IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**CRIMINAL ACTION**
v.	)	**No. 12-20141-04-KHV**
	)	
FRANK SHARRON PIPER III,	)	**CIVIL ACTION**
	)	**No. 17-2719-KHV**
Defendant.	)	
	)	

MEMORANDUM AND ORDER

On May 14, 2014, Scott W. Skavdahl of the United States District Court for the District of Wyoming, sitting by designation, sentenced defendant to 135 months in prison. On November 12, 2015, the Court overruled defendant's motion to reduce sentence under 18 U.S.C. § 3582(c)(2). This matter is before the Court on defendant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. #1048) filed December 18, 2017.[1] For reasons stated below, the Court overrules defendant's motion and denies a certificate of appealability.

Factual Background

On January 8, 2014, defendant pled guilty to conspiracy to distribute and possess with intent to distribute more than five kilograms of cocaine and to maintain a drug-involved premises in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846. As noted, Judge Skavdahl sentenced defendant to 135 months in prison.

On September 16, 2015, defendant filed a Motion For Sentence Reduction (Doc. #944) under

[1] Section 2255 motions must be brought before "the court which imposed the sentence." 28 U.S.C. § 2255(a). Although Judge Skavdahl sentenced defendant as a visiting judge, defendant's case remained assigned to the undersigned judge who presided over the hearing on defendant's motion to reduce sentence under Section 3582(c)(2). Defendant's present motion only addresses alleged errors in the proceedings on his Section 3582(c)(2) motion. Accordingly, defendant's Section 2255 motion remains for disposition with the undersigned judge.

18 U.S.C. § 3582(c)(2). Defendant sought relief under Amendment 782 to the United States Sentencing Guidelines ("U.S.S.G."), which lowered the base offense levels for certain quantities in the Drug Quantity Table at U.S.S.G. § 2D1.1. The government agreed that defendant was eligible for relief under Amendment 782 but claimed that a reduction was not warranted in light of defendant's post-sentencing conduct. On November 12, 2015, the Court overruled defendant's motion. See Memorandum And Order (Doc. #952).

Defendant appealed the Court's denial of his motion to reduce sentence. Notice Of Appeal (Doc. #954) filed November 19, 2015. On October 25, 2016, the Tenth Circuit affirmed. See United States v. Piper, 839 F.3d 1261 (10th Cir. 2016). On June 19, 2017, the Supreme Court denied defendant's petition for a writ of certiorari. See United States v. Piper, 137 S. Ct. 2263.

On December 18, 2017, defendant filed a motion to vacate his sentence under 28 U.S.C. § 2255. See Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. #1048). Defendant asserts that counsel provided ineffective assistance in the district and appellate court proceedings on his motion to reduce sentence under Section 3582(c)(2).

Analysis

Defendant argues that counsel provided ineffective assistance at the hearing and on appeal of his motion under 18 U.S.C. § 3582(c)(2). Defendant had no constitutional or statutory right to counsel, however, in the proceedings related to his Section 3582(c)(2) motion. United States v. Campos, 630 F. App'x 813, 816 (10th Cir. 2015); United States v. Carrillo, 389 F. App'x 861, 863 (10th Cir. 2010); United States v. Brown, 556 F.3d 1108, 1113 (10th Cir. 2009); United States v. Olden, 296 F. App'x 671, 674 (10th Cir. 2008); see also Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (right to appointed counsel extends to first appeal of right and no further); Coronado v. Ward, 517 F.3d 1212, 1218 (10th

Cir. 2008) (no constitutional right to counsel beyond direct appeal of criminal conviction). Accordingly, defendant cannot assert a claim under Section 2255 that he received ineffective assistance of counsel in relation to his Section 3582(c)(2) motion. Carrillo, 389 F. App'x at 863; see Coleman v. Thompson, 501 U.S. 722, 752 (1991) (defendant cannot claim ineffective assistance in proceeding in which he had no constitutional right to counsel); Wainwright v. Torna, 455 U.S. 586, 587-88 (1982) (per curiam) (denial of effective assistance not possible if defendant had no constitutional right to counsel). The Court therefore overrules defendant's Section 2255 motion.

Motion To Appoint Counsel

Defendant seeks counsel to assist with his motion to vacate sentence. Doc. #1048 at 17. Defendant has no constitutional or statutory right to appointment of counsel in the prosecution of a Section 2255 motion unless the Court determines that an evidentiary hearing is required. Rule 8(c) of the Rules Governing Section 2255 Proceedings; see Pennsylvania v. Finley, 481 U.S. at 555. In determining whether to appoint counsel in a civil case, the Court considers several factors including (1) the merit of the litigant's claims; (2) the nature of the factual issues raised in the claims; (3) the litigant's ability to present his or her claims; and (4) the complexity of the claims involved. See Williams v. Meese, 926 F.2d 994, 996 (10th Cir. 1991). Applying these factors, defendant is not entitled to counsel. As explained above, defendant's claim lacks merit. Moreover, defendant's claim is not particularly complex factually or legally, and he is able to adequately present his claim. The Court therefore overrules defendant's motion to appoint counsel.

Conclusion

Defendant does not allege specific and particularized facts which, if true, would entitle him to relief. Accordingly, no evidentiary hearing is required. See 28 U.S.C. § 2255; United States v. Cervini,

379 F.3d 987, 994 (10th Cir. 2004) (standard for evidentiary hearing higher than notice pleading); United States v. Kilpatrick, 124 F.3d 218 (Table), 1997 WL 537866, at *3 (10th Cir. 1997) (conclusory allegations do not warrant hearing); United States v. Marr, 856 F.2d 1471, 1472 (10th Cir. 1988) (no hearing required where court may resolve factual matters raised by Section 2255 petition on record); United States v. Barboa, 777 F.2d 1420, 1422-23 (10th Cir. 1985) (hearing required only if "petitioner's allegations, if proved, would entitle him to relief" and allegations not contravened by record).

Certificate Of Appealability

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the Court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).[2] To satisfy this standard, the movant must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Saiz v. Ortiz, 392 F.3d 1166, 1171 n.3 (10th Cir. 2004) (quoting Tennard v. Dretke, 542 U.S. 274, 282 (2004)). For reasons stated above, the Court finds that defendant has not satisfied this standard. The Court therefore denies a certificate of appealability as to its ruling on defendant's Section 2255 motion.

IT IS THEREFORE ORDERED that defendant's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. #1048) filed December 18, 2017 is **OVERRULED**.

[2] The denial of a Section 2255 motion is not appealable unless a circuit justice or a circuit or district judge issues a certificate of appealability. See Fed. R. App. P. 22(b)(1); 28 U.S.C. § 2253(c)(1).

IT IS FURTHER ORDERED that a certificate of appealability as to the ruling on defendant's Section 2255 motion is **DENIED**.

Dated this 12th day of March, 2018 at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge