IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Criminal Action No. 97-61-1-JJF
	:	
	:	Civil Action No. 98-659-JJF
LUIS BOLIVAR ESPINAL,	:	
	:	
Defendant.	:	
	:	

Thomas V. McDonough, Esquire, Assistant United States Attorney, Richard G. Andrews, Esquire, Acting United States Attorney of the UNITED STATES DEPARTMENT OF JUSTICE, Wilmington, Delaware.*
Attorney for Plaintiff.

Luis Bolivar Espinal, Pro Se Defendant.

MEMORANDUM OPINION

July 31, 2001

Wilmington, Delaware

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* Mr. McDonough resigned from the Department of Justice during the pendency of this matter.

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. 51) filed by Defendant, Luis Bolivar Espinal. For the reasons set forth below, Defendant's Section 2255 Motion will be denied.

BACKGROUND

In February 1997, a confidential informant told federal and state law enforcement officers that an individual named Wilfredo Rosa had received two kilograms of cocaine from a Dominican drug supplier. The cocaine had been transported from New York to Delaware for Rosa to distribute. (D.I. 56, Exh. 1 at ¶ 15). Based on the information received from the confidential informant, the Delaware State Police requested and received a search warrant to search Rosa's apartment.

In March 1997, the Drug Enforcement Administration ("DEA") arrested Rosa and his brother, Julio Rosa. The Rosas were charged with numerous offenses, including federal drug conspiracy charges. Shortly thereafter, both Rosas agreed to cooperate with DEA officials.

Between March 1997 and mid-May 1997, Wilfredo Rosa informed DEA agents that his drug supplier was Defendant. Rosa also told agents that Defendant had traveled from New

York to Delaware on at least three occasions to deliver to Rosa 2 kilograms of cocaine per trip, for a total of 6 kilograms of cocaine. In return for these shipments, Rosa indicated that he owed Defendant approximately $40,000.

On May 28, 1997, DEA agents arrested Defendant and his co-defendant, Eddy Almonte, after Defendant instructed Almonte to hand Julio Rosa approximately 500 grams of cocaine. After his arrest, Defendant admitted that Wilfredo Rosa owed him in excess of $30,000 on a drug debt. However, Defendant maintained that he was only a middleman trying to collect the debt for an unnamed supplier.

On June 26, 1997, Defendant appeared with his attorney, John S. Malik, Esquire for an off-the-record proffer meeting with DEA agents and the prosecutor, Thomas V. McDonough, Esquire. Prior to requesting a statement from Defendant, the prosecutor advised Defendant that the Government's investigation revealed that at least 6 or 6 ½ kilograms of cocaine were attributable to Defendant under the Sentencing Guidelines. The parties then discussed the remaining terms of a plea offer, and Defendant agreed to make a statement.

On July 2, 1997, the prosecutor sent Defendant's attorney a Memorandum Of Plea Agreement which indicated that the weight of the cocaine in this case yielded a base offense level of 32

under Section 2D1.1(c)(4) of the United States Sentencing Guidelines, an amount consistent with the 6 to 6 ½ kilograms of cocaine that the Government represented to Defendant that its investigation revealed. On August 5, 1997, Defendant pled guilty in accordance with the terms of a plea agreement.

In November 1997, Defendant appeared before the Court for sentencing. At sentencing, the Court granted the Government's Substantial Assistance Motion and sentenced Defendant to 84 months imprisonment, five years of supervised release and a special assessment of $100.00.

In November 1998, Defendant filed the instant Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence. By his Section 2255 Motion, Defendant contends that his counsel was ineffective during Defendant's plea negotiations and failed to file a direct appeal. Specifically, Defendant contends that counsel erroneously advised him to accept a plea agreement containing two contradictory provisions and counsel failed to appeal the Court's decision not to grant a "minor participant" reduction contained in Defendant's plea agreement. In addition to his ineffective assistance of counsel claims, Defendant also contends that the Government improperly used information obtained from Defendant's off-the-record proffer to increase

Defendant's sentence under the Sentencing Guidelines. The Government has filed a Response to Defendant's Motion, and therefore, the Motion is ripe for the Court's review.

DISCUSSION

I. Whether An Evidentiary Hearing Is Required To Address Defendant's Claims

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, Answer 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 Defendant on the record before it. Government of the Virgin Islands v. Forte, 865 F.2d 59, 62 (3d Cir. 1989) (holding that evidentiary hearing 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), appeal after remand, 904 F.2d 694 (3d Cir. 1990), cert denied, 500 U.S. 954 (1991); Soto v. United States, 369 F. Supp. 232, 241-42 (E.D. Pa. 1973), (holding that crucial inquiry in determining whether to hold a hearing is whether additional facts are required for fair

adjudication), aff'd, 504 F.2d 1339. Accordingly, the Court will proceed to Defendant's claims.

II. Defendant's Ineffective Assistance Of Counsel Claims

By his Motion, Defendant raises two claims that his counsel was ineffective. First, Defendant contends that counsel failed to challenge conflicting paragraphs of his plea agreement. Second, Defendant contends that counsel failed to file a direct appeal challenging the Court's decision not to grant Defendant a "minor participant" reduction.

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, reh'g denied, 467 U.S. 1267 (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; Frey v. Fulcomer, 974 F.2d 348, 358 (3d Cir. 1992), cert. denied, 507 U.S. 954 (1993). 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). Thus, a purely outcome determinative perspective is inappropriate. Id.; Flamer v. State, 68 F.3d 710, 729 (3d Cir. 1995), cert. denied, 516 U.S. 1088 (1996). Where, as here, a defendant has entered a guilty plea on the advice of counsel, the defendant must show that there is a reasonable probability that, but for counsel's errors, the defendant would have proceeded to trial instead of pleading guilty. See United States v. Kauffman, 109 F.3d 186, 190 (3d Cir. 1997).

A. Counsel's Failure To Object To An Alleged Inconsistency In The Plea Agreement

With regard to Defendant's claim that counsel was ineffective for failing to challenge two inconsistent provisions of Defendant's plea agreement, Defendant

specifically directs the Court to paragraphs 1 and 4 of the plea agreement. Paragraph 1 of the plea agreement indicates that Defendant agreed to plead guilty to Count I of the Indictment, which charged Conspiracy to Distribute Cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). Paragraph 1 states that "[t]he maximum penalties for this offense are 40 years imprisonment, a mandatory minimum term of 5 years imprisonment, at least 4 years supervised release, a $2 million fine, and a $100.00 special assessment." (D.I. 56, Exh. 2 at ¶ 1). Paragraph 4 of the plea agreement states that:

> [t]he parties agree and understand that the weight of the cocaine in this case yields a base offense level of 32 under SG 2D1.1(c)(4). The agreement reflected in this paragraph does not bind the Court or the presentence officer. Defendant recognizes that if the Court of the presentence officer disagree with [the] agreement reflected in this paragraph defendant will not be allowed to withdraw his guilty plea.

(D.I. 56, Exh. 2 at ¶ 4).

After reviewing Paragraphs 1 and 4 of the plea agreement, the Court concludes that these paragraphs are not inconsistent as Defendant contends. Paragraph 1 of the plea agreement accurately states the maximum penalties for the offense committed. As for Paragraph 4, the base offense level referenced is consistent with the amount of drugs, i.e. 6 to 6

½ kilograms, that the Government's investigation attributed to Defendant. Defendant appears to contend that his guilty plea was only based on the transportation of approximately 500 grams of cocaine, and therefore, he should have been sentenced at a base offense level of 26 pursuant to Section 2D1.1(c)(7) of the Sentencing Guidelines. However, the term "offense" as used in the Sentencing Guidelines includes "the offense of conviction and all relevant conduct under §1B1.3." U.S.S.G. §1B1.1, comment (n.1(l)). Section 1B1.3 explains the manner in which the base offense level and any adjustments should be calculated. According to Section 1B1.3 offenses for which Section 3D1.2 would require grouping of multiple counts includes conduct that is part of the same course of conduct or common scheme or plan as the offense of conviction. In turn, Section 3D1.2 requires grouping for drug offenses governed by Section 2D1.1. Because Defendant pled guilty to an offense governed by Section 2D1.1 of the Sentencing Guidelines, Defendant's base offense level may take into consideration relevant conduct that was part of the same course of conduct as Defendant's offense of conviction. Indeed, Defendant's counsel acknowledged that the base offense level was based on this relevant conduct when he argued that the Court should sentence Defendant at the bottom of the Guideline range.

(D.I. 41 at 11). Because it was appropriate for the Court to consider as relevant conduct the additional amount of drugs attributable to Defendant beyond that to which he pled guilty, the Court concludes that Paragraph 4 of Defendant's plea agreement was not inconsistent with Paragraph 1, and therefore, there was no basis for counsel to object to the plea agreement.

Further, at the plea hearing, the Court reviewed each paragraph of the plea agreement with Defendant, and with regard to Paragraph 4, the Court expressly asked Defendant if he agreed with the base offense level of 32. Defendant unequivocally indicated that he agreed that level 32 was an appropriate base offense level given the weight of cocaine involved in the case. In addition, at sentencing, the Court specifically asked Defendant if there were any miscalculations in the presentence report. (D.I. 41 at 6). Defendant indicated that the presentence report was accurate. Given the penalties Defendant faced in this case, there is a strong presumption that counsel's decision to stipulate to a base offense level of 32 was a calculated strategic decision made to avoid trial and enable Defendant to obtain a favorable plea agreement, which included downward departures for acceptance of responsibility and substantial assistance. See e.g. Brown

v. United States, 1996 WL 479248 (S.D.N.Y. Aug. 23, 1996) (holding that counsel's decision to stipulate to drug quantity was reasonable strategic decision to obtain favorable plea agreement given length of sentence defendant was facing). Thus, because Defendant stipulated to the base offense level in the plea agreement and his counsel's advice to agree to the base offense level was not objectively unreasonable, the Court cannot conclude that counsel was ineffective for failing to object to the agreed upon base offense level. See Sanchez v. United States, 1996 WL 507316, *1-4 (S.D.N.Y. Sept. 6, 1996) (holding that counsel was not ineffective for failing to object to base offense level, where parties agreed to base offense level).

Moreover, even if Defendant could establish that counsel should have objected to the base offense level stated in Paragraph 4 of the plea agreement, the Court concludes that Defendant cannot establish prejudice. With a criminal history category of II, and a three point downward departure from the agreed upon base offense level for acceptance of responsibility, Defendant was exposed to a Guideline Range of 108 to 135 months imprisonment. (D.I. 41 at 11). However, the Court sentenced Defendant to 84 months, substantially less time than the amount required by the base offense level

stipulated to by Defendant as a result of his plea agreement. Thus, even if counsel's failure to object was objectively unreasonable, the Court cannot conclude that Defendant was prejudiced. See e.g. United States v. Malone, 133 F.3d 930, 1997 WL 804371, *1 (9th Cir. 1997) (where defendant and government stipulated to base offense level, defendant could not establish prejudice based on counsel's failure to challenge accuracy of base offense level); Etter v. United States, 86 F.3d 1159, 1996 WL 292236, *1 (6th Cir. 1996) (same); Sanchez, 1996 WL 507316 at *2-4. Accordingly, the Court will dismiss Defendant's claim that counsel was ineffective for failing to object to an alleged inconsistency in the plea agreement.

B. Counsel's Failure To File A Direct Appeal Challenging The Court's Decision Not To Grant Defendant A "Minor Participant" Reduction

With regard to Defendant's contention that counsel failed to file a direct appeal, Defendant specifically contends that counsel should have appealed the court's decision not to grant him a two level "minor participant" reduction contained in his plea agreement. (D.I. 51 at 13, 16). However, a review of Defendant's plea agreement and of the transcripts of both his plea hearing and sentencing reveals no such provision for or discussion about a "minor participant" reduction. Thus, any

such argument by Defendant's counsel on this issue would be patently frivolous.[1] Because counsel is not ineffective for failing to assert a meritless claim, the Court will dismiss Defendant's claim that his attorney should have appealed the Court's alleged denial of a "minor participant" reduction. See e.g. Lily v. Gilmore, 988 F.2d 783, 786 (7th Cir. 1993).

III. Defendant's Claim That The Government Improperly Used Information Obtained From Defendant's Off-The-Record Proffer To Increase Defendant's Sentence Under The Sentencing Guidelines

Defendant next contends that the Government improperly utilized information provided by Defendant during plea negotiations to calculate a higher base offense level for Defendant in the Presentence Report. Specifically, Defendant contends that he provided the Government with the information that he was present during other drug transactions totaling

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[1] In Solis v. United States, the Third Circuit recently held that a defendant is entitled to an evidentiary hearing when there is a factual dispute concerning the defendant's claim that his lawyer failed to abide by his request to file a direct appeal. 252 F.3d 289 (3d Cir. 2001). However, the Third Circuit also stated that a defendant is not entitled to such a hearing "if his allegations were contradicted conclusively by the record, or if the allegations were patently frivolous." Id. at 295. In this case, Defendant's plea agreement does not even contain the "minor participant" reduction as Defendant claims. Accordingly, the Court concludes that Defendant's claim that he requested his attorney to file an appeal based on this non-existent reduction is patently frivolous, and therefore, the Court concludes that an evidentiary hearing on Defendant's claim is not warranted.

six kilograms of cocaine, and that this information was inappropriately used by the Government to arrive at a base offense level of 32.

After reviewing the record in this case, the Court concludes that Defendant's claim lacks merit. First, Defendant expressly agreed by signing the plea agreement and by his statements in open court, that he should be sentenced at a base offense level of 32 based upon the weight of cocaine involved in the case. (D.I. 49 at 12; D.I. 56, Exh. 2 at ¶ 4).

Second, the record, including the Presentence Report in this case, indicates that the Government knew from the statements of Wilfredo Rosa and a confidential informant that Defendant participated in transactions involving at least six kilograms of cocaine prior to Defendant's off-the-record proffer. Indeed, Defendant's post-arrest admission that he was attempting to collect more than $30,000 from Wilfredo Rosa on a drug debt corroborated in part the Government's evidence that Defendant participated in drug transactions involving several kilograms of cocaine.

Defendant relies heavily upon Section 1B1.8 of the Sentencing Guidelines to support his argument that the Government improperly used information provided by Defendant

to increase his sentence. However, after reviewing the record in this case in light of Section 1B1.8, the Court concludes that this provision is not relevant. Defendant's plea agreement does not contain any reference to Section 1B1.8 and Defendant's agreement to cooperate with the Government as set forth in the plea agreement contains no assurance by the Government that such information would not be utilized against Defendant. Moreover, Section 1B1.8(b) of the Sentencing Guidelines expressly states that the protections afforded to information provided under Section 1B1.8(a) of the Sentencing Guidelines do not apply to information "known to the government prior to entering into the cooperation agreement." U.S.S.G. 1B1.8(b)(1).

Because the Government knew the extent of Defendant's involvement in certain drug transactions in advance of any statements made by Defendant, the Court cannot conclude that the Government inappropriately utilized statements made by Defendant during his plea negotiations. Accordingly, the Court will dismiss Defendant's claim that the Government improperly utilized statements made by Defendant during his plea negotiations to enhance his sentence under the Sentencing Guidelines.

CONCLUSION

For the reasons discussed, the Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody filed by Defendant, Luis Bolivar Espinal, will be denied.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Criminal Action No. 97-61-1-JJF
	:	
	:	Civil Action No. 98-659-JJF
LUIS BOLIVAR ESPINAL,	:	
	:	
Defendant.	:	
	:	

O R D E R

At Wilmington, this 31 day of July 2001, 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. 51) 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.

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UNITED STATES DISTRICT JUDGE