

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Criminal Action No. 99-033-2-JJF
	:	
	:	Civil Action No. 03-029-JJF
LEROY COLEY,	:	
	:	
Defendant.	:	

Colm F. Connolly, Esquire, United States Attorney, Richard G. Andrews, Esquire, First Assistant United States Attorney of the UNITED STATES DEPARTMENT OF JUSTICE, Wilmington, Delaware. Attorney for Plaintiff.

Leroy Coley, Pro Se Defendant.

MEMORANDUM OPINION

February 9, 2004

Wilmington, Delaware

Farnan, District Judge.

Presently 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. 205) filed by Defendant, Leroy Coley, III. For the reasons discussed, Defendant's Motion will be denied.

BACKGROUND

Defendant and four other individuals were charged in a multiple count indictment for various drug offenses. Two of the five defendants pled guilty and testified at Defendant's trial as government witnesses. After a ten day jury trial, Defendant was convicted of Count V of the Indictment which charged Defendant with possession with intent to distribute more than 50 grams of crack cocaine in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(A). Defendant was sentenced by the Honorable Roderick R. McKelvie to 121 months imprisonment and five years of supervised release.

Defendant appealed his conviction and sentence, and the Court of Appeals for the Third Circuit affirmed Defendant's conviction and his term of imprisonment. However, the Third Circuit vacated the term of supervised release imposed by the Court and remanded the matter so that the Court could impose a supervised release term of three years.

Defendant timely filed the instant Petition seeking relief pursuant to 28 U.S.C. § 2255. By his Petition, Defendant contends that (1) the Court erred in applying the ten year

mandatory minimum sentence pursuant to 21 U.S.C. § 841(b)(1)(A), because it did not make a finding that there was a "single violation" involving at least 50 grams of cocaine base; (2) his sentence violates Apprendi v. New Jersey, 530 U.S. 466 (2000); (3) the Court erred in allowing Defendant "to be convicted of 18 U.S.C. § 2 in conjunction with 21 U.S.C. § 841, because they are two distinct and separate offenses," and the elements of 18 U.S.C. § 2 were not set forth separately in the Indictment; and (4) the Court erred in sentencing Defendant to the enhanced penalties of Section 841(b)(1)(A), because the Government did not prove that the substance was produced with sodium bicarbonate, and therefore, the substance should have been treated as cocaine powder rather than crack. Defendant has also filed a Motion For Leave To Supplement 28 U.S.C. § 2255 Motion To Vacate in which he raises a fifth argument that is essentially a variation of his previous arguments that he was improperly sentenced under Section 841(b)(1)(A). The Government has filed its response to the Motion, and therefore, this matter is ripe for the Court's review.

DISCUSSION

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

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 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 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), 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 address each of Defendant's claims in turn.

II. Whether The Court Erred In Sentencing Defendant By Failing To Make The Requisite Findings To Support The Sentence

By his Motion, Defendant contends that the Court erroneously imposed the mandatory minimum sentence of ten years pursuant to 21 U.S.C. § 841(b)(1)(A), because the Court did not find that there was more than 50 grams of cocaine base involved in the offense. Defendant did not raise this claim on direct appeal and alleges in his Motion that the issues were not raised because his appellate counsel was ineffective.

It is well-established that Section 2255 may not be utilized as a substitute for direct appeal. United States v. Frady, 456 U.S. 152, 165 (1982) (collecting cases). Accordingly, federal courts apply a procedural default rule to bar consideration of claims which a defendant could have raised on direct appeal, but did not. Id. at 168. In order to overcome the procedural bar, a defendant must show "cause" excusing the procedural default and "actual prejudice" resulting from the errors of which he or she complains. Id. at 167-68. In further defining the "cause and actual prejudice standard," courts have held that cause exists where a factor external to the defense prevented a defendant from complying with the procedural rule, and actual prejudice exists where the alleged error actually worked a substantial disadvantage to a defendant. Kikumura v. United States, 978 F. Supp. 563, 574-75 (D.N.J. 1997) (citations omitted); Rodriguez v. United States, 866 F. Supp. 783, 785 (S.D.N.Y. 1994) (citations omitted).

In this case, Defendant has alleged cause based on ineffective assistance of counsel. However, even if Defendant could establish cause for his procedural default, the Court concludes that Defendant cannot establish actual prejudice as a result of his claim.¹ By his Motion, Defendant contends that the

¹ Ineffective assistance of counsel may only satisfy the cause prong of the procedural default inquiry, if the ineffective assistance rises to the level of a constitutional deprivation

Court failed to make a finding that 50 or more grams of cocaine base was involved in the offense. Defendant's claim is contradicted by the record in this case. According to the presentence report, Defendant possessed 204 grams of cocaine base. Although Defendant voiced an objection to the drug quantity contained in the presentence report, the Court did not sustain Defendant's objection. Rather, the Court accepted and adopted the findings contained in the presentence report, and therefore, the Court made the findings necessary to support its sentencing determination. Accordingly, Defendant cannot establish prejudice based on his claim that the Court failed to make the requisite findings to support Defendant's sentence, and therefore Defendant's claim is procedurally barred.

Further, to the extent that Defendant's claim can be construed to raises an Apprendi concern because the Third Circuit has concluded that Defendant should have been sentenced pursuant to 21 U.S.C. § 841(b)(1)(C) rather than 21 U.S.C. § 841(b)(1)(A),

under Strickland v. Washington, 466 U.S. 668 (1984). Where the claim of ineffective counsel is based on the failure to raise certain issues on appeal, counsel is not ineffective if the claims he declined to raise are not meritorious. United States v. Mannino, 212 F.3d 835, 840 (3d Cir. 2000); Holden v. Kearney, 2000 WL 1728290, *3 (D. Del. Mar. 29, 2000). In this case, the Court concludes that the procedurally defaulted claims raised by Defendant in his Section 2255 Motion are not meritorious, and therefore, the Court also concludes that Defendant cannot establish cause for his procedural default based on counsel's failure to raise the procedurally defaulted claims on direct appeal.

the Court concludes that any error by the Court in sentencing Defendant was harmless. The Court is not precluded from making drug quantity findings on its own, unless those findings lead to the imposition of a sentence higher than the maximum sentence permitted under the jury's findings. See e.g. United States v. Gibson, 2003 WL 23021566, *7 (D.C. Cir. Dec. 30, 2003) (citing United States v. Fields, 242 F.3d 393, 395-396 (D.C. Cir. 2001)); United States v. Caba, 241 F.3d 98, 101 (1st Cir. 2001) (recognizing that sentencing court may make factual findings that increase defendant's sentence, including findings as to drug type and quantity, as long as sentence is within the default statutory maximum derived from 21 U.S.C. § 841(b)(1)(C)). At a minimum, the jury's findings in this case support a violation of Section 841(b)(1)(C), and Defendant's sentence falls well within the sentencing range prescribed by Section 841(b)(1)(C). United States v. DeSumma, 272 F.3d 176, 181 (3d Cir. 2001), cert. denied, 535 U.S. 1028 (2002); United States v. Webb, 255 F.3d 890, 896-899 (D.C. Cir. 2001) (failure to submit drug quantity to jury is harmless error as long as defendant is sentenced within range authorized by Section 841(b)(1)(C)). Therefore, the Court concludes that Defendant's sentence was not unconstitutional, and that any error by the Court in sentencing Defendant was harmless. Accordingly, the Court will deny Defendant's request for relief.

III. Whether Defendant's Sentence Violates Apprendi v. New Jersey, 530 U.S. 466 (2000)

Defendant next contends that his sentence violates the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), because the drug quantities involved in this case were not listed in the Indictment and were not proven beyond a reasonable doubt. Defendant raised his claim of an Apprendi violation in his direct appeal before the Third Circuit, and the Third Circuit thoroughly analyzed and rejected Defendant's argument. Accordingly, the Court will not permit Defendant to relitigate this issue in the context of his Section 2255 Motion. United States v. DeRewal, 10 F.3d 100, 105 n.4 (3d Cir. 1993).

To the extent that Defendant now suggests that his sentence exceeded the statutory maximum penalty available for the offense under which he was convicted, the Court disagrees with Defendant's assertion. Defendant conceded before the Third Circuit that his sentence was below the maximum penalty, and as the Third Circuit noted, Defendant faced a penalty of a maximum of twenty years imprisonment under 21 U.S.C. § 841(b)(1)(C). It is well-established that Apprendi is not violated where, as here, the sentences imposed did not exceed the maximum sentence permitted by law for the conviction. DeSumma, 272 F.3d at 181. Accordingly, the Court will deny Defendant's request for relief on the basis of his Apprendi claim.

IV. Whether The Indictment Was Defective Because It Did Not

Separately Allege The Elements Of 18 U.S.C. § 2

Defendant next contends that the Court erred in allowing him “to be convicted of 18 U.S.C. § 2 in conjunction with 21 U.S.C. § 841, because they are two distinct and separate offenses” and the elements of 18 U.S.C. § 2 were not set forth separately in the Indictment. Defendant contends that he was not notified of the elements required to prove a Section 2 offense and that the Indictment only set forth the elements of the offense that Defendant was alleged to have aided and abetted.

Defendant did not raise this argument in his direct appeal, and therefore, it is procedurally barred unless he can establish cause for his failure to raise the claim and actual prejudice. Although Defendant alleges cause in the form of ineffective assistance of counsel, the Court concludes that, even if Defendant could establish cause, Defendant cannot establish prejudice.² Courts have recognized that a violation of 18 U.S.C. § 2 does not constitute a separate offense from the underlying offense and that aiding and abetting charges are implicit in all indictments for substantive offenses. United States v. Sabatino, 943 F.2d 94, 99-100 (1st Cir. 1991); United States v. Galiffa, 734 F.2d 306, 310 (7th Cir. 1984); United States v. Walker, 621 F.2d 163 (5th Cir. 1980). As such, courts have held that the

² As the Court discussed previously, however, Defendant also cannot establish the cause prong of the procedural default analysis. See infra n.1.

elements of aiding and abetting need not be specifically pled in the indictment for a conviction to be returned. Sabatino, 943 F.2d at 99-100. Because Defendant cannot establish that he was prejudiced on the grounds that the Indictment did not set forth the elements of 18 U.S.C. § 2, the Court will dismiss his claim as procedurally barred.

V. Whether The Government Was Required To Prove That The Substance Defendant Possessed Contained Sodium Bicarbonate In Order To Be Considered "Crack" Cocaine

Defendant next contends that the Court erred in applying the enhanced sentencing penalties for crack cocaine, because the Government did not prove that the substance Defendant possessed was produced with sodium bicarbonate. It appears to the Court that Defendant raised this argument in his direct appeal before the Third Circuit, and that the Third Circuit rejected this argument without discussion. Accordingly, the Court will not permit Defendant to relitigate this issue in the context of his Section 2255 motion. DeRewal, 10 F.3d and 105 n.4.

However, even if the Court considers the merits of Defendant's claim, the Court concludes that Defendant is not entitled to relief. It is well established in this Circuit, that the Government does not need to prove that a substance contains sodium bicarbonate to be considered crack cocaine within the meaning of the sentencing guidelines. United States v. Waters, 313 F.3d 151, 155 (3d Cir. 2002). In this case, the Government

offered sufficient evidence to establish that the substance was crack cocaine despite the possible absence of sodium bicarbonate. Accordingly, the Court will deny Appellant's request for relief on the grounds that the Government failed to prove that the substance he possessed was the crack form of cocaine.

VI. Whether Defendant Was Inappropriately Sentenced Under 21 U.S.C. § 241(b) (1) (A) And (b) (1) (C) As A Result Of The Third Circuit's Decision Requiring The Court To Decrease His Term Of Supervised Release From Five Years To Three Years

By a Supplemental Motion For Leave To Supplement 28 U.S.C. § 2255 Motion To Vacate (D.I. 235), Defendant sets forth an additional claim for relief stemming from the Third Circuit's decision to reduce the term of Defendant's supervised release from the five years imposed by the Court to three years consistent with 21 U.S.C. § 841(b) (1) (C).³ Based on this change, Defendant argues that he was inappropriately sentenced pursuant to two different statutes. Defendant contends that his sentence of ten years was imposed pursuant to 21 U.S.C. § 841(b) (1) (A) and that his supervised release term was imposed pursuant to 21 U.S.C. § 841(b) (1) (C), and that he should be sentenced consistently with one section.

Considering Defendant's claim on the merits, the Court concludes that Defendant is not entitled to relief and that any

³ Defendant's claim appears to overlap and touch upon his previous claims, and therefore, the Court will grant Defendant's application for Leave To Supplement.

error by the Court in sentencing Defendant was corrected by the Third Circuit and otherwise harmless. Although the Court sentenced Defendant consistently with the mandatory minimum of ten years as prescribed by Section 841(b)(1)(A), Defendant's sentence is also consistent with Section 841(b)(1)(C), the section under which the Third Circuit concluded was the appropriate section for purposes of Defendant's sentencing. In reaching its sentencing determination, the Court was not guided solely by the mandatory minimum, but rather by the facts and circumstances of the case, including but not limited to, the sentencing of the other defendants in the case, Defendant's failure to accept responsibility and Defendant's role in the offense. As the Court has previously explained in the context of Defendant's other claims, the Court's sentence falls within the sentencing range set forth in Section 841(b)(1)(C), which requires no mandatory minimum sentence, but sets forth a maximum sentence of twenty years. As such, the Court's sentence is consistent with Section 841(b)(1)(C) and would not change under the application of that section. Accordingly, the Court concludes that any error by the Court in sentencing Defendant was harmless, and therefore, Defendant is not entitled to relief on his claim of improper sentencing.

VII. Whether A Certificate Of Appealability Should Issue

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, 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.

CONCLUSION

For the reasons discussed, Defendant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody, as amended by Defendant's Motion For Leave To Supplement, 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,	:	
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v.	:	Criminal Action No. 99-33-2-JJF
	:	
	:	Civil Action No. 03-029-JJF
LEROY COLEY,	:	
	:	
Defendant.	:	

O R D E R

At Wilmington, this 9th day of February 2004, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Defendant's Motion For Leave To Supplement 28 U.S.C. § 2255 Motion To Vacate (D.I. 235) is GRANTED.

2. Defendant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside Or Correct Sentence By A Person In Federal Custody (D.I. 205), as amended by the Motion For Leave To Supplement, is DENIED.

3. 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.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE