IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

KENON DURELL SWEAT,	)	
	)	
Petitioner,	)	
	)	
v.	)	1:08CV630
	)	1:05CR280-3
	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM ORDER

Before the court is a motion styled "Application for a Certificate of Appealability Pursuant to Title 28 U.S.C. § 2253(c)(2)" ("Application"), filed by Kenon Durell Sweat ("Sweat"), a federal prisoner proceeding pro se. (Doc. 81.)[1] Sweat seeks a certificate of appealability ("COA") permitting him to appeal this court's denial of his prior motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255. (Id.) Also pending is Sweat's "Motion to Alter or Amend Judgment, Pursuant to Fed. R. Civ. P. 59(e)" ("Motion to Alter or Amend Judgment"). (Doc. 79.) For the reasons below, both motions are denied.

[1] All citations to the record are to the criminal case, 1:05CR280-3.

I. BACKGROUND

In 2005, Sweat was convicted of two counts of bank robbery, in violation of 18 U.S.C. § 2113(a) and (d); one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e); and one count of carrying or using, by brandishing, a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii). (Doc. 42 at 1.) He was sentenced to 360 months of imprisonment, five years of supervised release, a special assessment of $300, and restitution of $6,712. (Id. at 2-3, 5.) On appeal, Sweat's convictions and sentence were affirmed by the Fourth Circuit. (Docs. 50, 51.)

On September 2, 2008, Sweat filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. (Doc. 53.) He subsequently filed a motion for leave to amend (Doc. 57), which was granted by the United States Magistrate Judge (Doc. 74 at 2-3, 14). In general, Sweat claimed that the trial court lacked jurisdiction to try him because of a defect with the indictment, that his counsel provided constitutionally ineffective assistance, that the prosecutor engaged in malicious prosecution and misconduct, and that his conviction was invalid because no complaint was ever issued in his case. (See Doc. 53 at 4-5; Doc. 54 at 5-23; Doc. 57 at 2-3; Doc. 57-2 at 2-5.)

On June 15, 2009, the Magistrate Judge, having considered these claims, issued a fifteen-page memorandum opinion and recommendation ("Recommendation"), which provided a detailed analysis of the claims and recommended denial of Sweat's § 2255 motion and dismissal of the action. (Doc. 74.) Sweat subsequently filed objections to the Recommendation. (Doc. 76.) On October 29, 2009, this court overruled the objections, affirmed and adopted the Magistrate Judge's Recommendation, denied Sweat's § 2255 motion, and dismissed the action. (Doc. 77.) In the same order and judgment, this court also denied a COA. (Id. at 3-4; Doc. 78 at 1.)

Sweat then filed his "Motion to Alter or Amend Judgment, Pursuant to Fed. R. Civ. P. 59(e)." (Doc. 79.) In this motion, Sweat argued that the court committed a clear error and a manifest injustice because it allegedly did not consider the merits of his § 2255 motion or explain the basis for its denial of that motion. (Id. at 2-3, 6-7.) In making this argument, Sweat restated each of his six claims from his § 2255 motion. (Id. at 3-6.) He also argued that the court erred when it entered an order denying a COA contemporaneously with its judgment disposing of the § 2255 motion. (Id. at 7-8.) Sweat contended that the court instead should have allowed him to file a formal petition for a COA. (Id.)

In a memorandum order filed on January 6, 2011 ("January 6 Order"), this court held that Sweat's "Motion to Alter or Amend Judgment," though labeled as a Rule 59(e) motion, was more properly construed as one for relief from a judgment pursuant to Federal Rule of Civil Procedure 60(b), because of its filing date (Doc. 80 at 4-5);[2] that Sweat's failure-to-consider and failure-to-explain arguments were baseless and there was no such defect in the § 2255 proceeding (id. at 7-11); and that Sweat's restatement of his § 2255 claims therefore constituted a "second or successive" § 2255 motion over which this court had no subject matter jurisdiction pursuant to § 2255(h) (id. at 3-4, 6-11). The court also held that it would ordinarily have jurisdiction to address Sweat's COA-related claim in a timely Rule 60(b) (or Rule 59(e)) motion. (Id. at 11-12.) However, because this claim was joined with Sweat's "second or successive" § 2255 claims, this court concluded it lacked jurisdiction over the COA-related claim as well. (Id. at 12.) Consequently, Sweat was given twenty days within which to file a motion to amend his "Motion to Alter or Amend Judgment" to delete the "second or successive" claims. (Id. at 13-14.) The court stated that if Sweat elected to delete these claims, the court would proceed to adjudicate the remaining COA-related

[2] The court noted that even if Sweat's motion were construed as a Rule 59(e) motion, the result would be the same. (Doc. 80 at 5 n.2, 7 n.3.)

claim; but if Sweat did not file a motion to amend, the court would treat the entire "Motion to Alter or Amend Judgment" as a "second or successive" motion under § 2255(h). (Id. at 14.)

Subsequently, Sweat filed the pending "Application for a Certificate of Appealability Pursuant to Title 28 U.S.C. § 2253(c)(2)." (Doc. 81.) In this Application, he requests a COA permitting him to appeal this court's October 29, 2009, denial of his § 2255 motion. (Id.) At the same time, Sweat filed a notice of appeal to the Fourth Circuit with regard to the denial of his § 2255 motion. (Doc. 82.) On February 3, 2011, the Fourth Circuit remanded the case to this court "for the limited purpose of permitting the district court to supplement the record with an order granting or denying the pending motion for certificate of appealability." (Doc. 85 at 1.)

II. ANALYSIS

A. Construction of the Application

The first question before the court is how to construe Sweat's pending Application (Doc. 81), because it is unclear whether the Application constitutes Sweat's response to this court's January 6 Order (Doc. 80) or whether it is an independent motion. If it is the latter, then Sweat has failed to respond to the January 6 Order and his earlier "Motion to

Alter or Amend Judgment" (Doc. 79), still pending, must be disposed of accordingly.

The January 6 Order read, in relevant part, as follows:

> IT IS THEREFORE ORDERED that Sweat shall have twenty (20) days within which to file in this court a motion to amend his motion to alter or amend judgment (Doc. 79) to delete the successive claims . . . . If Sweat elects to delete his successive claims, the court will proceed to adjudicate his remaining COA-related claim. If Sweat elects not to file a motion to amend, the court will treat his motion to alter or amend judgment (Doc. 79) as a successive motion pursuant to 28 U.S.C. § 2255.

(Doc. 80 at 13-14.) The pending Application appears to have satisfied the twenty-day deadline established by the court in the January 6 Order,[3] and its contents are consistent with the court's statement that "[i]f Sweat elects to delete his successive claims, the court will proceed to adjudicate his remaining COA-related claim" (id. at 14), insofar as the Application deals solely with Sweat's requests for a COA and

[3] The twenty-day period ended on January 26, 2011. Sweat's Application was not placed on the docket until January 31. However, "[a] paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing." R. Governing Section 2255 Proceedings 3(d). The Application itself unfortunately contains no date: the signed "Certificate of Service" at the end of the document certifies that the Application was "mailed via first-class mail . . . on this ___ day of January 2011." (Doc. 81 at 16.) But the envelope in which the Application was sent to the clerk of court is postmarked January 27, 2011, and "1/26/11" is handwritten across the envelope's seal. (See Doc. 81-1.) Moreover, Sweat's notice of appeal, which was also sent in an envelope postmarked January 27, 2011 (see Doc. 82-1), and which was also placed on the court's docket on January 31, certifies that it was mailed "on this 24 day of January 2011" (Doc. 82 at 2). All indications, therefore, are that Sweat mailed his Application on or before January 26, 2011.

does not contain the "successive" § 2255 claims discussed in the January 6 Order.

On the other hand, Sweat's pending Application does not contain a motion to amend, does not mention his pending "Motion to Alter or Amend Judgment," and does not even allude to the January 6 Order. (See Doc. 81.) Moreover, unlike the "Motion to Alter or Amend Judgment," the Application does not challenge the court's earlier denial of a COA but simply states six requests for a COA, each based upon one of Sweat's six original § 2255 claims. (Compare id. at 3-15, with Doc. 79 at 7-8.) Therefore, the Application is best construed as a brand new motion and the court will so construe it.

Consequently, Sweat has failed to respond to this court's January 6 Order within the twenty days provided. The court stated in the January 6 Order that if Sweat failed to respond, his entire "Motion to Alter or Amend Judgment" (Doc. 79), which is still pending, would be treated as a "successive" § 2255 motion. (Doc. 80 at 14.) A district court lacks jurisdiction to hear such a motion, absent prior authorization from the court of appeals. 28 U.S.C. § 2255(h) (citing id. § 2244); R. Governing Section 2255 Proceedings 9; United States v. Winestock, 340 F.3d 200, 205 (4th Cir. 2003). Sweat has not received any such authorization from the Fourth Circuit.

Therefore, Sweat's "Motion to Alter or Amend Judgment" (Doc. 79) is denied for lack of subject matter jurisdiction.[4]

The court will now turn to the substance of Sweat's new "Application for a Certificate of Appealability Pursuant to Title 28 U.S.C. § 2253(c)(2)." (Doc. 81.)

B. Petitioner's Arguments for Issuance of a COA

Sweat's Application for a COA may be granted only if Sweat "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a petitioner's constitutional claims have been rejected on the merits, as in this case (see Doc. 74 at 4-14; Doc. 77 at 1-3), "the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

[4] Sweat's filing of a notice of appeal (Doc. 82) does not affect this court's power to deny his "Motion to Alter or Amend Judgment" (Doc. 79), styled as a Rule 59(e) motion and interpreted by the court as a "second or successive" § 2255 motion in the guise of a Rule 60(b) motion. See Fobian v. Storage Tech. Corp., 164 F.3d 887, 889 (4th Cir. 1999) ("We hold that a district court does retain jurisdiction to entertain a Rule 60(b) motion, even when the underlying judgment is on appeal."); id. at 890 (holding that even during a pending appeal, a district court may consider and act upon matters "in aid of the appeal"); Brinn v. Tidewater Transp. Dist. Comm'n, 113 F. Supp. 2d 935, 939 (E.D. Va. 2000) ("[T]he district court retains jurisdiction when a notice of appeal is filed prior to the disposition of a motion to alter or amend a judgment." (citing Fed. R. App. P. 4(a)(4))).

Sweat's Application largely restates the six claims from his original § 2255 motion (see Doc. 81 at 3-15) and it incorporates by reference his earlier arguments in favor of that motion (id. at 2-3). For the reasons provided in the Magistrate Judge's Recommendation advising denial of Sweat's § 2255 motion (Doc. 74 at 4-14) and this court's order affirming and adopting the Recommendation (Doc. 77 at 1-3), the court finds that Sweat's constitutional claims clearly lack merit and that reasonable jurists would not find this assessment debatable or wrong. Nothing in the pending Application affects this holding or renders the court's rejection of Sweat's constitutional claims potentially debatable.

The Application also requests a COA because (1) Sweat allegedly should have been permitted "to inspect the record of the proceeding before the grand jury to insure that 12 or more grand jurors concurred in finding and returning of the indictment" (Doc. 81 at 3); and (2) an evidentiary hearing allegedly should have been held as to several of Sweat's § 2255 claims (id. at 5-13). Because 28 U.S.C. § 2253(c)(2) permits a COA to be issued only if the applicant "has made a substantial showing of the denial of a constitutional right," and because Sweat has not made such a showing as to any of his underlying constitutional claims, it is not clear that failure to grant Sweat access to grand jury records or failure to hold an

evidentiary hearing, standing alone, would entitle him to a COA. See, e.g., Jackson v. United States, No. 1:04CV251, No. 1:00CR74, 2010 WL 2775402, at *2 (W.D.N.C. July 13, 2010) ("If no constitutional violation is asserted, the non-constitutional claims [such as denial of an evidentiary hearing] are only considered to the extent that they are connected to a claim on which a COA is granted." (quoting Alix v. Quarterman, 309 F. App'x 875, 878 (5th Cir. 2009) (unpublished per curiam opinion))); see also Alix, 309 F. App'x at 878 ("Thus, a [COA] petition challenging an evidentiary ruling [such as denial of an evidentiary hearing] may only be entertained as corollary to a constitutional violation."); United States v. Hadden, 475 F.3d 652, 660 n.5 (4th Cir. 2007) ("Two of Hadden's three arguments . . . are not constitutional arguments, and therefore cannot warrant a COA [in the context of a § 2255 action]."). Even if Sweat's arguments could warrant a COA, they lack merit for the following reasons.

1. Grand Jury Records

Sweat insists that this court should have permitted him to review the record of the proceedings before the grand jury to ensure that the indictment against him was agreed to by at least twelve grand jurors, as required by Federal Rule of Criminal Procedure 6(f). However, it does not appear that Sweat requested the release of this material at any time during this

§ 2255 action. (See Doc. 74 at 6 n.2 ("Petitioner does not appear to be seeking the release of the document recording the number of concurring grand jurors in his case.").)

Even if Sweat had done so, he has not provided any grounds upon which such a request could be granted. Federal case law recognizes a "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." Dennis v. United States, 384 U.S. 855, 869 (1966). Federal Rule of Criminal Procedure 6(e)(3)(E) lists several instances in which "[t]he court may authorize disclosure . . . of a grand-jury matter," but none of these applies to Sweat's situation. First, disclosure may be authorized "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii). Putting aside the fact that this exception relates to a potential motion to dismiss an indictment, rather than to a collateral attack under § 2255, Sweat has not "show[n] that a ground may exist" to question the validity of the indictment because of any "matter that occurred before the grand jury." As the Magistrate Judge concluded in his Recommendation, "[Sweat] is left with nothing to create any inference that the requirements of [Federal Rule of Criminal Procedure] 6 were not met in his case. His claim that they were

not is entirely speculative and conclusory . . . ." (Doc. 74 at 6; see id. at 4-6.)

The only other exception to grand jury secrecy that is potentially applicable to Sweat's case is the court's power to authorize disclosure "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(i). However, this exception is limited: "The Supreme Court has explained that a party seeking disclosure of grand jury materials must make a showing of a 'particularized need' by demonstrating that (1) the materials are needed to avoid an injustice in another proceeding; (2) the need for disclosure is greater than the need for continued secrecy; and (3) the request is structured to cover only needed materials." United States v. Moussaoui, 483 F.3d 220, 235 (4th Cir. 2007) (citing Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 222 (1979)). For the reasons provided in the Magistrate Judge's Recommendation, Sweat has shown no such "particularized need." (See Doc. 74 at 4-6.)

Sweat relies heavily upon United States v. Bullock, 448 F.2d 728 (5th Cir. 1971) (per curiam), in which a criminal defendant moved to dismiss the indictment against him, contending that it had been seen and signed only by the foreman of the grand jury and that twelve or more grand jurors had not concurred. Id. at 728. The defendant also moved for production of a transcript of the testimony and proceedings before the

grand jury, for the development of the issue raised in the motion to dismiss. Id. at 729. The district court denied both motions, but on appeal the Fifth Circuit, in a brief opinion, held that the defendant "should have been accorded the right to inspect the . . . record." Id.

Bullock was issued in the context of a direct appeal, unlike the present case, and the defendant in Bullock had filed a motion requesting production of grand jury records. Here, on the other hand, Sweat claims that he is entitled to a COA because this court did not give him access to grand jury materials that he never requested. Moreover, to the extent Bullock stands for the principle that a criminal defendant has an unlimited right to view grand jury records and confirm that the requisite number of grand jurors concurred, the opinion is difficult to reconcile with case law in this circuit. See, e.g., Moussaoui, 483 F.3d at 235 ("[A] party seeking disclosure of grand jury materials must make a showing of a 'particularized need' . . . ."); United States v. Moreland, 437 F.3d 424, 428 n.2 (4th Cir. 2006) (holding that the district court did not abuse its discretion in denying a criminal defendant's request for "disclosure of information regarding the composition of the grand jury" or alternatively for *in camera* review of this information by the court, because the defendant made no showing "that a ground may exist to dismiss the indictment because of a

matter that occurred before the grand jury"), abrogated on other grounds by Gall v. United States, 552 U.S. 38 (2007), and Rita v. United States, 551 U.S. 338 (2007); United States v. Loc Tien Nguyen, 314 F. Supp. 2d 612, 616 (E.D. Va. 2004) ("[Rule 6(e)(3)(E)(ii)] is not an invitation to engage in a fishing expedition to search for grand jury wrongdoing and abuse when there are no grounds to believe that any wrongdoing or abuse has occurred."). See generally United States v. Deffenbaugh Indus., Inc., 957 F.2d 749, 757 (10th Cir. 1992) ("If Bullock . . . stand[s] for the proposition that defendants are always entitled to view the report of the foreman of the grand jury specifying the number of votes for the indictment, we respectfully disagree."); United States v. Friel, Criminal No. 06-25-P-H, 2006 WL 2061395, at *3 (D. Me. July 21, 2006) (Cohen, Mag. J.) (denying a criminal defendant's motion to compel disclosure of "the number of grand jurors who concurred that he should be indicted," because "[c]onclusory or speculative allegations about what went wrong in a grand jury proceeding . . . do not suffice to merit lifting the veil of grand-jury secrecy" (internal quotation marks omitted)), aff'd and adopted, 448 F. Supp. 2d 222 (D. Me. 2006).

2. Evidentiary Hearing

Sweat's second contention is that the court should have held an evidentiary hearing on his § 2255 claims. He points to

the statutory requirement that "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255(b). Sweat requested a hearing in his brief supporting his § 2255 motion (see, e.g., Doc. 54 at 4 n.3; id. at 24), but as noted by the Magistrate Judge, "Petitioner is not entitled to a hearing based upon unsupported, conclusory allegations" (Doc. 6 at 74). The records of this § 2255 action and the underlying criminal action "conclusively show[ed] that [Sweat was] entitled to no relief," so no evidentiary hearing was required.

Sweat argues that he filed affidavits supporting his claims (Doc. 55 at 2-3; Doc. 57-2 at 7-8) and that these affidavits justified an evidentiary hearing. However, these affidavits largely consist of unsupported, conclusory allegations. (See, e.g., Doc. 55 at 2-3.) As to the more specific allegations in the affidavits, these were carefully considered by both the Magistrate Judge and this court and found insufficient to entitle Sweat to relief, even if true. (See Doc. 74 at 7-14; Doc. 77 at 1-3.) Cf., e.g., Brown v. United States, Civil No. RDB-09-0395, Criminal No. RDB-06-0179, 2010 WL 3075181, at *3 (D. Md. Aug. 4, 2010) ("[A] federal court must hold an evidentiary hearing [in a § 2255 action] when the petitioner

alleges facts, which, if true, would entitle him to relief. . . . A hearing is also required . . . where material facts are in dispute and there are inconsistencies beyond the record." (citations omitted) (internal quotation marks omitted)).[5]

Therefore, the court concludes that Sweat has not made the showing required for issuance of a COA. The Application will be denied and no COA will be issued.

III. CONCLUSION

For the reasons set forth above, IT IS THEREFORE ORDERED that Petitioner Kenon Durell Sweat's "Motion to Alter or Amend Judgment, Pursuant to Fed. R. Civ. P. 59(e)" (Doc. 79) is DENIED for lack of subject matter jurisdiction; and his "Application for a Certificate of Appealability Pursuant to Title 28 U.S.C. § 2253(c)(2)" (Doc. 81) is DENIED.

/s/ Thomas D. Schroeder
United States District Judge

February 25, 2011

[5] The court has reviewed all the case law relied upon by Sweat to support his evidentiary-hearing argument and concludes that these opinions do not save his COA request.