IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	C.A. No. 01-457 GMS
	)	Cr.A. No. 99-24 GMS
TORVALD JONES,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On April 14, 1999, Torvald Jones ("Jones") pled guilty to possession with intent to distribute cocaine base. On September 17, 1999, the court sentenced Jones to two-hundred and ninety-two months imprisonment, four years of supervised release, and a one-hundred dollar special assessment. Pending now before the court is Jones' motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. In his motion, Jones raises the following five arguments related to his plea and sentence: (1) his plea was not knowingly, intelligently, and voluntarily entered; (2) his sentence improperly exceeded the statutory maximum; (3) his Felony Information failed to allege an offense against the United States; (4) the court erred in sentencing him as a career offender; and (5) he was denied the effective assistance of counsel. Since Jones fails to present any facts that would support the allegations in his motion, the court will deny the motion.

II. BACKGROUND

On February 3, 1999, law enforcement officers in Delaware seized cocaine base in Jones' possession. On March 9, 1999, the grand jury returned a two-count indictment against Jones, charging

him with Possession With Intent to Distribute Cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and Possession of a Firearm By a Prohibited Person in violation of 18 U.S.C. § 922(g)(1). On April 14, 1999, the United States filed a one-count Superceding Felony Information charging Jones with Possession With Intent to Distribute Cocaine Base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii). The Superceding Felony Information alleged that, on or about February 3, 1999, Jones did knowingly possess, with intent to distribute, cocaine base, a.k.a. 'crack,' a controlled substance. During a Rule 11 hearing on April 14, 1999, Jones waived indictment and entered a guilty plea to that offense.

At the Rule 11 hearing, and before the court began its colloquy with Jones, the court asked the Government for its understanding of 21 U.S.C. § 841 (b)(1)(B)(iii). The Government responded that subsection (b)(1)(B)(iii) "is the section that deals with cases involving five grams or more of a mixture or substance which contains cocaine base."

Jones was then sworn, and the court began the waiver of indictment and guilty plea colloquy. The court first advised Jones that he had been charged by Felony Information for possession with intent to distribute cocaine base. The court instructed the Clerk to read the plea agreement into the record, including the stipulated statement of facts.

The plea agreement consisted of the following information. First, the maximum penalties for Count I of the Felony Information are forty years imprisonment, with a mandatory minimum of five years imprisonment, a two-million dollar fine, at least four years of supervised release, any or all of the above, and a one-hundred dollar special assessment. Second, Jones believed that the amount of crack cocaine base attributable to him for sentencing was 31.65 grams, but the Government believed that the amount exceeded 1.5 kilograms. Third, Jones knowingly, voluntarily and intelligently admitted, and the parties

knowingly, voluntarily and intelligently stipulated, that law enforcement officers seized 31.65 grams of cocaine base, a.k.a. 'crack,' that Jones possessed with intent to distribute on February 3, 1999. Jones advised the court that he had also read the plea agreement, discussed it with his counsel, and understood it.

The court then repeated the maximum penalties for possession with intent to distribute cocaine base. Additionally, the court instructed Jones that his sentence "could be controlled in significant part by the outcome of a hearing which would be held to determine the amount of crack with which [he is] properly charged and attributed to [him]." Further, the court reviewed the Felony Information with Jones, and the following two elements of the offense: (1) Jones' knowing possession of crack cocaine base, and (2) Jones' intent to distribute it.

Jones swore to the court that he committed the crime with which he had been charged. The Government advised the court of the factual basis for Jones' guilty plea by referencing the factual stipulation in the plea agreement, and by reciting that the cocaine base seized from Jones weighed 31.65 grams. The court then accepted the plea agreement and Jones' guilty plea to the charge.

On September 14 and 15, 1999, the court held an evidentiary hearing to determine the quantity of crack cocaine attributable to Jones for sentencing. On September 17, 1999, the court issued an opinion finding that over 1.5 kilograms of crack cocaine was attributable to him for sentencing.[1] In this opinion, the court essentially adopted the factual findings and guidelines calculations in the Pre-Sentence Report (the

[1]On or about September 20, 1999, the court issued a revised opinion that updated the references to the revised Pre-Sentence Report, and to correct an error in the last paragraph on page 6 of the original opinion.

"Report").

The Report determined Jones to be a U.S.S.G. § 4B1.1 Career Offender. This determination was based on Jones' two prior Robbery First Degree convictions. The first robbery occurred on January 2, 1990, when Jones pointed a shotgun at the victim and stole the victim's jewelry and two-hundred dollars. He was arrested for that robbery on February 11, 1991. The second robbery occurred on November 4, 1991, when Jones and a co-defendant entered a store, displayed guns, and removed money from a cash register. They also removed jewelry and money from the persons working in the store. Jones was arrested for that robbery on November 4, 1991. He pled guilty to both robberies on January 28, 1993, and was sentenced to two to four years imprisonment on February 22, 1993.

At his September 17, 1999 sentencing, the court set the total offense level at thirty-five, based on the 1.5 kilograms of cocaine base the court determined to be attributable to Jones at the sentencing hearing. The court set Jones' Criminal History Category at VI because he was found to be a U.S.S.G. § 4B1.1 Career Offender. Finally, the court sentenced him to two-hundred and ninety-two months imprisonment, four years of supervised release, and a one-hundred dollar special assessment in accordance with 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii).

At no time during his sentencing on September 17, 1999, did Jones raise the claims that his Career Offender enhancement was improper; that he was not entering his guilty plea knowingly; that his sentence exceeded the statutory maximum, or that his Felony Information failed to allege an offense against the United States.

Jones filed a notice of appeal. He argued that the court improperly attributed over 1.5 kilograms of crack cocaine to him at sentencing. On March 22, 2000, the Third Circuit upheld the District Court's

ruling. On May 5, 2000, the Third Circuit denied panel re-hearing of Jones' appeal. Jones petitioned the Supreme Court for writ of certiorari. It denied his petition on December 11, 2000.

On June 25, 2001, Jones filed this 28 U.S.C. § 2255 motion.

III. DISCUSSION

A. Evidentiary Hearing

Before addressing Jones' substantive claims, the court must first consider whether an evidentiary hearing is necessary. *See Government of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989). "[T]he question of whether to order such a hearing is committed to the sound discretion of the court." *Id*. Furthermore, in exercising its discretion, the court must accept as true the movant's factual allegations, unless they are clearly frivolous on the basis of the existing record. *See id.* Accordingly, the court "must order an evidentiary hearing to determine the facts unless the motion and files and records of the case show conclusively that the movant is not entitled to relief." *Id*.

After a review of the motion, answer brief, and records submitted by the parties, the court finds that an evidentiary hearing is not required. The court thus concludes that it can fully and fairly evaluate the issues presented by Jones on the record before it. *See Soto v. United States*, 369 F. Supp. 232, 241-42 (E.D. Pa. 1973) (noting that the crucial inquiry in determining whether to hold a hearing is whether additional facts are required for fair adjudication.)

The court will now turn to the substance of Jones' Section 2255 motion.

B. Jones' Guilty Plea

Jones claims that he did not knowingly, intelligently, and voluntarily enter his guilty plea with a full understanding of the charge against him. He argues that his plea must therefore be vacated. In support of

this claim, Jones relies on *Apprendi v. New Jersey*, and its progeny. 530 U.S. 466 (2000). Specifically, he cites to these cases for the proposition that the quantity of drugs must be alleged in the Felony Information, and referenced in the guilty plea, before the court may accept a plea. The court finds this argument to be without merit.

1. *Apprendi* Does Not Apply Retroactively

The Third Circuit has yet to expressly rule on whether the rule enunciated in *Apprendi* applies retroactively to cases on collateral review. However, the majority of courts are of the view that it does not apply retroactively. *See United States v. Moss*, 252 F.3d 993, 996 (8th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227, 1238 (9th Cir. 2000), *United States v. Gibbs*, 125 F. Supp. 2d 700, 706 (E.D. Pa. 2000) (collecting cases), *United States v. Robinson*, 2001 WL 840231, at *4 (D. Del. July 20, 2001). The *Gibbs* court concluded that *Apprendi* announces a new rule because "it requires [the Government] to prove certain facts to a jury beyond a reasonable doubt when previously it needed only to prove such facts to a judge at sentencing by a preponderance of the evidence." 125 F. Supp. 2d at 703. The *Gibbs* court further examined whether the new rule in *Apprendi* fit into one of the two exceptions described in *Teague v. Lane*, which would permit retroactive application. *See id.*, *Teague v. Lane*, 489 U.S. 288 310 (1989).

The first *Teague* exception applies to those rules which categorically forbid punishment of certain conduct. This exception is inapplicable to the new *Apprendi* rule. *See Robinson*, 2001 WL 840231, at *4. The second *Teague* exception applies to new rules that are considered "watershed rules of criminal procedure" that are "implicit in the concept of ordered liberty." *See id.* (citing *Teague*, 489 U.S. at 311). Examining whether the new *Apprendi* rule fit within this exception, the *Gibbs* and *Robinson* courts

concluded that the role of the court in determining drug quantity, rather than a jury as required by *Apprendi*, would not render a proceeding fundamentally unfair or unreliable. *See Gibbs*, 125 F. Supp. 2d at 706, *Robinson* 2001 WL 840231, at *4. The court accepts this analysis. Accordingly, the court finds that *Apprendi* does not apply retroactively. *See Robinson* 2001 WL 840231, at *4.

2. Jones' *Apprendi* Claim is Meritless

Jones' *Apprendi* claim must also fail for being meritless. "Section 2255 petitions . . . serve only to protect a defendant from a violation of the [C]onstitution or from a statutory defect so fundamental that a complete miscarriage of justice has occurred." *United States v. Cepero*, 224 F.3d 256, 267 (3d Cir. 2000). Jones cannot show that a complete miscarriage of justice has occurred for four reasons. First, the Government advised him both at his waiver of indictment, and at his guilty plea hearing, that the charge dealt with five grams or more of cocaine base. Second, he stipulated in his plea agreement, and confirmed to the court at his guilty plea hearing, that the applicable quantity of cocaine base exceeded five grams. Third, he did not argue at sentencing that the quantity of cocaine base was less than five grams. Finally, he was properly advised of the forty year maximum penalty for that amount of cocaine base by the plea agreement, the statements at the guilty plea hearing, and the Pre-Sentence Report.

Further, courts have upheld sentences when the defendant stipulated, or admitted to a quantity of drugs, and was sentenced under the statutory maximum for a crime involving that amount, even though no quantity of drugs was alleged in the indictment. *See United States v. Garcia*, 252 F.3d 838, 842-844 (6th Cir. 2001); *United States v. Duarte*, 246 F.3d 56, 58, 62-64 (1st Cir. 2001). Jones stipulated to being in possession of over five grams of cocaine base. Through its extensive plea colloquy, the court ensured that he was well aware of the maximum sentence for that crime before he entered his plea. He can

thus be said to have entered the plea knowing that he faced a maximum of four-hundred and eighty-months in prison. Since Jones' actual sentence of two-hundred and ninety-two months is less than the maximum four-hundred and eighty-months allowable under 21 U.S.C. 841 § (a)(1) and (b)(1)(B), there is no *Apprendi* error rendering his plea involuntary.

For these reasons, Jones' Section 2255 claim based on his guilty plea is denied.

C. The Statutory Maximum Sentence

Jones next contends that, under *Apprendi*, his sentence improperly exceeded the statutory maximum. 530 U.S. 466 (2000). Specifically, he claims that the offense for which he was actually convicted was 21 U.S.C. § 841(a)(1) and (b)(1)(C), because the indictment specified no quantity of cocaine base. The maximum sentence of imprisonment for that offense is twenty years. He was sentenced to two-hundred and ninety-two months. As such, he claims his sentence is higher than the maximum allowed for the offense he pled guilty to.

This argument is essentially a reformulation of Jones' *Apprendi* claim discussed in Section B, *supra*. Briefly, this claim must fail because he stipulated to a quantity of drugs of five or more grams. In such a situation, it is within the court's province to sentence him within the statutory maximum for a crime involving that amount. *See Garcia*, 252 F.3d at 842-844. Jones' sentence is less than the statutory maximum for the crime he stipulated to. For this reason, and the reasons stated in Section B, the court will deny relief on this ground.

Jones also alleges that this "error" affected the U.S.S.G. § 4B1.1 calculation of his offense level as a career offender. He contends that this is so because the career offender guideline uses the statutory maximum term of imprisonment to set the offense level. *See* U.S.S.G. § 4B1.1. As above, he claims that

he was convicted of 21 U.S.C. § 841(a)(1) and (b)(1)(C), because the indictment specified no quantity of cocaine base. This offense carries a twenty-year maximum sentence. Thus, for an offense level with a statutory maximum of twenty years imprisonment, the career offender offense level is thirty-two. The court, however, sentenced Jones under 21 U.S.C. § 841(a)(1) and (b)(1)(B)(iii), which has a maximum term of forty years imprisonment. This conviction yields an offense level of thirty-four under the career offender § 4B1.1(B) guideline. Therefore, Jones contends that the failure to allege a drug quantity in the Felony Indictment, and the court's failure to treat that drug quantity as an element of the crime during the plea colloquy, prejudiced him by adding two offense levels.

Jones' claim on this point is meritless because the statutory maximum for his offense of conviction did not lead to the setting of his base offense level. Section 4B1.1 provides that, "[i]f the offense level for a career criminal from the table [] is greater than the offense level otherwise applicable, the offense level from the table should apply." U.S.S.G. § 4B1.1. Where the total offense level before the application of the U.S.S.G. § 4B1.1 career offender table equals or exceeds the offense level using the U.S.S.G. § 4B1.1 career offender offense table, the determination of the offense statutory maximum is unnecessary. *See United States v. McCulligan,* 256 F.3d 97, 107 n.6 (3d Cir. 2001). In that situation, the otherwise applicable offense level applies, without resorting to the table. *See United States v. Gay*, 240 F.3d 1222, 1229-1231 (10th Cir.), *United States v. Marrone*, 48 F.3d 735, 740 n.9 (3d Cir. 1995).

The court calculated Jones' total offense level as thirty-five. This calculation was not based on the statutory maximum of forty-years imprisonment for his offense of conviction. Instead, it was calculated

because the court attributed over 1.5 kilograms of cocaine base to him.[2] *See* U.S.S.G. § 2D1.1. The total offense level for that crime clearly exceeded the offense level of thirty-four that Jones would have received under the career offender table. As such, the court was not required to resort to the career offender table. *See Gay*, 240 F.3d at 1229-1231. Therefore, Jones' alleged *Apprendi* error would have had no effect on the calculation of his U.S.S.G. § 4B1.1 career offender sentence. Jones' argument on this claim is rejected.

D. Alleged Failure to Charge Jones with a Crime Against the United States

Jones next claims that, under *Apprendi*, since his Felony Information does not allege a specific quantity of cocaine base, the Felony Information fails to charge Jones with a crime. He thus concludes that the court had no jurisdiction to hear the case. However, a defendant convicted using a charging document that does not allege a specific drug quantity may not object that the charging document is invalid, after he admits to a drug quantity at his plea hearing. *See Sanders v. United States*, 2001 WL 25702, at *3 n.2 (2d Cir. January 11, 2001); *see also Moore v. United States*, 2001 U.S. DIST. LEXIS 2760, at *59 (S.D.N.Y. March, 15, 2001) (noting that, in any event, errors in indictments are rendered harmless by virtue of a guilty plea). There is no dispute that Jones admitted to possessing in excess of five grams of cocaine base at his plea hearing. Accordingly, he cannot now claim the indictment was faulty. For this reason, and the reasons discussed above in conjunction with Jones' earlier *Apprendi* arguments, the court will deny relief on this ground.

E. Alleged Error in Sentencing Jones as a Career Offender

Jones further claims that the court erred in sentencing him under the career offender provisions of

[2]The base offense level for this crime is thirty-eight. The court adjusted this number down three points for acceptance of responsibility.

U.S.S.G. § 4B1.1, because his two prior robbery convictions were part of a common scheme or plan. The court finds this argument meritless.

Jones does not contest that he was over eighteen years old when he committed his instant offense of conviction. Nor does he contest that this offense is a felony controlled substance offense. He further does not contest that he has two prior robbery convictions. Rather, Jones contends that the two robbery convictions counted only as one prior conviction because they stemmed from the same crime spree. Jones further contends that they should count as one crime because he was sentenced on the same day for both crimes.

Section 4B1.2(c)(2) provides that, for purposes of U.S.S.G. § 4B1.1 career offender sentencing, the sentences for the predicate convictions include sentences that "are counted separately under the provisions of U.S.S.G. § 4A1.1(a), (b) or (c)." *See* U.S.S.G. § 4B1.2(c)(2). Thus, "[t]he provisions of § 4A1.1 are applicable to the counting of convictions under § 4B1.1. *See* U.S.S.G. § 4B1.2, comment, n.4; *see also* U.S.S.G. § 4A1.1, comment, n.1, 2 and 3 (for purposes of calculating criminal history scores under U.S.S.G. § 4A1.1(a), (b) and (c), the definition of the term "prior sentence" in U.S.S.G. § 4A1.2(a) is used). Prior sentences are not related under U.S.S.G. § 4A1.2 if the offenses were separated by an intervening arrest. *See* U.S.S.G. § 4A1.2, comment, n.3, *see also United States v. Hightower*, 25 F.3d 182, 183 n.1 (3d Cir. 1994) (noting that prior convictions following separate arrests means that the convictions are not related under U.S.S.G. § 4A1.2); *United States v. Hallman*, 23 F.3d 821, 824-825 (3d Cir. 1994) (stating that, even if prior cases were consolidated for sentencing, if the defendant was arrested for the first offense prior to committing the second offense, the two convictions are not related under § 4A1.2).

In the present case, the court found Jones to be a U.S.S.G. § 4B1.1 career offender in light of his two prior robbery convictions. The first robbery occurred on January 2, 1990. Jones was arrested for that robbery on February 11, 1991. The second robbery occurred on November 4, 1991. Jones was arrested for that robbery on November 4, 1991. Jones pled guilty to both robberies on January 4, 1993. He was sentenced to two to four years imprisonment for those robberies on February 22, 1993. Since Jones' second robbery offense occurred after he committed, and was arrested for, the first robbery offense, his two robberies are separated by an intervening arrest. Thus, they properly count as two separate prior convictions for U.S.S.G. § 4B1.1 career offender sentencing. *See Hallman*, 23 F.3d at 824-825.

F. Ineffective Assistance of Counsel

Finally, Jones argues that his counsel provided ineffective assistance by not raising his *Apprendi* claims and alleged lack of career offender status at the sentencing or on direct appeal. The court rejects this argument.

The Sixth Amendment grants a criminal defendant the right to "reasonably effective" legal assistance. *See Roe v. Flores-Ortega*, 528 U.S. 470, 476 (2000) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To prevail on an ineffective assistance of counsel claim, the petitioner must demonstrate that (1) his attorney's performance was deficient and unreasonable as compared to prevailing professional standards; and (2) this deficient and unreasonable performance prejudiced the defense. *See Strickland*, 466 U.S. at 694. Both of these prongs must be satisfied for the Section 2255 petitioner to meet his burden. *See George v. Sively*, 254 F.3d 428, 443 (3d Cir. 2001).

The first prong of the *Strickland* test requires that the petitioner prove that "counsel's representation 'fell below an objective standard of reasonableness.'" *Flores-Oretga*, 528 U.S. 470, 476-477 (2000).

A reviewing court "must indulge a strong presumption that 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 strategy.'" *Strickland*, 466 U.S. at 689 (citations omitted).

The second prong of the *Strickland* test requires that the petitioner demonstrate that counsel's deficient representation made the result of the proceeding unreliable. *See Flores-Ortega*, 528 U.S. at 484. Courts have interpreted this standard as being less stringent than the preponderance of the evidence burden. *See Hull v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999). Essentially, the petitioner must prove that there was a reasonable probability that counsel's performance prejudiced him. *See id*. In cases of guilty pleas, the petitioner proves prejudice by demonstrating that he would have chosen trial, rather than pleading guilty. *See United States v. Kauffman*, 109 F.3d 186, 191 (3d Cir. 1997).

Jones cannot demonstrate that his attorney's representation fell below an objective standard of reasonableness. As to his three *Apprendi* claims, the Supreme Court decided *Apprendi* on June 26, 2000. 530 U.S. 466 (2000). Jones' sentencing, however, took place on September 17, 1999. The Third Circuit affirmed Jones' Judgement of Conviction on March 22, 2000, and denied panel rehearing on May 5, 2000. Therefore, *Apprendi* had not yet been decided at the time Jones' attorney represented him before the court and the Third Circuit. The Sixth Amendment right to effective counsel is not violated by counsel's failure to forecast changes in the law. *See Valenzuela v. United States*, 261 F.3d 694 (7th Cir. 2001). Accordingly, Jones cannot establish objectively unreasonable conduct by his counsel with regard to his *Apprendi* claims.

Furthermore, Jones cannot demonstrate ineffective assistance of counsel on his claim that his counsel

failed to object to the court's determination that he was a career offender. As stated in Section D, *supra*, Jones' robbery offenses were separated by an intervening arrest. As such, they were properly counted as separate predicate offenses for purposes of U.S.S.G. § 4B1.1 career offender sentencing. *See Hallman*, 23 F.3d at 824-825 (stating that, even if prior cases were consolidated for sentencing, if the defendant was arrested for the first offense prior to committing the second offense, the two convictions are not related under § 4A1.2). Accordingly, the court finds that failing to raise a clearly meritless objection cannot render his attorney's conduct deficient and unreasonable.

Jones has thus failed to meet either prong of the *Strickland* test. *See George*, 254 F.3d at 443 (requiring both prongs be satisfied). Accordingly, the court will deny his ineffective assistance of counsel claim.

IV. CONCLUSION

For the reasons discussed above, Jones has failed to provide a factual or legal basis that would allow the court to grant him the relief he seeks. Therefore, his 28 U.S.C. § 2255 motion must be denied.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

1. Jones' 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody is DENIED.

Dated: December 3, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE