IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**CRIMINAL ACTION**
v.	)	**No. 04-20027-KHV**
	)	
TREMAYNE DARKIS,	)	**CIVIL ACTION**
	)	**No. 05-3315-KHV**
Defendant.	)	
	)	

MEMORANDUM AND ORDER

On October 25, 2004, defendant pled guilty to conspiracy to distribute and possess with intent to distribute 100 or more kilograms of marijuana in violation of 21 U.S.C. §§ 841(a)(1), 846 and 841(b)(1)(B)(vii) and possessing firearms during and in relation to a drug trafficking crime in violation of 18 U.S.C. §§ 2 and 924(c)(1). See Plea Agreement (Doc. #64). This matter comes before the Court on defendant's Petition For Relief Pursuant To U.S.C.A. § 2255 (Doc. #92) filed July 25, 2005 and the government's Motion For Enforcement Of Plea Agreement (Doc. #104) filed January 19, 2006. On March 16, 2006, the Court held an evidentiary hearing. For reasons stated below, the Court sustains the government's motion to enforce the plea agreement and overrules defendant's Section 2255 petition.

Case History

On March 5, 2004, the government charged defendant with six counts: (1) conspiracy to distribute and possess with intent to distribute 100 or more kilograms of marijuana in violation of 21 U.S.C. §§ 841(a)(1), 846 and 841(b)(1)(B)(vii); (2) distributing marijuana in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; (3) distributing marijuana in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; (4)

possessing marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; (5) possessing firearms during and in relation to a drug trafficking crime in violation of 18 U.S.C. §§ 2 and 924(c)(1); and (6) being a convicted felon in possession of firearms in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

On July 23, 2004, defense counsel filed a motion to suppress, arguing that the government lacked probable cause to search defendant's car and obtain a warrant to search an apartment in Parsons, Kansas. See Doc. #34. On September 24, 2004, after an evidentiary hearing, the Honorable G. Thomas VanBebber denied defendant's motion. See Docs. #52 and #53.

On October 25, 2004, defendant pled guilty to Counts 1 and 5, i.e. conspiracy to distribute and possess with intent to distribute 100 or more kilograms of marijuana in violation of 21 U.S.C. §§ 841(a)(1), 846 and 841(b)(1)(B)(vii) and possessing firearms during and in relation to a drug trafficking crime in violation of 18 U.S.C. §§ 2 and 924(c)(1). See Plea Agreement (Doc. #64).

More than two months later, on January 6, 2005, after receiving a copy of the presentence report, defendant filed a motion to withdraw his guilty plea. See Doc. #71. Before sentencing, however, defendant withdrew that motion. See Motion For Enforcement Of Plea Agreement (Doc. #104) at 4-5 (citing Doc. #93 at 2-3). On January 10, 2005, consistent with the recommendation of the presentence report, Judge VanBebber sentenced defendant to 110 months on Count 1 and 60 consecutive months on Count 5, a total of 170 months.

Analysis

I. Government's Motion To Enforce Plea Agreement

The government asserts that the plea agreement precludes defendant from seeking Section 2255

relief. The plea agreement contains the following waiver of appeal and collateral attack rights:

> Defendant knowingly and voluntarily waives any right to appeal or collaterally attack any matter in conjunction with this prosecution, conviction and sentence. The defendant is aware that Title 18, U.S.C. § 3742 affords a defendant the right to appeal the conviction and sentence imposed. By entering into this agreement, the defendant knowingly waives any right to appeal a sentence imposed which is within the guideline range determined appropriate by the court. The defendant also waives any right to challenge a sentence or manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under Title 28, U.S.C. § 2255 [except as limited by United States v. Cockerham, 237 F.3d 1179, 1187 (10th Cir. 2001)]. In other words, the defendant waives the right to appeal the sentence imposed in this case except to the extent, if any, the court departs upwards from the applicable sentencing guideline range determined by the court. * * *

Id. at 8-9.

In United States v. Cockerham, 237 F.3d 1179 (10th Cir. 2001), the Tenth Circuit held that a defendant's waiver of the right to collaterally attack his conviction and sentence are generally enforceable "where the waiver is expressly stated in the plea agreement and where both the plea and the waiver were knowingly and voluntarily made." Id. at 1183. Such an agreement, however, does not waive the right to bring a Section 2255 petition based on ineffective assistance of counsel which goes to the validity of the plea or the waiver. Id. at 1187. In the guilty plea context, to establish a claim for ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that but for counsel's error, defendant would have insisted upon going to trial. See Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). To show deficient performance, defendant must show that counsel made "errors so serious" that his performance could not be considered reasonable "under prevailing professional norms." Strickland v. Washington, 466 U.S. 668, 687-88 (1984). In other words, defendant must prove that counsel's performance was "below an objective standard of reasonableness."

United States v. Walling, 982 F.2d 447, 449 (10th Cir. 1992). The Supreme Court recognizes "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. To show prejudice, defendant must establish "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59.

Defendant makes the following ineffective assistance of counsel claims which go to the validity of his plea or the waiver of his appeal and collateral rights: (1) counsel induced him to plead guilty by stating that he would get seven to eight years in prison if he did so; (2) counsel did not adequately explain the waiver of appeal and collateral attack rights; and (3) counsel advised him to not raise any issues or indicate any apprehensiveness regarding the plea.

Standing alone, an attorney's erroneous sentence estimate does not render a plea involuntary. See United States v. Silva, 430 F.3d 1096, 1099 (10th Cir. 2005). To prove the first claim, defendant must show that counsel materially misrepresented the consequences of the plea. See Laycock v. State of N.M., 880 F.2d 1184, 1186 (10th Cir.1989). Defendant testified that he only entered the plea because his attorney, Jay DeHardt, told him that he would receive a sentence of seven to eight years. DeHardt flatly denied telling defendant that he would receive a set range of seven to eight years if he took the plea, however, and defendant's testimony to the contrary is not credible. Defendant acknowledged that his attorney could not give him a concrete answer on what his criminal history category would be. Defendant admitted that he read the plea agreement and that his attorney read it to him. The plea agreement stated that defendant's sentence would be no less than five years on Count I and no less than five consecutive years on Count 5. See Plea Agreement (Doc. #64) at 1-2. In addition, Judge VanBebber verbally

admonished defendant that his sentence would be no less than five years on Count 1 and no less than five consecutive years on Count 5, and that it could be even more severe than what defendant might anticipate under the plea agreement. See Exhibit 1 to Doc. #104 at 5-6. Defendant expressly acknowledged that his sentence could be different from any estimate his attorney might have given him. See id. at 8. Defendant has completed two years of junior college. He appears to be an intelligent individual. His testimony at the hearing was coherent, and he has a long-standing familiarity with the criminal justice system. For all of the foregoing reasons, the Court cannot credit defendant's testimony that he entered his guilty plea because he thought that he would receive a seven or eight-year sentence if he did so.[1]

Defendant asserts that he did not knowingly waive his appeal and collateral attack rights because his attorney did not explain what collateral attack meant. The Court, however, believes DeHardt's testimony that he thoroughly explained the waiver to defendant. Moreover, defendant had ample opportunities to seek clarification from his attorney and the Court. He did not do so, and represented to the Court that he fully understood the plea agreement which included the waiver in question.

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[1] Defendant also raises a slightly different argument that he would have not entered a guilty plea if he had known that he would receive a sentence of 14 years. On January 6, 2005, defendant filed a motion to withdraw his guilty plea. See Doc. #71. He instructed his attorney to file that motion because the presentence report recommended a sentence of 110 to 137 months on the drug count and 60 consecutive months on the gun count. Defense counsel testified that the motion was scheduled to be heard on the same date as defendant's sentencing hearing, but that immediately before the sentencing hearing, defendant instructed him to withdraw the motion to set aside the guilty plea. Defendant denied doing so, but his testimony was not credible. In open court, in defendant's presence, DeHardt withdrew defendant's motion to withdraw the guilty plea. By direct questioning of defendant, Judge VanBebber verified that defendant wanted to withdraw the motion and proceed with sentencing. See Doc. #93 at 2-3. Defendant agreed that he wanted to withdraw the motion and opted to proceed with sentencing with full knowledge of the contents of the presentence report. Defendant stated that he was too scared and confused to question the judge or his attorney, but the Court does not credit his testimony in this regard.

Finally, defendant contends that counsel advised him to go along with what the judge asked and to give short affirmative answers and not raise any issues or indicate any apprehensiveness regarding the plea. Id. at 4. DeHardt testified that he advised defendant that if he wanted the judge to accept his plea, he needed to give short, unequivocal answers to the judge's questions. Even accepting defendant's version of the facts, DeHardt's advice does not call into question the validity of the plea or the waiver of appeal and collateral rights.

On this record, defendant has not shown that counsel made errors so serious that his performance could be considered unreasonable or that but for counsel's errors, defendant probably would not have pleaded guilty and probably would have insisted on going to trial. See Hill, 474 U.S. at 59. The Court therefore sustains the government's motion to enforce defendant's waiver of the right to collaterally attack his conviction and sentence.

II. Defendant's Petition For Section 2255 Relief

In addition to the ineffective assistance claims discussed above, defendant claims that counsel was ineffective in (1) presenting the motion to suppress and (2) failing to appeal the denial of the motion to suppress.[2] The standard of review of Section 2255 petitions is quite stringent. The Court presumes that the proceedings which led to defendant's conviction were correct. See Klein v. United States, 880 F.2d 250, 253 (10th Cir. 1989). To prevail, defendant must show a defect in the proceedings which resulted in a "complete miscarriage of justice." Davis v. United States, 417 U.S. 333, 346 (1974).

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[2] In his Section 2255 petition, defendant also asserted that the government breached the plea agreement by seeking to increase his sentence under 21 U.S.C. § 851. See Petition For Relief Pursuant To [28] U.S.C.A. 2255 (Doc. #92) at 2-4. At the evidentiary hearing, however, defendant withdrew this contention.

Defendant claims that counsel was ineffective in presenting his motion to suppress. To prove this claim, defendant must show that counsel's performance was deficient, i.e. that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. Second, defendant must show prejudice, i.e. a reasonable probability that but for the errors of counsel, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694.

Although the record is not entirely clear, it appears that defendant claims that counsel was ineffective in failing to secure witnesses for the suppression hearing. In the motion to suppress, defendant argued that the government lacked probable cause to search his car during a traffic stop and to use the results of the stop to obtain a warrant to search 1608 Corning, Apartment C½ in Parsons, Kansas. See Motion To Suppress And Request For Franks Hearing By Defendant Tremayne Darkis (Doc. #34) filed July 23, 2004. Defendant claims that he told his attorney to contact witnesses and gave him telephone numbers of witnesses and letters which they had written. By name, defendant identified only Melissa Ludwig, who allegedly wrote a letter (Defendant's Exhibit 1) which stated that a gun and certain drugs which were found at 1608 Corning, Apartment C½, belonged to her and/or her roommate – not to defendant. See id. at 2. It is not clear whether the letter refers to the gun and drugs which were involved in the charges against defendant. In addition, the letter sheds no light on whether Ludwig was willing and available to testify, how her testimony would have helped defendant's overall case, or defendant's relationship to Ludwig, the premises searched, or the drugs and gun mentioned in the letter. DeHardt

testified that he attempted to contact Ludwig by mail and by telephone.[3] On this record, the Court cannot conclude that counsel's performance was deficient or that the result of the proceeding probably would have been different if counsel had successfully secured Ludwig's appearance at the suppression hearing.

Defendant also claims that counsel was ineffective in not appealing the denial of the motion to suppress. In light of the fact that defendant entered into a plea agreement which waived his right to post-conviction relief, counsel's performance was not deficient. See United States v. Morales-Morales, No. 02-20082-KHV, 2005 WL 3845347, at *6 (D. Kan. Jan. 7, 2005). Moreover, defendant has not shown a reasonable probability that the result would have been different if counsel had filed an appeal.

IT IS THEREFORE ORDERED that the government's Motion For Enforcement Of Plea Agreement (Doc. #104) filed January 19, 2006 be and hereby is **SUSTAINED.** The plea agreement bars defendant's Section 2255 claims.

IT IS FURTHER ORDERED that in the alternative, defendant's Petition For Relief Pursuant To U.S.C.A. § 2255 (Doc. #92) filed July 25, 2005 be and hereby is **OVERRULED.**

Dated this 3rd day of April, 2006 at Kansas City, Kansas.

s/ Kathryn H. Vratil
Kathryn H. Vratil

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[3] The government presented evidence that defendant's attorney also tried unsuccessfully to subpoena two witnesses who lived in Parsons, Kansas. Defendant did not identify the substance of these witnesses' testimony or show that their testimony would have changed the result of his case.