

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DAVID TJADER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

OPINION AND ORDER

20-cv-973-wmc

17-cr-100-wmc

Proceeding *pro se*, petitioner David Tjader, a federal prisoner incarcerated at the Federal Correctional Institution in Lisbon, Ohio, filed a motion to vacate his sentence imposed by this court, pursuant to 28 U.S.C. § 2255. Having conducted a preliminary review of his motion under Rule 4 of the Rules Governing Section 2255 Cases, the court concludes that it is plainly apparent petitioner is not entitled to relief for the reasons that follow. Accordingly, his motion will be denied, and this action dismissed.

BACKGROUND

On October 25, 2017, following the execution of a search warrant at David Tjader's home, he was charged with three counts of receiving child pornography, in violation of 18 U.S.C. § 2252(a)(2). On February 16, 2018, Tjader entered into a plea agreement with the government, agreeing to plead guilty to the first count in exchange for the government's agreement to dismiss the remaining two counts. The court held a plea hearing on March

20, 2018, during which the court explained in detail the ramifications of the guilty plea and confirmed Tjader's understanding of the charge to which he was pleading guilty: that on or around June 16, 2017, he knowingly received a visual picture, a depiction, of a minor engaging in sexually explicit conduct, through his Gmail account. The government made the following proffer as to that charge:

Had this case gone to trial, there would have been testimony that on October 24, 2017, law enforcement agents executed a search warrant at the defendant's home in Maple, Wisconsin. Numerous electronic devices were seized and analyzed.

During their analysis, agents went through the defendant's email and found numerous emails sent to his Gmail account A message dated June 16th of 2017 contained an image . . . depict[ing] a 10-to-12-year old female bending over, exposing her vagina to the camera. There would have been testimony that this was a real child.

Agents also reviewed the defendant's Facebook and Yahoo Messenger chats and saw numerous conversations between the defendant and the person who sent the email. The general nature of the conversations was that the defendant would ask the sender for child pornography images and videos and the sender would ask the defendant for money in exchange.

(CR,¹ 3/20/2018 Hrg. Tr. (dkt. #46) 19-20.) Then Tjader explicitly conceded not only that he engaged in those communications but also that the image sent via email constituted child pornography. He more specifically conceded to receiving the image charged in Count 1. (*Id.* at 22.) The court accepted his guilty plea and set the matter for sentencing.

¹ For ease of reference, the court cites to the criminal record, No. 17-cr-100, as "CR."

On July 15, 2018, the court sentenced Tjader to 84 months of incarceration. At sentencing, the court overruled Tjader's objections to the proposed conditions of supervised release, which will require him to provide financial information upon request, sit for a psychosexual evaluation and potentially participate in counseling. When asked whether Tjader objected to any other condition, Tjader explicitly waived reading the additional conditions and had no further objections.

Tjader appealed, challenging the court's decision to overrule those two objections, as well as raising challenges to several additional terms of his conditions of supervision. On July 10, 2019, the Court of Appeals for the Seventh Circuit rejected Tjader's challenge to those conditions, agreeing with the court's decisions as to the conditions explicitly challenged, and finding that Tjader's waiver before this court constituted an appellate waiver as well. *United States v. Tjader*, 927 F.3d 483, 485 (7th Cir. 1029) (citations omitted). The court in particular noted that Tjader showed a clear intent to waive objections to any other conditions because he had (1) advanced notice of the conditions prior to sentencing, (2) time to review them and understood them, and (3) raised objections to some conditions but not others. *Id.* Although the Seventh Circuit further noted that the government agreed with Tjader's vagueness objections to the condition requiring him to notify third parties of the risks that his history and characteristics pose, it further concluded that Tjader was free to request that the court modify his conditions *after* his release, as opposed to on direct appeal. *Id.* at 485 n.1. Tjader filed a petition for

a writ of certiorari with the United States Supreme Court, which was denied on October 21, 2019.

OPINION

Tjader appears to claim that his trial attorney performed deficiently in three respects: (1) his attorney failed to investigate possibly exculpatory evidence, specifically pointing to evidence that someone else had accessed his email account and that money was stolen from his checking account to make a purchase from Hulu; (2) he was denied access to the polygraph examiner's notes, and his attorney refused to appeal Magistrate Judge Crocker's denial of his request for those notes; and (3) his attorney failed to confirm there was a search warrant authorizing the search of his home, apparently based on Tjader's hunch that no such search warrant existed. Generally speaking, a § 2255 motion cannot raise: (1) issues that were raised and decided on direct appeal, unless there is a showing of changed circumstances; (2) non-constitutional issues that could have been raised on direct appeal but were not; and (3) constitutional issues that were not raised on direct appeal. *See Belford v. United States*, 975 F.2d 310, 313 (7th Cir. 1992) (overruled on other grounds by *Castellanos v. United States*, 26 F.3d 717 (7th Cir. 1994)). That said, an ineffective assistance of counsel claim may generally be brought in a § 2255 motion regardless of whether the claim was raised on direct appeal. *Massaro v. United States*, 538 U.S. 500, 504 (2003). While Tjader challenges his conviction on the ground of ineffective assistance of

counsel, he has not begun to demonstrate that he would be entitled to relief under the demanding standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

Under *Strickland*, a petitioner must demonstrate both constitutionally deficient performance by counsel *and* actual prejudice because of the alleged deficiency. See *Williams v. Taylor*, 529 U.S. 390, 39091 (2000). In the context of a guilty plea, the prejudice prong requires a showing that there is a reasonable probability that but for counsel's deficient performance, the petitioner would not have pleaded guilty but would have insisted on going to trial. *Lafler v. Cooper*, 566 U.S. 156, 163 (2012); *Moore v. Bryant*, 348 F.3d 238, 241 (7th Cir. 2003). Although he charges his attorney with failing to investigate exculpatory evidence, and instead urging Tjader to enter into the plea agreement, Tjader does not develop this argument in a meaningful way. Critically, plaintiff makes *no* mention of this court's exchange with Tjader during the plea hearing, in which the court confirmed his understanding of the nature of the charges and potential sentence. Nor does Tjader reconcile his suggestion that he could prove his innocence against the government's proffer, which included not only the email but also Tjader's Facebook conversations with the same person that sent him the email containing the charged image, all of which he admitted during the plea hearing. As such, there is *no* basis to infer that, had his attorney pressed Tjader's innocence and pursued a theory that some third party was responsible for the communications leading up to his receipt of the charged image, Tjader would have taken this case to trial. Accordingly, seeing no basis to infer that Tjader's conviction or sentence suffers from a constitutional defect, this motion will be denied.

Under Rule 11 of the Rules Governing Section 2254 Cases (which can be applied to cases under § 2255), the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. The question is whether “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.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted). Because reasonable jurists could not disagree that Tjader cannot show a denial of a constitutional right, no certificate will issue.

ORDER

IT IS ORDERED that:

- (1) David Tjader’s motion to vacate pursuant to 28 U.S.C. § 2255 (dkt. #1) is DENIED and his petition is DISMISSED.
- (2) A certificate of appealability will not issue.

Entered this 9th day of March, 2022.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge