No. 21-7283

In the
United States Court of Appeals
for the Fourth Circuit

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIE SLOCUM, JR.,
Appellant.

Appeal from the United States District Court
for the Southern District of West Virginia
The Honorable John T. Copenhaver, Jr., United States District Judge

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Brief of Appellee the United States of America

WILLIAM S. THOMPSON
United States Attorney

Joshua C. Hanks
Assistant United States Attorney
300 Virginia Street, East, Room 4000
Charleston, West Virginia 25301
(304) 345-2200

Attorneys for the United States of America

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STATEMENT OF JURISDICTION

Appellant Willie Slocum, Jr. appeals the dismissal of his 28 U.S.C. § 2255 petition and the denial of his request for a Certificate of Appealability by the United States District Court for the Southern District of West Virginia. The district court had original jurisdiction under 28 U.S.C. §§ 2255 and 1331. The district court entered its Judgment Order dismissing the petition and denying a Certificate of Appealability on August 20, 2021. JA1575-1576. Slocum filed a timely notice of appeal. JA1577. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

ISSUE PRESENTED

Was trial counsel ineffective in failing to challenge Count Two of the second superseding indictment as multiplicitous of Count One of the second superseding indictment, in contravention of the Double Jeopardy Clause when each count required proof of a fact the other did not and where the evidence presented at trial supported a jury verdict that Slocum engaged in two distinct conspiracies?

STATEMENT OF THE CASE

On July 22, 2014, a federal grand jury sitting in Charleston, West Virginia, returned a five-count second superseding indictment against defendant Willie Slocum, Jr., also known as "Jay." JA31-36. Count One charged him with conspiracy

to distribute more than one kilogram of heroin in violation of 21 U.S.C. § 846. JA31. Count Two charged him with conspiracy to distribute a quantity of oxycodone in violation of 21 U.S.C. § 846. Counts Three and Four charged him with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). JA.33-34. Count Five charged him with witness tampering in violation of 18 U.S.C. § 1512(b)(1). JA35.

Following a three-day trial, Slocum was convicted of all five counts of the Second Superseding Indictment. JA37-38. At trial, the United States presented seventeen witnesses who testified *inter alia* about Slocum's wide-ranging heroin and oxycodone drug trafficking activities occurring between Detroit, Michigan, and several locations within the Southern District of West Virginia. JA70-797.

Slocum was sentenced to 360 months' imprisonment as to Count One, 240 months' imprisonment as to Count Two, 120 months' imprisonment as to Counts Three and Four, and 240 months' imprisonment as to Count Five. JA41-42. He was assessed a $100 special assessment on each count for a total of $500. JA44. The sentences for Counts Two through Five were imposed concurrently with the 360 months' term imposed on Count One. JA.41. He was further sentenced to five years of supervised release as to Count One and three years of supervised release as to the

other counts, all of which were imposed concurrently with the five years. JA42. This Court affirmed Slocum's conviction and sentence on April 22, 2016. *United States v. Slocum*, 646 F. App'x. 294 (4th Cir. 2016).

On August 4, 2017, Slocum filed a 215-page *pro se* petition pursuant to 28 U.S.C. § 2255 raising approximately 21 issues, including approximately 18 claims of ineffective assistance of counsel. JA1008-1223, JA1254-1255. Of relevance to this appeal, Slocum argued that trial counsel was ineffective for failing to argue that Counts One and Two of the second superseding indictment were multiplicitous and thereby violated the Double Jeopardy Clause. JA1100-1112. The United States Magistrate Judge entered her Proposed Findings and Recommendations recommending that the district court deny and dismiss the petition on May 6, 2019. JA1253-J1318. Slocum filed his objections on May 28, 2019. [1] JA1319-1348. The district court denied and dismissed the petition and declined to grant a certificate of appealability on August 20, 2021. JA1575-1576.

[1] Before the district court ruled on the magistrate judge's Proposed Findings and Recommendations, Slocum filed several pleadings relative to the firearm crimes set forth in Counts Three and Four of the Second Superseding Indictment. JA1350-1358, JA1376-1484. None of those pleadings are relevant to the issue raised in this appeal.

In denying Slocum's Section 2255 petition, the district court applied the flexible "totality of the circumstances" test under *United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986) and the "same evidence test" under *Blockburger v. United States*, 284 U.S. 299, 304 (1932). JA1543-1545. The district court found that the combination of Slocum's "extensive operations and network" and the distinct controlled substances involved satisfied both *Blockburger* and *MacDougall* tests and thus there was no violation of the Double Jeopardy Clause. JA1544-1545. The court concluded that counsel was not ineffective for failing to raise a double jeopardy challenge. JA1545.

This Court granted a certificate of appealability on the sole issue of whether trial counsel was ineffective in failing to challenge Count Two of the Second Superseding Indictment as multiplicitous, in contravention of the Double Jeopardy Clause.

STANDARD OF REVIEW

This Court "review[s] *de novo* a district court's legal conclusions in denying a Section 2255 motion." *United States v. Cannady*, 63 F.4th 259, 265 (4th Cir. 2023), *quoting United States v. Carthorne*, 878 F.3d 458, 464 (4th Cir. 2017).

SUMMARY OF ARGUMENT

Trial counsel was not ineffective by failing to argue that Counts One and Two were multiplicitous and violated the Double Jeopardy Clause. Under the seminal *Blockburger* "same evidence test," the Double Jeopardy Clause is not implicated where multiple charges each "require[] a proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. In this case, Count One alleged conspiracy to distribute more than one kilogram of heroin, a Schedule I controlled substance, and Count Two alleged conspiracy to distribute a quantity of oxycodone, a Schedule II controlled substance. Thus, each count required proof of facts not required in the other. Each count required proof of the identity of the controlled substance, its schedule under the controlled substances act, and the quantity involved.

In this case, the proof of quantity is of particular importance because of the different statutory sentences implicated by that quantity. In Count One, Slocum faced a mandatory minimum sentence of 10 years and up to life imprisonment because he was convicted of conspiracy to distribute more than a kilogram of heroin. In Count Two, he faced a term of imprisonment up to 20 years upon being convicted of conspiracy to distribute a quantity of oxycodone. Where Congress has provided different penalties based upon the controlled substance involved, Congress intended

the offenses to be separate such that courts may impose a separate sentence for each offense. *United States v. Grandison*, 783 F.2d 1152, 1156 (4th Cir. 1986) (holding no Double Jeopardy Clause violation where defendant convicted of two offenses arising from his simultaneous possession with intent to distribute schedule I heroin and schedule II cocaine because Congress imposed separate penalties based upon the differing schedules and thus intended them to be distinct offenses).

Further, under the *MacDougall* totality of the circumstances test, there was no violation of Double Jeopardy Clause based on the evidence at trial even though even though the two charges included the same location, dates, and potential co-conspirators, coupled with the distinct facts necessary for conviction. The United States properly charged two distinct conspiracies. Consequently, trial counsel was not ineffective by failing to raise a double jeopardy claim.

ARGUMENT

Trial counsel was not ineffective by failing to argue that Count One and Count Two of the second superseding indictment were multiplicitous prosecutions in violation of the Double Jeopardy Clause where each count required proof of facts the other did not and where the extent of Slocum's drug trafficking activities supported a jury verdict that he engaged in two distinct conspiracies.

Defendant Willie Slocum, Jr. appeals the district court's denial and dismissal of his petition filed pursuant to 28 U.S.C. § 2255, arguing that his trial counsel was ineffective by failing to argue that Count One and Count Two of the second superseding indictment were multiplicitous prosecutions in violation of the Double Jeopardy Clause. The district court properly concluded that there was no double jeopardy violation, and trial counsel was not ineffective by failing to raise a multiplicitous prosecution claim.

A. Double Jeopardy

The Double Jeopardy Clause protects a defendant from being prosecuted more than once for the same offense. U.S. Const. Amend. V; *United States v. Ragins*, 840 F.2d 1184, 1192 (4th Cir. 1988). This protection includes both "the imposition of cumulative *punishments* for the 'same offense' in a single criminal trial" and "being subject to successive *prosecutions* for the same offense." *Ragins*, 840 F.2d at 1187. In

this case, Slocum argues that the evidence at trial established the existence of only one conspiracy, and thus his convictions were multiplicitous resulting in his being unconstitutionally convicted (and thereafter punished) twice for a single offense. *See United States v. Colton*, 231 F.3d 890, 908 (4th Cir. 2000) ("Multiplicity involves charging a single offense in more than one count in an indictment.").

There is no multiplicitous prosecution when each charged offense "requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). Here, Slocum was charged in two counts with conspiracy to violate 21 U.S.C. § 841(a)(1), that is, distribution of a controlled substance, in violation of 21 U.S.C. § 846. JA31-32. The elements of that offense are that: 1) an agreement to distribute the identified controlled substance existed between two or more persons; 2) the defendant knew of the conspiracy; and 3) the defendant knowingly and voluntarily became a part of the conspiracy. *See United States v. Wilson*, 135 F.3d 291, 306 (4th Cir. 1992) (setting forth elements of conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846).

While the elements of 21 U.S.C. § 846 as charged in the two counts required similar proof of facts, they differed in three obvious respects. First, each count identified a different substance as the object of the conspiracy. Second, each substance

was scheduled differently under the controlled substances act. Third, each count required proof of the quantity of the controlled substances involved.

This Court has held, albeit in an unpublished opinion, that violations of 21 U.S.C. § 846 are separate offenses under *Blockburger* when the identity of the controlled substance is different in each charge. *United States v. Ivey*, 722 F. App'x. 336 (2018), *citing United States v. Davis*, 55 F.3d 517, 521 (10th Cir. 1995) (possession with intent to distribute crack and possession with intent to distribute powder cocaine are separate offenses for double jeopardy purposes). The *Ivey* holding is unsurprising in that it is consistent with precedent in this Court and most other circuits that simultaneous possession with intent to distribute more than one controlled substance does not violate double jeopardy when charged as separate counts. *United States v. Grandison*, 783 F.2d 1152, 1156 (4th Cir. 1986) ("Congress intended the possession of each controlled substance to be a separate offense and to permit trial courts to impose separate sentences for each offense."); *see also United States v. Lockett*, 859 F.3d 425, 428 (7th Cir. 2017); *United States v. Vargas-Castillo*, 329 F.3d 715, 717, 722 (9th Cir. 2003); *United States v. Richardson*, 86 F.3d 1537, 1552-53 (10th Cir. 1996); *United States v. Bonilla Romero*, 836 F.2d 39, 46-47 (1st Cir. 1987); *United States v. DeJesus*, 806

F.2d 31, 35-37 (2d Cir. 1986); *United States v. Davis*, 656 F.2d 153, 159 (5th Cir. 1981).[2]

It is true that these precedents (except for *Ivey*) address violations of 21 U.S.C. § 841(a)(1) and not 21 U.S.C. § 846. Nevertheless, because § 841(a)(1) is the object of an § 846 conspiracy, the reasoning in those cases remains highly relevant to the case at bar. When discussing multiple § 846 conspiracy charges, this Court has recognized that the value of the *Blockburger* "same evidence" test can be limited since "prosecutors could carefully draw two indictments by choosing different sets of overt acts and make one conspiracy appear to be two." *United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986). Thus, the Court adopted flexible application of a five-part "totality of the circumstances" analysis. *Id.*

The "totality of the circumstances" analysis considers "1) time periods in which the alleged activities of the conspiracy occurred; 2) the statutory offenses charged in the indictments; 3) the places where the alleged activities occurred; 4) the persons acting as co-conspirators; and 5) the overt acts or any other descriptions of the offenses

[2] *But see Maxwell v. United States*, 617 F. App'x. 470, 473 (6th Cir. 2015) (vacating one of two convictions of drug conspiracy on double jeopardy grounds where the offenses differed only as to the identity of the drug involved and where the government concluded and conceded that the prosecutions were multiplicitous); *see also United States v. Gomez-Pabon*, 911 F.2d 847 (1st Cir. 1990) (same).

charged which indicate the nature and scope of the activities to be prosecuted." *Id.*, *citing United States v. Thomas*, 759 F.2d 659, 662 (8th Cir. 1985).

Here, there was significant factual overlap between the Count One and Count Two conspiracies. They covered the same time period, occurred in similar places, involved many of the same co-conspirators and participants, and shared many of the acts performed in furtherance of the conspiracy. However, there are significant differences between the statutory offenses charged as well as distinct overt acts in furtherance of the charged conspiracies.

Statutory Distinctions: In addition to the identity and schedule of the controlled substances discussed above, the two counts carried markedly different penalties. The penalty for Count One was 10 years and up to life imprisonment and a $10,000,000 fine under 21 U.S.C. § 841(b)(1)(A)(i). The penalty for Count Two was up to 20 years' imprisonment and a fine of $1,000,000 under 21 U.S.C. § 841(b)(1)(C).

This Court has held that where Congress proscribes different penalties for drug offenses, there is no double jeopardy violation for multiple charges – even were the district court to impose consecutive sentences. *Grandison*, 783 F.2d 1152 at 1156. In *Grandison* the defendant simultaneously possessed with intent to distribute schedule I

heroin and schedule II cocaine. The Court found that by proscribing different penalties, Congress intended separate charges and "to permit trial courts to impose separate sentences for each offense." *Id.* In light of the distinct statutory sentences implicated by Slocum's convictions, the district court properly imposed separate, albeit concurrent, sentences.

Evidence of Distinct Conspiracies: In addition to the statutory differences, the evidence at trial was such that a jury could reasonably find that Slocum engaged in separate conspiracies to distribute heroin and oxycodone. For example, Adrianna White was a drug addict during the timeframe of the charged conspiracies who began selling oxycodone she obtained from Slocum or his lower-level dealers approximately twice per week in quantities ranging from 20 to 100 pills at a time to support her habit. JA283-298. White's dealings with Slocum and his associates did not involve heroin. Additionally, Gabrielle Beeman testified regarding an incident in July 2012 where she and several others traveled several hours away from Charleston, West Virginia at Slocum's direction where they picked up a supply of oxycodone for him from an unidentified person they met in a hotel. JA334-340.

The United States Magistrate Judge and the district court applied both the *Blockburger* "same evidence" test and the *MacDougall* "totality of the circumstances" test and correctly concluded that there was no multiplicitous prosecution in violation of the Due Process Clause in this case. This Court should reach the same conclusion.

B. Ineffective Assistance of Counsel

To prevail on his claim of ineffective assistance of counsel, Slocum must prove first, that counsel's representation fell below "an objective standard of reasonableness," and second, that but-for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 at 687-91, 694 (1984). The two prongs of the *Strickland* test are sometimes referred to as the "performance prong" and the "prejudice prong." *Fields v. Attorney Gen. of Md.*, 956 F.2d 1290, 1297 (4th Cir. 1992). Here, Slocum fails to satisfy either prong.

Slocum argues that his counsel was ineffective by failing to raise a claim that Count One and Count Two were multiplicitous in violation of the Due Process Clause. As discussed *supra*, there was no Due Process Clause violation in this case. While *Ivey* may have been decided after his conviction, *Blockburger*, *Grandison*, and *MacDougall* were already well-established precedent. Further, as noted in the PFR, "the

prevailing law in this circuit was that some overlap did not preclude a finding that the defendant was involved in two separate conspiracies."[3] JA1277. Thus, it was objectively reasonable for counsel to not raise the multiplicitous prosecution claim in the district court. *Strickland*, 466 U.S. at 687-88.

Even if this Court were to conclude that Slocum has proven that counsel's failure to raise the argument resulted in representation falling below the objective standard of reasonableness, he must then prove that he was prejudiced, that is, "but for counsel's unprofessional error[], the result of the proceeding would have been different." *Id.* at 693-94.

Here, the district court sentenced Slocum to 240 months imprisonment followed by a three-year term of supervised release on Count Two to be served concurrently with the 360 months' sentence and five-year term of supervised release imposed on Count One. JA41. Thus, the term of imprisonment and supervised release were unaffected by counsel's failure to argue multiplicitious prosecution, and there would have been no different outcome in terms of incarceration and post-release supervision.

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[3] *Citing United States v. Aleman*, 855 F. Supp. 117, 121 (M.D.N.C.), *aff'd*, 33 F.3d 53 (4th Cir. 1994); *United States v. Murphy*, No. 3:12CR-235, 2013 WL 5636710, at *5 (W.D.N.C. Oct. 16, 2013); and *United States v. Manning*, No. 4:07cr81, 2008 WL 5100119, at *5 (E.D. Va. Dec. 2, 2008).

However, the sentences each required the payment of a $100 special assessment. JA44. Consequently, the prejudice in this case would simply be the imposition of the additional special assessment. *United States v. Colton*, 231 F.3d 890, 910 (4th Cir. 2000), *citing Ball v. United States*, 470 U.S. 856, 864-65 (1985).

Slocum speculates that he was further prejudiced because the jury may have had an exaggerated impression of his criminal activity which *may* have influenced the verdicts on the firearm charges and that the district court *may* have imposed a lesser fine. These speculative claims do not establish a reasonable probability of a different outcome under the *Strickland* standard. This Court has found no prejudice even where there is a multiplicitous prosecution if the trial evidence would be the same. *Colton*, 231 F.3d at 910. Moreover, in the absence of reasonable probability of a different outcome with respect to the verdict, there is also no reasonable probability that the district court would have imposed a different fine.

CONCLUSION

For the reasons set forth herein, this Court should affirm the district court's denial and dismissal of Slocum's Section 2255 petition alleging ineffective assistance of counsel.

Respectfully submitted,

WILLIAM S. THOMPSON
United States Attorney

By: s/Joshua C. Hanks
JOSHUA C. HANKS
Assistant United States Attorney

STATEMENT REGARDING ORAL ARGUMENT

Optional. You may want to say this:

In accordance with Rule 34(a) of the Federal Rules of Appellate Procedure, the United States respectfully requests oral argument. Full argument would be beneficial in assisting the Court when making its decision.

Or, you may want to say this:

The United States respectfully suggests that oral argument is not necessary in this case. The legal issues are not novel, and oral argument likely would not aid the Court in reaching its decision.

Or, you may choose not to make any statement about oral argument. Fed. R. App. 34(a); *see also* Local Rule 34(a) ("In furtherance of the disposition of pending cases under this rule, parties may include in their briefs at the conclusion of the argument a statement setting forth the reasons why, in their opinion, oral argument should be heard.").

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 2946 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because the brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2016 in 14-point Goudy Old Style.

s/Joshua C. Hanks
JOSHUA C. HANKS
Assistant United States Attorney
Attorney for the United States

Date: July 26, 2023

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2023, I electronically filed the foregoing "BRIEF OF APPELLEE THE UNITED STATES OF AMERICA" with the Clerk of court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user:

Salvatore Mancina, Esq.
Supervising Attorney
GEORGETOWN UNIVERSITY LAW CENTER
Appellate Litigation Program
600 New Jersey Ave. NW, Suite 306
Washington, DC 20001
Sm3866@georgetown.edu

s/Joshua C. Hanks
JOSHUA C. HANKS
Assistant United States Attorney
Attorney for the United States