


Farnan, District Judge.

Pending before the Court is a Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody (D.I. 43) filed by Defendant, Thomas L. Davis, Jr. For the reasons set forth below, Defendant's Section 2255 Motion will be denied.

I. BACKGROUND

On October 2, 2007, Defendant was convicted by a jury of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The Court sentenced Defendant to 78 months imprisonment and 3 years of supervised release.

Defendant filed a direct appeal challenging the Court's decision to deny suppression of the firearm, the reasonableness of his sentence, the effectiveness of his counsel, and the Court's charge to the jury. The Third Circuit affirmed Defendant's conviction and sentence. United States v. Davis, 328 Fed. Appx. 138 (3d Cir. 2009).

Thereafter, Defendant filed the instant Section 2255 Motion. By his Motion, Defendant contends that his trial and appellate counsel were constitutionally ineffective. The Government has filed a response to Defendant's Section 2255 Motion alleging that Defendant is not entitled to relief.

DISCUSSION

I. Evidentiary Hearing

Pursuant to Rule 8(a) of the Rules Governing Section 2255 Proceedings, the Court should consider whether an evidentiary hearing is required in this case. After a review of Defendant's Motion, the Government's response, and the record in this case, the Court concludes that it can fully evaluate the issues presented by Defendant, and the record conclusively establishes that Defendant is not entitled to relief. Accordingly, the Court concludes that an evidentiary hearing is not required. United States v. McCoy, 410 F.3d 124, 131 (3d Cir. 2005).

II. Ineffective Assistance Of Counsel

To succeed on an ineffective assistance of counsel claim, a defendant must satisfy the two-part test set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The first prong of the Strickland test requires a defendant to show that his or her counsel's errors were so egregious as to fall below an "objective standard of reasonableness." Id. at 687-88. In determining whether counsel's representation was objectively reasonable, "the court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. In turn, the defendant must "overcome the presumption that, under the circumstances, the challenged action

'might be considered sound ... strategy.' " Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

Under the second prong of Strickland, the defendant must demonstrate that he or she was actually prejudiced by counsel's errors, meaning that there is a reasonable probability that, but for counsel's faulty performance, the outcome of the proceedings would have been different. Strickland, 466 U.S. at 692-94. To establish prejudice, the defendant must also show that counsel's errors rendered the proceeding fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

A. Counsel's Failure To Request A Competency Hearing

Defendant's ineffective assistance of counsel claim centers on his contention that counsel failed to appreciate Defendant's significant mental health problems and consequently made significant errors in his representation of Defendant at trial. Specifically, Defendant contends that his trial counsel failed to request a competency evaluation and hearing prior to Defendant's trial and sentence.

In the context of counsel's failure to request a competency evaluation, a defendant must show that "there is a reasonable probability that he would have been found incompetent to stand trial." Hummel v. Rosemeyer, 564 F.3d 290, 303 (3d Cir. 2009). To be competent to stand trial, the defendant must have (1) sufficient ability at the pertinent time to consult with his

lawyers with a reasonable degree of rational understanding, and (2) a rational, as well as factual understanding, of the proceedings against him. Drope v. Missouri, 420 U.S. 162, 172 (1975) (citing Dusky v. United States, 362 U.S. 402, 402 (1960)). There is no fixed formula for determining whether these requirements are met. Rather, the Court must consider the totality of the circumstances, including "evidence of a defendant's irrational behavior, [the defendant's] demeanor at trial, and any prior medical opinion on competence to stand trial." Drope, 420 U.S. at 180.

In this case, the Court concludes that Defendant has not shown a reasonable probability that he would have been found incompetent to stand trial. The evidence concerning Defendant's mental health problems predated his trial and sentencing by three years or more, and thus, is not probative of his mental health condition at the pertinent time. See Jermyn v. Horn, 266 F.3d 257, 293 (3d Cir. 2001) (finding that suicide attempt several years before trial did not suggest incompetency to stand trial); see also Paul v. United States, 534 F.3d 832, 845 (8th Cir. 2008) (holding that mental health records from 1993 pertained to "afflictions that [the defendant] suffered years before trial, and . . . thus had little if any bearing on his competence" to stand trial in 1996). Further, and perhaps most importantly, the record indicates that Defendant understood the proceedings

against him, and could consult with his attorney and assist in the preparation of his defense. Indeed, Defendant even petitioned the Court independently and in writing (D.I. 29) for a new attorney based on errors he perceived were occurring in counsel's trial strategy. The Court also observed Defendant at trial and during other proceedings related to his case, and noted no deficiencies in his behavior or demeanor suggesting that he was unable to comprehend the proceedings or assist and communicate with his counsel. Accordingly, the Court concludes that Defendant cannot establish a reasonable probability that he would have been found incompetent to stand trial, and therefore, the Court concludes that Defendant cannot establish ineffective assistance of his trial counsel for failure to request a competency hearing.

B. Downward Departure In Sentencing And The Presentence Report

Defendant next contends that counsel was constitutionally ineffective for failing to move for a downward departure at sentencing based on his mental health history and failing to object to calculations in the Presentence Report ("PSR"). With regard to the downward departure, Defendant specifically cites U.S.S.G. § 5K2.13 pertaining to diminished capacity and U.S.S.G. § 4A1.3 pertaining to the seriousness of a defendant's criminal history. Defendant contends that the PSR included convictions that should not have been included because they were sustained

when he was unrepresented by counsel or suffering under mental incompetency that should have precluded his ability to plead guilty to those crimes.¹

Section 5K2.13 of the Sentencing Guidelines allows the Court to depart downward where the defendant committed the subject offense "while suffering from a significantly reduced mental capacity" and the reduced mental capacity "contributed substantially to the commission of the offense." Section 4A1.3 of the Sentencing Guidelines allows a downward departure where "reliable information indicates the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes."

In the Court's view neither of these departures would have been applicable to Defendant, and therefore, the Court concludes that Defendant cannot establish either prong of Strickland. As the Court has discussed, the mental health history that Defendant relies on predates his arrest by at least two to three years. There is no indication in the record that defense counsel was presented with evidence that would have supported an argument under Section 5K2.13 that Defendant suffered from a reduced

¹ To the extent Defendant challenges the convictions used in his presentence report, the Court notes that Defendant is not specific as to which convictions he challenges, and in any event, the Guidelines do not permit the Defendant to collaterally attack his prior convictions. U.S.S.G. § 4A1.2, app. note 6.

mental capacity at the time he committed the offense of conviction. Further, Section 5K2.13 prevents the Court from departing downward where "the defendant's criminal history indicates a need to incarcerate the defendant to protect the public." U.S.S.G. § 5K2.13. In this case, Defendant's criminal history includes five assault convictions which, in the Court's view, prohibits the application of Section 5K2.13 based on the need to protect the public.

As for Section 4A1.3, Defendant has not presented any reliable information suggesting that reasonable counsel would have challenged the PSR's criminal history category as overstating the seriousness of the crimes or the likelihood that Defendant will commit other crimes. In fact, the record suggests that when Defendant was noncompliant with his medications, he was more likely to commit an offense. (D.I. 38 (Sentencing Hearing Tr.) at 4 (noting that, according to defense counsel, "a lot of his prior crimes are a result of not taking his medication")).

In addition to the foregoing, the Court notes that it thoroughly considered Defendant's mental health history in sentencing Defendant. Despite counsel's arguments that Defendant's mental health difficulties were mitigating factors, the Court viewed the combination of his mental health problems and his criminal history as warranting a sentence at the higher end of the Guideline Range. In this regard, the Court stated:

What I read [in the PSR] was that sometimes you hear voices and the voice tells you to hurt yourself or hurt other people. I can't imagine a more dangerous mix than your record and being on the streets in Wilmington with a gun and then your mental health history uncontrolled because, apparently, depending on any given day you're taking the medication or not.

(Id. at 7).

Given the Court's view that Defendant's mental health condition posed a danger with his criminal history, it was unlikely that the Court would have granted a downward departure on the basis of reduced mental capacity or an overstated criminal history. Accordingly, the Court concludes that Defendant cannot demonstrate that counsel was unreasonable or that the outcome of his proceedings would have differed as required by Strickland.

C. Advice During Plea Bargaining

Defendant next contends that his counsel was ineffective for failing to advise him of U.S.S.G. § 3E1.1 regarding acceptance of responsibility and the possibility that he could have entered a conditional guilty plea to preserve his acceptance of responsibility while still challenging the Court's decision denying his motion to suppress. Defendant contends that if he was properly advised, he would have pled guilty, avoided trial and received acceptance of responsibility credits.

After reviewing the record, the Court is not persuaded by Defendant's assertion that he would have entered a guilty plea

but for counsel's allegedly deficient advice.² Indeed, in his Section 2255 Motion, Defendant maintains that he still "vehemently disputes the government's version of events, but for purposes of his motion will recite the facts as gleaned from the appellate record." D.I. 43 at n.1. The record also indicates that Defendant went to trial to preserve his right to appeal the Court's denial of his suppression motion. Id., Exh. B at 2. As for his reference to a conditional plea, the Court notes that Rule 11(a)(2) requires the consent of the Court and the Government to a conditional plea agreement. Fed. R. Crim. P. 11(a)(3). Defendant has not demonstrated that either the Court or the Government would have consented to the entry of such a conditional agreement. In fact, counsel for defendant conceded in a statement filed after the suppression hearing, that she "could not find any case law to rebut the arguments set forth by the government." (D.I. 18 at 1). Given the strength of the

² The Court notes that the Third Circuit has not yet determined whether a defendant must present "objective evidence" that he would have pled guilty but for counsel's deficient advice. U.S. v. Day, 969 F.2d 39, 45 (3d Cir. 1992). However, courts have recognized that something more than defendant's bare assertion that he would have pled guilty is required. Enright v. United States, 347 F. Supp. 2d 159, 166 (D.N.J. 2004) ("The Third Circuit has not affirmatively adopted or rejected an objective evidence requirement for demonstrating that a habeas petitioner would have accepted a plea offer, but it is clear that something more than a bare allegation is required.") In this case, not only is Defendant's assertion that he would have pled guilty vague and conclusory, it is contrary to the record evidence, including his position in his Section 2255 Motion.

Government's suppression arguments, it is unlikely that the Government would have agreed to a conditional plea agreement. Accordingly, the Court concludes that Defendant cannot establish prejudice under Strickland as a result of counsel's allegedly deficient advice.

IV. Certificate Of Appealability

The Court may issue a certificate of appealability only if Defendant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In this case, the Court has concluded that Defendant is not entitled to relief on his claims, and the Court is not convinced that reasonable jurists would debate otherwise. Because Defendant has not made a substantial showing of the denial of a constitutional right, the Court declines to issue a certificate of appealability for Defendant's claims.

CONCLUSION

For the reasons discussed, the Court will deny Defendant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody and decline to issue a certificate of appealability.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, :
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 Plaintiff, :
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 v. :
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THOMAS L. DAVIS, :
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 Defendant. :
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O R D E R

At Wilmington, this 2 day of March 2010, for the reasons set forth in the Memorandum Opinion issued this date,

IT IS HEREBY ORDERED that:

1. Defendant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (D.I. 44) is DENIED.

2. Because the Court finds that Defendant has failed to make "a substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2), a certificate of appealability is DENIED.


UNITED STATES DISTRICT JUDGE