

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA)
)
 Plaintiff/Respondent,)
)
 v.)
)
ROYCE BROWN,)
)
 Defendant/Petitioner.)
)

)
)
 Crim. Action No. 95-69-SLR
)
)
 Civil Action No. 00-562-SLR

Royce Brown, Marion, Illinois. Petitioner pro se.

Colm F. Connolly, United States Attorney and Keith M. Rosen,
Assistant United States Attorney, United States Attorney's
Office, Wilmington, Delaware. Counsel for Respondent.

MEMORANDUM OPINION

Dated: February 5, 2003
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner Royce Brown is an inmate at the Federal Correctional Institution in Marion, Illinois. Currently before the court are petitioner's application for habeas relief pursuant to 28 U.S.C. § 2255 (D.I. 155, 174), petitioner's request for an evidentiary/discovery hearing (D.I. 177), petitioner's Rule 33 motion (D.I. 180), and petitioner's motion requesting adjudication of judicially noticeable facts (D.I. 181). Because the court finds that petitioner's claims are without merit, his motions are denied.

II. BACKGROUND

On June 27, 1996, a jury found petitioner guilty of one count of possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and one count of possession of a firearm by a felon in violation of 18 U.S.C. § 922(g)(1). (D.I. 60) The court sentenced defendant to 360 months of imprisonment on the drug charge and 120 months on the weapons charge, to be served concurrently. (D.I. 140) On December 16, 1998, the Third Circuit affirmed petitioner's conviction. (D.I. 147) Petitioner then filed a writ of certiorari to the Supreme Court which was denied June 1, 1999. (D.I. 148)

On July 8, 1996, petitioner filed a motion for acquittal and for a new trial. (D.I. 64) This motion was denied. (D.I. 137)

On August 2, 1999, petitioner filed a second motion pro se for a new trial under Fed. R. Crim. P. Rule 33. (D.I. 150) The court denied this motion and the Third Circuit affirmed. (D.I. 165, 171)

On May 28, 2000, petitioner filed a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255. (D.I. 155) On September 25, 2001, petitioner filed an extensive amendment to his § 2255 petition. (D.I. 174) He subsequently filed a motion for an evidentiary hearing, another rule 33 motion and a motion requesting adjudication of judicially noticeable facts.

III. STANDARD OF REVIEW

After conviction and exhaustion, or waiver, of any right to appeal, courts are entitled to presume that a defendant stands fairly and finally convicted. United States v. Frady, 456 U.S. 152, 164 (1982); United States v. Shaid, 937 F.2d 228, 231-32 (5th Cir. 1991). However, prisoners in federal custody may attack the validity of their sentences via 28 U.S.C. § 2255. Section 2255 is a vehicle to cure jurisdictional errors, constitutional violations, proceedings that resulted in a "complete miscarriage of justice," or events that were "inconsistent with the rudimentary demands of fair procedure." United States v. Timmreck, 441 U.S. 780, 784 (1979).

"Generally if a prisoner's § 2255 [petition] raises an issue of material fact, the district court must hold a hearing to

determine the truth of the allegations.” United States v. Essig, 10 F.3d 968, 976 (3d Cir. 1993). However, a defendant is not entitled to a hearing if his allegations are contradicted conclusively by the record, or if they are patently frivolous. Solis v. United States, 252 F.3d 289, 295 (3d Cir. 2001); see also Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989) (holding that evidentiary hearing is not required where motion and record conclusively show movant is not entitled to relief and that decision to order hearing is committed to sound discretion of district court).

IV. DISCUSSION

A. Petitioner’s Request for an Evidentiary/Discovery Hearing

Pursuant to Rule 8 of the Rules Governing Section 2255 Proceedings, the court should consider whether an evidentiary hearing is required in this case. After a review of the motion, amended motion, answering brief, and records submitted by the parties, the court finds that an evidentiary hearing is not required. See Rule 8(a) of the Rules Governing Section 2255 Proceedings. The court concludes that it can fully evaluate the issues presented by petitioner on the existing record. Therefore, petitioner’s request for an evidentiary/discovery hearing is denied.

B. Petitioner’s Habeas Petition Under 28 U.S.C. § 2255

The Sixth Amendment guarantees an accused the assistance of counsel in all criminal proceedings, and the Supreme Court has interpreted this right to mean the effective assistance of counsel. See Strickland v. Washington, 464 U.S. 668, 686 (1984). Accordingly, a defendant claiming ineffective assistance of counsel must show (1) that counsel's performance was deficient, and (2) a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. See id. at 686, 694. In determining whether counsel's conduct was deficient, the court must consider the totality of the circumstances of the case and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 688-89.

Petitioner's original § 2255 petition raised only ineffective assistance of counsel as the basis for relief. (D.I. 155) He stated four main grounds for this allegation. These were expanded into nine arguments in his amended petition. (D.I. 174) Each of the claims will be discussed individually below.¹

¹The court notes that petitioner's amended § 2255 petition was not filed timely as it was filed one year after this court's extension. (D.I. 165 at 7) The amended petition raises numerous new grounds for relief not listed in the original petition. Under Third Circuit law, amendments to a § 2255 petition are considered only if the amendment adds additional facts which clarifies or amplifies a claim or theory in the original petition. See United States v. Thomas, 221 F.3d 430, 431 (3d Cir. 2000) ("We hold that . . . an amendment which, by way of additional facts, clarifies or amplifies a claim or theory in the petition may . . . relate back to the date of that petition if

The court finds that none of petitioner's claims has merit and his § 2255 petition for habeas relief is, therefore, denied.

1. Ineffective assistance of counsel for failure to object to insufficiency of crack evidence at trial.

Petitioner claims that 21 U.S.C. § 841 (a) (1) and (b) (1) (A) require the government to prove that the substance seized in his house was "crack" cocaine as opposed to cocaine base. (D.I. 155) Petitioner is mistaken. Section 841 (b) (1) (A) requires possession of cocaine base - it does not require possession of "crack" cocaine.² The suspected cocaine base seized from petitioner's home was analyzed by the DEA's Northeast Regional Laboratory, where a chemist confirmed that the bulk of the material seized tested positive for cocaine base. (D.I. 1, Aff. at 2)

The court finds there was no reasonable basis for raising the claim of insufficiency of this evidence at trial. As it is clearly established that counsel is not ineffective for failing to raise a meritless claim, this argument of petitioner fails. See Strickland, 466 U.S. at 691 (holding that failure of counsel

and only if . . . the proposed amendment does not seek to add a new claim or to insert a new theory."). Thus, the court has only considered the amended petition to the extent it added facts to petitioner's original § 2255 petition.

²21 U.S.C. 841(b) (1) (A) (iii) defines the penalty for possession with intent to distribute "50 grams or more of a mixture or substance . . . which contains cocaine base[.]"

to pursue fruitless claims "may not later be challenged as unreasonable"); see also Holland v. Horn, 150 F. Supp. 706, 787 (E.D. Pa. 2001) (holding that counsel cannot be ineffective for failing to raise a meritless claim).

2. Ineffective assistance of counsel for failure to object to constructive amendment of indictment.

Petitioner argues that his counsel was ineffective for failing to object to the constructive amendment of his indictment. Petitioner's argument is without merit. There were two amendments to petitioner's indictment. The first was on motion of the government to drop the second count of the indictment for using a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). (D.I. 21) The second was on motion of the government to renumber the counts to avoid prejudice to petitioner by letting the jury know that there had originally been three, not two, counts. (D.I. 47) Both of these amendments were beneficial to petitioner. Any objection by petitioner's counsel would have negated the beneficial effect of the two amendments. There is no evidence that these amendments had anything other than their intended beneficial effect for petitioner. Therefore, it cannot be ineffective assistance of counsel to have failed to object to these amendments.

3. Ineffective assistance of counsel for failure to object to violations of administrative due process.

The arguments petitioner raises in this motion are the same as those he raised in his motion to suppress the evidence seized during the probationary search of his home at trial (D.I. 14) and again on direct appeal of his conviction to the Court of Appeals for the Third Circuit. (D.I. 63) He again raised this claim in his first Rule 33 motion for a new trial. (D.I. 64) Thus, a subsequent review by this court is improper. See Withrow v. Williams, 507 U.S. 680 (1993) ("If the claim was raised and rejected on direct review, the habeas court will not readjudicate it absent countervailing equitable considerations."); see also United States v. DeRewal, 10 F.3d 100, 105 n.4 (3d Cir. 1993) ("Section 2255 generally may not be employed to relitigate questions which were raised and considered on direct appeal.") (internal citation omitted).

4. Ineffective assistance of counsel for failure to object to jury instruction on "joint possession" and for failure to object at procedurally correct time to incorrect jury instruction on joint possession.

Petitioner argues that his counsel's failure to object to the jury instruction on joint possession at the correct time led the jury to believe there was also a charge of conspiracy against him. (D.I. 174 at 39) Petitioner's argument is without merit.

The jury instruction³ is merely directed to determining who may be considered to have possession of property. The government was required to prove that petitioner had possession of the drugs as an element of the crime. The status of standard jury instructions is not seriously in question. Therefore, as noted above, it is not ineffective assistance of counsel to fail to raise a meritless claim. See Strickland, 466 U.S. at 691.

5. Ineffective assistance of counsel for failure to object to facts relating to prior felony conviction.

Petitioner claims his trial counsel was ineffective for failing to object that the stipulation to petitioner's prior felony contained facts concerning the crime for which he was convicted. (D.I. 174 at 42) Petitioner points to the case of Old Chief v. United States as support for his claim that the stipulation was unnecessarily prejudicial to him for including those facts. 519 U.S. 172, 185 (1997).

³ The jury instruction reads:
Joint Possession - More than one person can have control over the same cocaine base or firearm. If this is so, then these people have what is called "joint possession." For purposes of determining defendant's guilt, joint possession is no different from sole possession.

However, defendant does not have "joint possession" of the cocaine base or firearm simply because he associates with a person who does have possession and control over them. You cannot find defendant possessed the cocaine base or firearm unless you find that he exercised control over them, either on his own or acting with others.
(D.I. 59 at 20)

Petitioner's argument is without merit. Petitioner's trial counsel did object to the stipulation at trial. (D.I. 174 at H 97-98) It is not ineffective assistance of counsel if counsel does raise the objection but it is overruled by the court. See Strickland, 466 U.S. at 676-677 (noting state court's dismissal of petitioner's claim of ineffective assistance of counsel for failing to present meaningful arguments to the sentencing judge when the record showed counsel's argument was "admirable").⁴

6. Ineffective assistance of counsel for failure to investigate "fine points" of 21 U.S.C. § 851(a).

Petitioner argues that counsel was ineffective for failure to object to his sentencing as a career offender which resulted in his sentence being a minimum of 360 months instead of between 262 and 327 months. (D.I. 174 at 46)

Petitioner's argument is without merit. The record clearly supports a finding of petitioner's status as a career offender.⁵ Petitioner's presentence report details numerous instances of petitioner's encounters with the criminal justice system. In

⁴The court notes that the Old Chief case was decided after petitioner's trial. As there was a circuit split at the time on the issue of what information should be included in a stipulation of a defendant's prior conviction(s), see Old Chief, 519 U.S. at 177-78, counsel would not have erred by not objecting to the stipulation as it was submitted.

⁵Petitioner's Criminal History points at sentencing were calculated as 23. That placed him in a Criminal History Category of VI. (D.I. 145 at 2-3) The court notes that a minimum of 13 Criminal History points is necessary to place a person in Criminal History Category VI. (D.I. 145 at 15)

addition, petitioner's counsel spoke at sentencing about mitigating circumstances that the court should consider when setting petitioner's sentence. (D.I. 145 at 13-14) Therefore, petitioner's counsel was not ineffective.

7. Ineffective assistance of counsel for failure to object to prosecutor's failure to adhere to Fed. R. Civ. P. 16 and for failure to conduct adequate investigation relating to withholding of discovery evidence.

Petitioner argues that counsel was ineffective for failing to object to the characterization of Officer Collins as a probation officer during the search of petitioner's home when Officer Collins also had a part-time position as an Alcohol, Tobacco and Firearms ("ATF") agent. (D.I. 174 at 48)

This argument is without merit. The presearch checklist listed Officer Collins as a probation officer who would be present during the search. (Id. at H-16) The fact that Officer Collins may also have a position with ATF is not relevant. Petitioner's statement that he allegedly saw ATF present during the search is not disputed by the government - probation officer Santobianco stated that rather than call Wilmington Police for back-up for the search, the probation officers merely enlisted the assistance of the FBI Fugitive Task Force agents who were already present. (D.I. 38 at 127-36)

In addition, petitioner also objects to the failure of the government to provide a copy prior to trial of the substance of

what Officer Cronin would testify to in court. (D.I. 174 at 48) This argument was previously raised on direct appeal. As noted above, a § 2255 petition may not be used to relitigate issues already decided on direct appeal. See DeRewal, 10 F.3d at 105, n.4. Therefore, this argument is without merit.

8. Ineffective assistance of counsel for failure to object to prosecutor's misconduct at trial.

Petitioner argues that his trial counsel was ineffective for failing to object to prosecutorial misconduct at trial. (D.I. 174 at 53) Petitioner claims that the prosecutor was commenting on witness credibility. (Id.) The court has examined the record referred to by petitioner and finds the argument to be without merit. While the prosecutor's comments were not favorable to petitioner, they did not rise to a level that could be considered misconduct. It is not prosecutorial misconduct for the prosecutor to suggest that the jury evaluate a witness's credibility. As noted previously, it is not ineffective assistance of counsel to fail to make a meritless claim. See Strickland, 466 U.S. at 691.

9. Ineffective assistance of counsel for failure to object to incorrect calculation under sentencing guidelines.

Petitioner argues that his counsel was ineffective for failing to object to the calculation under the sentencing guidelines. Petitioner argues his two-year sentence of incarceration for third degree arson should not be considered for

the calculation because it was suspended after four months for probation. This conviction, therefore, was not for more than one year and should not be counted as a prior felony for purposes of the sentencing guidelines. (D.I. 174 at 56)

Petitioner's argument is without merit. Petitioner has misinterpreted the necessary conditions under the sentencing guidelines. The court notes that petitioner's sentence was not suspended - merely his period of incarceration was suspended. He was still sentenced to two years under the control of the criminal justice system. The sentence itself was not reduced, which is a necessary occurrence for it to be inapplicable for sentencing guideline purposes. As previously noted, it is not ineffective assistance of counsel to fail to raise a meritless claim. See Strickland, 466 U.S. at 691.

10. Ineffective assistance of counsel for failure to object to insufficiency of "crack" evidence as it applied to sentencing.

Petitioner argues that his counsel should have objected to the calculation under the sentencing guidelines using the amount of material seized in his home as "crack" as the government had not proven that the material was in fact "crack" and not merely cocaine base. (D.I. 174 at 58)

As noted above, all that is necessary for conviction under 21 U.S.C. § 841 (a) (1) and (b) (1) (A) is that the substance be shown to be cocaine base - which the government has proven.

(D.I. 1, Aff. at 2) Section 2D1.1(c)(3) of the sentencing guidelines refers to "cocaine base." While the definition of cocaine base was amended by amendment 487, petitioner is reading the provisions of that amendment out of context to support his contention that anything other than "crack" cocaine should be counted as merely cocaine hydrochloride for sentencing guidelines purposes. The comment to Amendment 487⁶ makes clear that the exception to considering material found to test positive for cocaine base that should not be considered as "crack" applies to material that is from an intermediate step in the processing of coca leaves into cocaine hydrochloride, e.g. coca paste. This material still produces results in chemical tests as cocaine base, but is to be considered as cocaine hydrochloride for sentencing guideline purposes. The material seized from petitioner's home was clearly the rock-like form of cocaine base commonly referred to as "crack" - not some intermediate step in

⁶ "This amendment provides that, for purposes of the guidelines, 'cocaine base' means 'crack.' The amendment addresses an inter-circuit conflict. Compare, e.g., United States v. Shaw, 936 F.2d 412 (9th Cir. 1991) (cocaine base means crack) with United States v. Jackson, 968 F.2d 158 (2d Cir. 1992) (cocaine base has a scientific, chemical definition that is more inclusive than crack). Under this amendment, forms of cocaine base other than crack (e.g., coca paste, an intermediate step in the processing of coca leaves into cocaine hydrochloride, scientifically is a base form of cocaine, but it is not crack) will be treated as cocaine. **The effective date of this amendment is November 1, 1993.**"
United States Sentencing Commission Guidelines Manual, 1995.
(emphasis in original)

processing. (D.I. 38 at 131) As noted above, it is not ineffective assistance of counsel for counsel to fail to make a meritless claim. See Strickland, 466 U.S. at 691.

C. Petitioner's Rule 33 Motion

Petitioner has twice filed motions for a new trial. (D.I. 64, 150). This is petitioner's third Rule 33 motion. Both previous motions were denied (D.I. 137, 165) The second denial was upheld on appeal to the Third Circuit. (D.I. 171) The court notes that while the second motion was denied as time-barred, the court also considered the merits of petitioner's claims and noted that even if the motion were not time-barred, the motion would still be denied on the merits. (D.I. 165 at 4-5) The Third Circuit, in affirming the denial on the time-barred ground, also noted that it would also affirm based on the merits. (D.I. 171 at 3-4) The current Rule 33 motion for a new trial raises no new issues of fact or law. All of the arguments that petitioner raises were raised in the two previous Rule 33 motions or on direct appeal. Petitioner's motion, therefore, is denied.

D. Petitioner's Motion Requesting Adjudication of Judicially Noticeable Facts

As the court has reached the merits of all of petitioner's claims, it is unnecessary to rule separately on this motion. Therefore, it is denied as moot.

V. CONCLUSION

Petitioner's request for an evidentiary/discovery hearing (D.I. 177) is denied. As the court finds that counsel's performance cannot be held deficient for failing to challenge any of the issues above, petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 and petitioner's amended motion to vacate, set aside, or correct his sentence (D.I. 155, 174) are denied. Furthermore, petitioner has failed to demonstrate how the court's denial of his claims will otherwise result in a fundamental miscarriage of justice.

Petitioner's Rule 33 motion (D.I. 180) is also denied. Petitioner's motion requesting adjudication of judicially noticeable facts (D.I. 181) is denied as moot. An appropriate order shall issue.

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ROYCE BROWN)
)
Defendant/Petitioner.)
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O R D E R

At Wilmington this 5th day of February, 2003, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. Petitioner's Royce Brown's application for habeas relief (D.I. 155) filed pursuant to 28 U.S.C. § 2255 is dismissed and the writ denied.
2. Petitioner's amended application for habeas relief (D.I. 174) filed pursuant to 28 U.S.C. § 2255 is dismissed and the writ denied.
3. Petitioner's request for an evidentiary/discovery hearing (D.I. 177) is denied.
4. Petitioner's Rule 33 motion (D.I. 180) is denied.

5. Petitioner's motion requesting adjudication of judicially noticeable facts (D.I. 181) is denied as moot.

6. For the reasons stated above, petitioner has failed to make a "substantial showing of the denial of a constitutional right," 28 U.S.C. §2253(c)(2), and a certificate of appealability is not warranted. See United States v. Eyer, 113 F.3d 470 (3d Cir. 1997); 3d Cir. Local Appellate Rule 22.2 (1998).

Sue L. Robinson
United States District Judge