999); see also United States v Jose
2 Arreola, 2008 US Dist LEXIS 91229 at *9-11 (ND Cal 2008) (denying
3 an IAC claim in a § 2255 petition when the Ninth Circuit had
4 previously rejected essentially the same issue on direct appeal).

5 Johnson falsely asserts that his trial counsel failed to
6 object to opinion testimony that he was "casing a bank" and
7 "preparing to rob the bank." CR Doc #95. But the record
8 establishes that Johnson's trial attorney objected in limine to
9 that very testimony, objected during trial when the government was
10 permitted to elicit testimony broader than that originally allowed,
11 and objected to the testimony after trial in a motion for judgment
12 of acquittal or for a new trial. Doc ##26, 54, 83. Subsequently,
13 Johnson's appellate attorney litigated the issue in the court of
14 appeals. Appellant's Opening Brief ("Johnson Brief"), United
15 States v Johnson, 327 Fed Appx 748, (9th Cir 2009)(No 08-10057).

16 Johnson attempts to present these issues in a new light,
17 claiming that his counsel in a subsequent case, in which he was
18 accused of robbing eight banks, successfully moved in limine to
19 exclude opinion testimony as improper conclusions as to his mental
20 state. See CR 08-0251 MMC, Docs #82 at 5, 103. This does not
21 change the fact that the appellate court in this case determined
22 that the ultimate admission of all pre-arrest surveillance
23 testimony, regardless of substance, was not error, and that
24 Johnson's trial counsel did not "fall below an objective standard
25 of reasonableness." Doc #90, see Wiggins, 539 US at 521. Even if
26 Johnson's trial attorney had couched his objections in terms of
27 Johnson's mental state, the result of the proceeding would be the
28

1 same. See Williams, 163 F3d at 866. Accordingly, the claim of
2 ineffective assistance of trial counsel is without merit.

3
4 B

5 Johnson's claim of ineffective assistance of appellate
6 counsel is similarly meritless because 1) counsel was not deficient
7 and 2) Johnson was not prejudiced by counsel's failure to argue
8 that opinions as to Johnson's mental state were improperly
9 admitted. See Wiggins, 539 US at 521.

10 Johnson asserts that appellate counsel failed to raise as
11 error the court's allowance of inadmissible "opinions of [Federal
12 Bureau of Investigation] agents that defendant was 'casing' and
13 'attempting to rob' a bank offered as defendant's motive for
14 possessing a firearm." CR Doc #95 at 3. In fact, appellate
15 counsel in large part did raise the claims asserted in Johnson's §
16 2255 petition before the court of appeals. See Johnson Brief,
17 Johnson, 327 Fed Appx 748 (9th Cir 2009)(No 08-10057):

18 First, the District Court erred when it admitted evidence of
19 pre-arrest surveillance that brought armed bank robbery
20 implications into a felon in possession trial. Second, that
21 defense counsel's representation fell below constitutional
22 requirements due to his blunder of 'opening the door' to
previously inadmissible evidence and his failure to alert Mr
Johnson and the Court of his intention to become a federal
prosecutor * * *."²

23 Id at *8. While Johnson's appellate counsel did not separately
24 enumerate each instance of opinion testimony elicited under FRE

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26 ² Records relating to trial attorney Knox's withdrawal were
27 unsealed for Johnson's use on appeal (Doc ##86, 88) in an IAC claim
28 based on Knox's interest in a position as a federal prosecutor.
Johnson Brief at *16. The court of appeals found that "[Knox]'s
failure to disclose to his client that he submitted his resume to the
United States Attorney's office did not create a conflict of
interest." Doc #90.

1 404(b), the applicable constitutional standard did not require him
2 to do so. See Jones v Barnes, 463 US 745, 751-54 (1983) (appellate
3 counsel does not have a constitutional duty to raise every non-
4 frivolous issue requested by defendant); Miller, 882 F2d at 1434
5 (“[T]he weeding out of weaker issues is widely recognized as one of
6 the hallmarks of effective appellate advocacy.”).

7 Moreover, the court of appeals found all surveillance-related
8 testimony admissible: the previously-excluded evidence pertaining
9 to surveillance on May 25-26, 2007 was admissible after “Johnson’s
10 counsel opened the door”; surveillance evidence from later dates
11 was admissible because “it was inextricably intertwined with
12 Johnson’s arrest.” CR Doc # 90. This surveillance evidence
13 included law enforcement opinion testimony as to Johnson’s mental
14 state. Because Johnson’s § 2255 claims were raised by appellate
15 counsel and dismissed by the court, Johnson was not prejudiced by
16 his attorney’s conduct. See Miller, 882 F2d at 1433. The
17 appellate-level IAC claim of is therefore also without merit.

18
19 IV

20 For the foregoing reasons, Johnson’s § 2255 motion is
21 DISMISSED without leave to amend. The clerk shall enter judgment
22 in favor of respondent and close file number C 09-3521 VRW.

23
24 IT IS SO ORDERED.

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26 
27 _____
28 VAUGHN R WALKER
United States District Chief Judge