IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

DAVID GRANT,	)	
	)	
Petitioner,	)	
	)	
v.	)	Crim. No. 02-007-1-SLR
	)	Civ. No. 04-029-SLR
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
	)	

David Grant, pro se, for Petitioner.

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

MEMORANDUM OPINION

Date: May 16, 2005

Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner David Grant is a federal inmate currently in custody at the Federal Medical Center, Ayers, Massachusetts. (D.I. 39) Before the court is petitioner's pro se motion to vacate, set aside, or his correct sentence pursuant to 28 U.S.C. § 2255.[1] (D.I. 38) Respondent United States of America filed its opposition and petitioner has filed a reply. (D.I. 48, 49) For the reasons that follow, petitioner's motion is denied.

II. BACKGROUND

On January 8, 2002 a federal grand jury returned a seven count indictment against petitioner charging him with distributing varying amounts of cocaine base.[2] (D.I. 2) Sometime thereafter, the parties entered into a plea agreement wherein petitioner agreed to plead guilty to count I of the indictment charging him with distribution of varying amounts of

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[1]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). See also U.S. v. Addonizio, 442 U.S. 178 (1979); United States v. Essig, 10 F.3d 968 (3d Cir. 1993).

[2]Count I charged petitioner with distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C); counts II - IV and VI - VII charged petitioner with distribution of more than five grams of cocaine base in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B) and count V charged petitioner with distribution of fifty grams of cocaine base in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A).

cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C).[3] (D.I. 31, 48) In return, respondent agreed to move to dismiss the remaining six counts of indictment. (Id.) Petitioner waived his right to seek any adjustment or downward departure from the United States Sentencing Guideline ("U.S.S.G.") range established by the presentence report ("PSR"). (D.I. 31) For purposes of determining the applicable offense level, the amount of cocaine distributed by petitioner was 194.7 grams. (Id. at ¶4) The plea agreement also contained a provision that the court was not bound by any stipulation reached by the parties and that petitioner would not be allowed to withdraw his guilty plea if the court sentenced him differently than anticipated. (Id. at ¶10)

On October 18, 2002, a change of plea hearing was held. (D.I. 32) After posing a series of questions, the court concluded that petitioner's decision to plead guilty was entered freely, knowingly and voluntarily. The court then reviewed each part of the plea agreement with petitioner and adjudged him guilty of count one.

Petitioner's sentencing hearing was held on January 15, 2003 and commenced with the court reviewing the applicable Sentencing Guideline ("the Guidelines") calculations. (D.I. 40)

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[3]Petitioner was represented by John S. Malik, Esquire from February 6, 2002 to January 15, 2003.

> Court: Before I do that, though I want to check with you, [petitioner], to make sure that you've had the opportunity to review the presentence investigation report with Mr. Malik as your attorney.
> Petitioner: Yes, ma'am.
> Court: All right. Thank you. The [petitioner] pled guilty to one count of an indictment, charging him with distribution of cocaine base, a violation of 21, title 21 of the United States Code, section 841(a)(1) and (b)(1)(C). The maximum term of imprisonment that could be imposed by statute is 20 years imprisonment, a $1 million fine, three years of supervised release and a $100 special assessment . . . the base offense level is 34, based on the quantity of crack cocaine and marijuana associated with this offense. There's an upward adjustment of two based on the fact that dangerous weapons were present at the residence where the defendant was arrested. That gives us an adjusted offense level of 36.
> There's a downward adjustment of three points for the defendant's acceptance of responsibility. So that gives us a total offense level of 33.
> Based on [petitioner's] criminal history, he has been given a criminal history, he has been put in a criminal history category of roman numeral III, . . . the guidelines would call for a period of incarceration of from 168-210 months followed by a period of supervised release. . .

(Id. at 2-3) The court next noted the absence of formal objection to the PSR by petitioner or respondent. (Id. at 4) Petitioner's attorney, however, made the following representations:

> I would like to note for the record that initially, when I reviewed the report with [petitioner], he indicated that he wished for me to consider filing an objection to the fact that the additional drugs found at the residence where he was arrested last January and the guns that were found at the residence were also included in the relevant conduct sections. This was discussed with Ms. Byrd [AUSA] and also with Mr. Durkin [probation officer] and I ascertained their positions and I also went back to [petitioner] and advised him of what the positions would be. Particularly, what the positions of the probation office and the government might be in the event of an unsuccessful challenge to the relevant conduct

> issue. And after our discussion, we determined jointly that it was [petitioner's] position not to set forth any challenge, but to proceed to sentencing on the basis of the findings that are in this final presentence investigation report.

(Id. at 4-5) When afforded the opportunity to address the court, petitioner stated the following:

> Yes, ma'am. I would like to say to you, your Honor, that you now, you read my presentence investigation and I made a couple of wrong decisions in life but, you know, I'm into the Lord right now. You know, I changed my life around. When I'm released from this prison, if I'm released tomorrow, I would never sell drugs again.
> Your Honor, I ask you to be merciful today on me for my sentence for I'm already punished for my illness. I have - - I have kidney dysfunction and heart enlargement and heart murmurs and am being sent away from my children right now. They're infants at this point and I'm going to be away for a long time. And I would just ask to be lenient on me, please.
> And I ask that you note on January 11th, when I was arrested, I was incarcerated and charged with drugs and guns at that time, but the charge has been dropped and I still am being charged for it and I don't think that's, like, fair. That's all I really have to say.

(Id. at 6)

Petitioner requested and respondent recommended a sentence on the low end of the Guidelines range. (Id. at 5; 6-8) The court agreed and sentenced respondent to 168 months followed by three years of supervised release. (D.I. 35) Defendant did not file an appeal to the sentence.

On January 15, 2004, petitioner filed a motion pro se to vacate under 28 U.S.C. § 2255. (D.I. 38, 39) Respondent filed

its response memorandum on May 11, 2004. (D.I. 48) Petitioner filed his reply on May 19, 2004 (D.I. 49) and, on August 5, 2004, filed a supplemental petition. (D.I. 50) By order dated January 14, 2005, the court directed the parties to address whether the United States Supreme Court's decision in United States v. Booker, 543 U.S. ___, 125 S.Ct. 738 (2005), affected petitioner's claims at bar. (D.I. 51) Petitioner filed his response on February 22, 2005. (D.I. 52) Respondent filed its response on March 8, 2005 (D.I. 54), and a supplemental response on April 27, 2005. (D.I. 58)

III. DISCUSSION

A. Evidentiary Hearing

Pursuant to Rule 8(a) of the Rules Governing Section 2255 Proceedings, the court has reviewed petitioner's motion, respondent's answer, the parties' supplemental responses as well as the record, and concludes that an evidentiary hearing is not required. Instead, the court can evaluate the issues on the present record. Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989)(evidentiary hearing not required where petition and record demonstrate that petitioner was not entitled to relief and that decision to hold hearing is in sound discretion of court); Soto v. United States, 369 F. Supp. 232, 242 (E.D. Pa 1973)(the crucial inquiry is whether additional facts must be adduced before a fair adjudication of petitioner's

claims can be made.)

B. Ineffective Assistance of Counsel

The crux of petitioner's claims is that his attorney rendered ineffective assistance of counsel by failing to: (1) object to the application of Guideline § 2D1.1(b)(1) enhancement; (2) seek a downward departure for life threatening medical conditions pursuant to Guideline § 5H1.4; and (3) move for minor role adjustment pursuant to Guideline § 3B1.2. It is uncontested that petitioner's attorney did not file objections to the PSR nor were motions for downward departure or role adjustment presented. Failure to raise an issue on direct review usually constitutes waiver that forecloses collateral review. United States v. Essig, 10 F.3d 968, 976-978 (3d Cir. 1993). Even if the appropriate objections were made, however, the court finds petitioner's three claims for relief fail.

Specifically, to establish an ineffective assistance of counsel violation, a petitioner must satisfy the two-prong standard announced in Strickland v. Washington, 466 U.S. 668 (1984). First, a petitioner must demonstrate that counsel's advice was unreasonable and was not within the range of competence demanded of attorneys in criminal cases. Id. at 690; Williams v. Taylor, 529 U.S. 362, 390-91 (2000). The defendant must overcome the "strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance; that is, the

defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689.

Second, a petitioner must demonstrate "prejudice," meaning that there is a "reasonable probability" that the deficient assistance of counsel affected the result of the proceeding in issue. Id. at 694; see also Hill v. Lockhart, 474 U.S. 52, 56-57 (1985); Frey v. Fulcomer, 974 F.2d 348, 358 (3d Cir. 1992). Petitioner must show that his attorney's errors rendered the proceeding fundamentally unfair or unreliable. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). An outcome determinative perspective is inappropriate. Id.; Flamer v. State, 68 F.3d 710, 729 (3d Cir. 1995).

C. U.S.S.G. § 2D.1(b)(1)

United States Sentencing Guidelines § 2D1.1(b)(1) requires courts to increase a defendant's offense level by two levels if a dangerous weapon was possessed by the defendant in the course of a drug trafficking offense. This enhancement "reflects the increased danger of violence when drug traffickers possess weapons" and the enhancement should be applied if the "weapon was present, unless it is clearly improbable that the weapon was connected with the offense." Note (3) of the Commentary to § 2D1.1(b)(1). "The only light [the Guidelines] shed on this issue is that the enhancement would not be merited if the 'defendant,

arrested at his residence, had an unloaded hunting rifle in the closet.'" United States v. Drozdowski, 313 F.3d 819, 822 (3d Cir. 2002).

The Court of Appeals for the Third Circuit has interpreted § 2D1.1(b)(1) broadly and found that defendants rarely overcome the "clearly improbable" hurdle. Id. In Drozdowski, the Third Court approved a two point enhancement for weapons found not at the defendant's home, but at his father's residence to which he had access. Id. at 822. In so doing, the Court focused on: (1) the type of gun involved; (2) whether the gun was loaded; (3) whether the gun was stored near drugs or drug paraphernalia; and (4) whether the gun was accessible. Id. at 822-823. Although the defendant did not store the drugs at his father's residence, the Third Court observed that he did store "a great deal of drug paraphernalia" there, as well as the significant cash proceeds of his drug conspiracy. Id. While the guns were well-hidden under piles of junk and inconspicuous, it was significant that the weapons were easily accessible to someone knowledgeable of their existence. Id. at 823.

Considering petitioner's claims in light of the record and applicable law, the court concludes that petitioner cannot establish that counsel's representation was objectively unreasonable. The record reflects that both parties were surprised by the application of the enhancement when it first

appeared in the PSR; however, the enhancement was expressly authorized by the Guidelines and ratified by the Third Court's decision in Drozdowski. Further, the court finds that petitioner has not demonstrated that he was prejudiced by his counsel's alleged error because there is no evidence to suggest that the court would have disregarded established precedent and declined to apply the enhancement had counsel made the appropriate objection.

D. U.S.S.G. 5H1.4 Downward Departure

Petitioner argues his attorney rendered ineffective assistance of counsel by failing to move for a downward departure pursuant to U.S.S.G. § 5H1.4 based on his serious medical illnesses.[4] Respondent argues that petitioner failed to demonstrate that his health problems were of the severity or kind that distinguish him from others who suffer from chronic health problems.

Section 5H1.4 provides:

> Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. However, an **extraordinary physical impairment** may be a reason to impose a sentence below the applicable guideline range; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment.

(Emphasis added)

At the time of sentencing, the court was aware of

[4]Petitioner apparently suffers from kidney dysfunction, heart enlargement and heart murmurs. (D.I. 40 at 6)

petitioner's medical problems. (D.I. 40) There was nothing of record, however, to suggest that his illnesses were "extraordinary" to warrant a downward departure. Considering the absence of exceptional circumstances warranting a downward departure, petitioner's attorney's failure to move accordingly was not unreasonable under Strickland. Moreover, petitioner cannot demonstrate prejudice since there is nothing to suggest that the court would have granted the motion.[5]

E. U.S.S.G. § 3B1.2(b)

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[5]Respondent urges the court to reject this claim because it violates terms of the plea agreement executed by the parties, wherein he agreed not to move for a downward departure. The court need not reach this issue considering the discussion outlined above. The court does note, however, the Third Circuit's recent discussion of plea agreements in United States v. Lockett, ___ F.3d. ___, 2005 WL 1038937 (3d Cir. May 5, 2005). As part of his plea agreement, Lockett voluntarily and expressly waived all rights to appeal or collaterally attack his conviction, sentence or any other matter related to his prosecution. Id. at *4. After the Supreme Court's decision in Booker, Lockett sought to invalidate his sentence because he did not know at the time that the Supreme Court would find the Guidelines advisory. Id. at *5. In concluding that a "change in the law cannot effect a change in his plea," the Third Circuit followed the reasoning of the Sixth Circuit: "[T]he salient point is that a plea agreement allocates risk between the two parties as they see fit. If the courts disturb the parties' allocation of risk in an agreement, they threaten to damage the parties' ability to ascertain their legal rights when they sit down at the bargaining table and, more problematically for criminal defendants, they threaten to reduce the likelihood that prosecutors will bargain away counts with knowledge that the agreement will be immune from challenge on appeal." United States v. Bradley, No. 03-6328, 2005 WL 549176, *5 (6th Cir. March 10, 2005).

Petitioner's third ineffective assistance of counsel claim is that his attorney failed to seek an adjustment for his minor role under Section 3B1.2(b). Section 3B1.2 provides:

> Based on the defendant's role in the offense, decrease the offense level as follows:
> (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.
> (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.
> In cases falling between (a) and (b), decrease by 3 levels.

Commentary Note (2) explains that the adjustment only applies if there is more than one participant involved in the offense. "Participant" is defined as a person criminally responsible for the commission of the offense; an undercover law enforcement officer is not a participant.

Petitioner's counsel's failure to move for this adjustment does not constitute ineffective assistance of counsel because the undisputed facts of the case did not warrant this adjustment. Specifically, several drug transactions occurred between petitioner and a confidential informant that formed the basis of the charges against him. Since the confidential informant was an agent of the government and not a participant in the offense, there were not the requisite number of participants involved to warrant application of this section.

F. The Booker Decision

The court requested clarification of the parties' positions after the Supreme Court issued its decision in United States v.

Booker, ___ U.S. ___, 125 S.Ct. 738 (2005). The Supreme Court held that "the Sixth Amendment as construed in Blakely does apply to the [Federal] Sentencing Guidelines. " 125 S.C. at 746. Booker was decided by two opinions of the Court approved by different majorities. Id. The first opinion authored by Justice Stevens reaffirmed the Court's holding in Apprendi that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt," Id. at 756. The second opinion by Justice Breyer created the remedy to address the ramifications of the Justice Stevens opinion. In so doing, the Court held that 18 U.S.C. § 3553(b)(1), the provision of the Sentencing Reform Act of 1984 which made the Guidelines mandatory, was incompatible with the Court's constitutional ruling and, consequently, the Court severed § 3553(b)(1) and 3742(e). The "net result was to delete the mandatory nature of the Guidelines and transform them to advisory guidelines for the information and use of the district courts in whom discretion has now been reinstated." United States v. Ordaz, 398 F.3d 236, 239 (3d Cir. 2005); In re Olopade, 403 F.3d 159 (3d Cir. 2005).

On April 11, 2005, the Third Circuit conclusively decided that the rule of United States v. Booker was not retroactively

applicable to cases on collateral review. The Third Circuit observed that "a new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive." In re Olopade, 403 F.3d at 162, citing Tyler v. Cain, 533 U.S. 656, 663 (2001). This is accomplished by the Supreme Court's expressly holding so or "where two or more of its decision when read together must absolutely dictate, that a particular rule is retroactively applicable to cases on collateral review." Olopade, 403 F.3d at 162.

The Supreme Court has not expressly held that Booker is applicable to cases on collateral review. In fact, Booker itself was decided on direct appeal and did not expressly declare that it should be applied retroactively to cases on collateral review. Moreover, "there is no combination of Supreme Court cases that 'dictates' that Booker has retroactive force on collateral review." Id.; accord Varela v. United States, 400 F.3d 864, 868 (11th Cir. 2005); Bey v. United States, 399 F.3d 1266, 1269 (10th Cir. 2005); Humphress v. United States, 398 F.3d 855, 860 (6th Cir. 2005); Green v. United States, 397 F.3d 101, 103 (2d Cir. 2005); McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005).

IV. CONCLUSION

For the reasons stated, petitioner's motion is denied. An appropriate order shall issue.