

United States Court of Appeals
For the Eighth Circuit

No. 23-3236

Curtis James McGarvey

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from United States District Court
for the District of North Dakota - Western

Submitted: August 19, 2024

Filed: August 22, 2024

[Unpublished]

Before SMITH, BENTON, and GRASZ, Circuit Judges.

PER CURIAM.

After a preliminary determination by the district court at defense counsel's request that relevant materials involved the "lascivious exhibition" of the genitals or pubic area and thus depicted "sexually explicit conduct," Curtis McGarvey pled guilty to two counts of attempted sexual exploitation of a minor and one count of cyberstalking. The district court sentenced him to 240 months in prison. On direct

appeal, this court affirmed, rejecting McGarvey's challenges to the factual basis for his guilty pleas to the exploitation offenses. United States v. McGarvey, 2 F.4th 783, 784-85 (8th Cir. 2021) (per curiam). McGarvey then moved for relief under 28 U.S.C. § 2255, arguing, inter alia, that counsel performed deficiently by failing to object to the district court's preliminary lasciviousness determination before he pled guilty and failing to challenge that determination on direct appeal. The district court¹ denied relief but granted a certificate of appealability as to that claim, and it is the only one we will consider. See Collins v. United States, 28 F.4th 903, 906 (8th Cir. 2022) (confining review to claim in certificate of appealability).

Following careful review, we conclude that McGarvey's claims of ineffective assistance lack merit. See Meza-Lopez v. United States, 929 F.3d 1041, 1044 (8th Cir. 2019) (standard of review). Any effort to object to or seek reconsideration of the preliminary lasciviousness determination would likely have been unsuccessful, and thus counsel did not perform in a deficient fashion by failing to take additional actions in that regard. See Thai v. Mapes, 412 F.3d 970, 978 (8th Cir. 2005) (counsel did not perform deficiently by failing to raise meritless argument). Similarly, given McGarvey's guilty plea, counsel did not perform deficiently by failing to raise a challenge to the preliminary lasciviousness determination on direct appeal, particularly in light of counsel's decision to raise a similar challenge to the sufficiency of the pleas. See Walker v. United States, 810 F.3d 568, 579-80 (8th Cir. 2016) (when appellate counsel competently asserts some arguments, it is difficult to sustain claim that counsel performed deficiently by failing to assert others).

Accordingly, we affirm the judgment of the district court.

¹The Honorable Daniel L. Hovland, United States District Judge for the District of North Dakota.