

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. 79) filed by Defendant, H. Karen Brown. For the reasons discussed, Defendant's Motion will be denied.

BACKGROUND

Defendant was charged by an indictment with conspiracy to import cocaine and conspiracy to import hashish in violation of 21 U.S.C. § 963. (D.I. 79 at A12). Defendant was convicted by a jury on both counts of the indictment. At sentencing, the Court sustained Defendant's only substantive objection to the presentence report, which resulted in a sentencing guideline range for Defendant of 121 to 151 months imprisonment. (D.I. 79 at A9). Consistent with these guidelines, the Court sentenced Defendant to 151 months imprisonment, three years of supervised release, and \$200 in special assessments.

Defendant appealed contending that the Court erred in refusing to appoint new counsel to represent Defendant during her sentencing proceeding. The Third Circuit affirmed the decision of this Court. United States v. Brown, No. 01-2342, slip. op. (3d Cir. Jul. 23, 2002).

By her instant Section 2255 Motion, Defendant raises an ineffective assistance of counsel claim. Defendant requests that this matter be set for a new sentencing hearing, because her

counsel breached his role as a zealous advocate by failing to adequately pursue grounds for a downward departure, or otherwise advocate on Defendant's behalf for a lesser sentence.

Specifically, Defendant contends that her counsel (1) did not advise her of the difference between going to trial and pleading guilty, (2) did not adequately object to the presentence report, (3) did not have her evaluated by a psychiatrist, even though he knew she had been in and out of mental health facilities in the past, (4) did not attend her proffer sessions with the Government because Defendant ran out of fees to pay him, (5) did not tell the Court about her life, history or family, (6) did not prepare a motion for downward departure and (7) did not interview anyone to obtain mitigating evidence for sentencing.

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. Defendant has not alleged specific facts to create a genuine issue of material fact, United States v. Martinson, 1998 WL 111801, at *2 (E.D.Pa. Mar. 4, 1998) (holding that in the absence

of supporting evidence, petitioner's "bald assertions and assumptions" did not warrant an evidentiary hearing); Rodriguez v. United States, 2003 WL 21817699, *4 (E.D. Mich. 2003) (dismissing, without a hearing, ineffective assistance claim involving, among other things, failure to investigate where claim was unsupported by specific facts), and 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). Accordingly, the Court will proceed to the merits of Defendant's claim.

II. Whether Defendant Is Entitled To Relief On Her Ineffective Assistance Of Counsel Claim

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).

Applying the Strickland standard in the context of this case, the Court concludes that Defendant cannot establish either prong of the Strickland analysis. With respect to the first prong of the Strickland analysis, the Court cannot conclude that defense counsel's representation of Defendant at sentencing was unreasonable. Defendant contends that her counsel's failure to

hire a psychiatrist and failure to bring her mental health history before the Court rendered defense counsel ineffective. However, Defendant's mental health history and drug use were already before the Court in the presentence report. Further, it was not unreasonable for defense counsel to consider his availability of resources in determining the extent of investigation he should conduct, particularly where, as here, information concerning Defendant's mental condition was already before the Court. See e.g. Rompilla v. Horn, Nos. 00-9005, 00-9006, slip op. at 32 (3d Cir. 2004) (holding that in capital murder case "it was permissible for [defense counsel] to consider his office's limited investigative resources in determining the extent of the investigation that should be conducted with respect to . . . [defendant's] childhood, family, and mental condition"). As the Third Circuit has recognized, "[t]he test for ineffectiveness is not whether counsel could have done more; perfection is not required." Id. Rather, the test is whether counsel's conduct fell within the wide range of reasonable professional assistance. In this case, Defendant's history was before the Court in the presentence report, and an objection was lodged to the presentence report which was sustained by the Court and resulted in a reduced sentencing range for Defendant under the guidelines. In these circumstances, the Court cannot conclude that counsel's performance was deficient.

In the alternative, even if counsel's performance is considered deficient, the Court concludes that Defendant has not established prejudice under the Strickland analysis. Specifically, Defendant has not demonstrated that the outcome of the proceeding would have been different or that defense counsel's conduct rendered the proceeding fundamentally unfair. As the Third Circuit noted in its decision on Defendant's appeal, this Court was aware of Defendant's mental health history through the presentence report (D.I. 79 at A22-23), but was troubled by Defendant's serious involvement in a sophisticated criminal operation and her recruitment of other vulnerable people to work for her at great risk to their own health. Brown, No. 01-2342, slip op. at 6. The Court also noted that Defendant was importing into this country drugs that "kill kids every single day," and thus, the Court was motivated by a desire to protect the public by sentencing Defendant to the maximum sentence under the guidelines. (D.I. 79 at A22-23). Defendant has not demonstrated that the Court's decision would have been different had defense counsel hired a psychiatrist and highlighted that information which was already presented in the presentence report. Indeed, Defendant has not shown what the results of a psychiatric report would have revealed or what any further investigations into

witnesses would have revealed.¹ Absent this information, Defendant's suggestion that the outcome of the proceeding would have been different is entirely speculative. See e.g. Lewis v. Mazurkiewicz, 915 F.2d 106, 115 (3d Cir. 1990) (affirming denial of habeas relief and concluding that petitioner could not establish prejudice where petitioner failed to show a reasonable likelihood that interview of witness "would have produced any useful information not already known to trial counsel, much less that any such information would have dictated a different trial strategy or led to a different result at trial"); United States v. Gray, 878 F.2d 702, 712 (3d Cir. 1989) (holding that reasonable probability that outcome of proceeding would have been different "may not be based on mere speculation about what the

¹ Defendant also contends that counsel was ineffective for failing to advise her of the difference between pleading guilty and going to trial. At the sentencing hearing, Defense counsel stated that both he and Defendant's previous counsel informed her of these differences, but Defendant insisted that she wanted to go to trial. (D.I. 79 at A4). Further, it was apparent to the Court at sentencing that Defendant still asserted her innocence saying that the facts proven by the Government during her trial were false. (D.I. 79 at A34). As the Court stated to Defendant in declining to substitute attorneys, Defendant simply appeared to be dissatisfied with the results of her trial. (D.I. 79 at A32). Indeed, Defendant has not asserted in the current Motion that she would have pled guilty instead of going to trial. United States v. Neely, 2001 WL 521841, *7 (N.D. Ill. May 14, 2001) (holding that prejudice was not established where defendant did not allege that, but for counsel's errors she would have pled guilty instead of going to trial). Accordingly, even if counsel was ineffective, the Court concludes that Defendant cannot establish prejudice under the Strickland analysis.

witnesses that [petitioner's trial counsel] failed to locate might have said"). Because the Court clearly stated its reasons for sentencing Defendant to the maximum sentence under the guidelines, and Defendant has not shown what further investigations or psychiatric reports would have revealed or that any further investigative efforts would have changed the outcome of the proceeding, the Court concludes that Defendant cannot establish the second prong of the Strickland analysis. Accordingly, the Court will deny Defendant's Section 2255 Motion based on ineffective assistance of counsel.

III. Whether A Certificate Of Appealability Should Issue

The Court may issue a certificate of appealability only if Petitioner "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 is denied.

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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H. KAREN BROWN, :
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 Defendant. :
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ORDER

At Wilmington, this 9th day of December 2004, 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. 79) is DENIED.

2. Because the Court finds that Defendant has not made "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