

admitted that he sold marijuana on one occasion but denied that he had ever been involved in the sale of cocaine. See generally Tr. of Direct and Cross-Examination of Def., Sept. 16, 2008, Docket No. 740-1. Despite the defendant's testimony, the jury returned a verdict against Perez, finding the defendant "guilty beyond a reasonable doubt of knowingly conspiring to manufacture, distribute or possess with intent to distribute more than 5 kilograms of a mixture or substance containing cocaine powder." Verdict Form, Sept. 16, 2008, Docket No. 450.

Prior to the sentencing hearing, a probation officer prepared a presentence investigation report. The probation officer determined that Perez was subject to a base offense level of thirty-six for his role in a conspiracy to possess with the intent to distribute at least 50 kilograms but less than 150 kilograms of cocaine. Additionally, the probation officer recommended a two-level enhancement for the defendant's aggravating role as the primary supplier within the conspiracy, resulting in a total offense level of thirty-eight. The probation officer reviewed the defendant's criminal history and assigned Perez four criminal history points, including two points for committing the instant offense while on probation, resulting in a criminal history category of III. Perez objected to the proposed base offense level on the basis that he should not be held responsible for any quantity of cocaine because his own trial testimony explained that he was only involved in marijuana transactions. The defendant also objected to the aggravating role enhancement. The government objected to the proposed offense level, asserting that the defendant should receive an additional two-level increase for obstruction of justice.

The court conducted Perez's sentencing hearing on February 2, 2009.² At the hearing, the court sustained the defendant's objection regarding his aggravating role in the offense and reduced his proposed offense level by two. Additionally, the court ruled sua sponte that

² The record reveals that Perez was assisted by a Spanish language interpreter at all court proceedings and that the presentence report was translated into Spanish for his review.

assigning two criminal history points for committing the instant offense while on probation was unfair and reduced the defendant's criminal history category to II. The court, however, overruled the defendant's objection with respect to the base offense level, finding that the jury "disbelieved Mr. Perez's disavowal of any dealing in cocaine." Sentencing Tr. 12, Docket No. 550. Relying on trial testimony provided by two credible government witnesses—Isidro Hernandez-Hernandez and Kelly Tharp—the court determined by a preponderance of the evidence that the defendant was involved with approximately 50 kilograms of cocaine, resulting in a base offense level of thirty-six. The court also sustained the government's objection and increased the offense level by two for obstruction of justice, resulting in a total offense level of thirty-eight. When combined with a criminal history category of II, Perez's total offense level gave rise to a range of imprisonment of 262 to 327 months under the 2007 Sentencing Guidelines. After considering the factors set forth in 18 U.S.C. § 3553(a), the court imposed a term of imprisonment of 262 months.

Perez appealed his sentence to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit remanded the case for resentencing on the basis that this court failed to make specific factual findings as to the elements of materiality and willfulness necessary to support the imposition of the obstruction of justice enhancement.³ Upon remand, the court made the necessary, specific factual findings and again imposed the obstruction of justice enhancement. However, the court also found that Perez's need for rehabilitation had decreased, that he had admitted his wrongful conduct and the impropriety of his actions, and that a sentence of 262 months was no longer necessary to deter him from committing illegal acts. Mem. Op. 7–8, Feb. 10, 2012, Docket No. 683. The court varied downward by four offense levels and resentenced

³ Perez also appealed this court's denial of his motion for the appointment of new counsel filed just prior to his sentencing hearing. The Fourth Circuit affirmed the denial.

the defendant to a term of incarceration of 168 months. Id. at 8. Perez appealed his amended sentence, arguing that the district court exceeded the scope of the Fourth Circuit’s mandate when it again imposed the two-level enhancement for obstruction of justice. The appellate court disagreed and affirmed the amended sentence. Mem. Op., Aug. 24, 2012, Docket No. 700.

On May 20, 2013, Perez filed the instant motion for relief under 28 U.S.C. § 2255, asserting two claims of ineffective assistance of counsel. On September 9, 2013, the defendant supplemented his motion with a third claim for relief under Alleyne v. United States, 133 S. Ct. 2151 (2013), decided by the Supreme Court of the United States on June 17, 2013. The government has moved to dismiss the defendant’s § 2255 motion in its entirety, arguing that the three asserted claims are without merit. The defendant has replied to the government’s motion to dismiss. The matter is now ripe for review.

Discussion

I. Ineffective Assistance of Counsel

Claims of ineffective assistance are reviewed under the standard enunciated by the Supreme Court of the United States in Strickland v. Washington, 466 U.S. 668 (1984). In order to succeed on such a claim, a defendant must show: (1) that his “counsel’s performance was deficient,” and (2) that “the deficient performance prejudiced the defense.” Id. at 687. With respect to the first prong, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 688. With respect to the second prong, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694. A court need not address both components of an ineffective assistance claim “if the defendant makes an insufficient showing on one.” Id. at 697. “If it is easier to dispose of an ineffectiveness claim on

the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” Id.

In his § 2255 motion, Perez alleges ineffective assistance of counsel on the following grounds: (1) failure to object to the probation officer’s recommended two-point criminal history score increase under U.S.S.G. § 4A1.1(d) for being on probation at the time of the instant offense; and (2) failure to raise the defense of sentencing entrapment or sentencing manipulation. Upon review of the record, the court concludes that these claims are without merit.

A. Criminal History Category: U.S.S.G. § 4A1.1(d)

Assuming, without deciding, that his counsel’s performance was deficient, Perez’s first claim must fail for lack of prejudice. Although defense counsel did not object to the probation officer’s assignment of two criminal history points for committing the instant offense while on probation pursuant to U.S.S.G. § 4A1.1(d), the court, on its own motion, modified the defendant’s presentence report to remove those two points. Sentencing Tr. 14, Docket No. 550 (Judge Conrad: “I think the assignment of the two criminal history points with the commission of an offense while on probation is unfair and I’m going to modify the report to delete those two criminal history points.”). A successful objection by defense counsel would not have changed the sentence ultimately imposed. Therefore, the defendant has failed to demonstrate that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694.

B. Sentencing Entrapment & Sentencing Manipulation

Perez’s second ineffective assistance claim must fail because the defendant has not shown that counsel’s failure to argue for a lesser sentence based on sentencing entrapment or sentencing manipulation “fell below an objective standard of reasonableness.” Id. at 688. The

United States Court of Appeals for the Fourth Circuit has distinguished sentencing entrapment from sentencing manipulation. Sentencing entrapment is outrageous official conduct which, for the purpose of increasing the sentence of the entrapped defendant, overcomes the will of an individual who was not predisposed to commit the crime. United States v. Jones, 18 F.3d 1145, 1154 (4th Cir. 1994) (adopting the definition set forth by the United States Court of Appeals for the Eighth Circuit in United States v. Barth, 990 F.2d 422 (8th Cir. 1993)). Sentencing manipulation, which does not require a lack of predisposition on the defendant's part, is "outrageous government conduct that offends due process [and] could justify a reduced sentence." Jones, 18 F.3d at 1153.

Although the Fourth Circuit has drawn a distinction between sentencing entrapment and sentencing manipulation, it has "never spoken to the legal viability of [the] 'sentencing entrapment' theory," and has not decided "whether the theory of sentencing manipulation has any basis in law." Jones, 18 F.3d at 1154; see also United States v. Atwater, 336 F. Supp. 2d 626, 629 (E.D. Va. 2004) (recognizing that the Fourth Circuit's decision in Jones "cast grave doubt over" the sentencing manipulation theory). Furthermore, even if sentencing entrapment and sentencing manipulation were viable legal theories, the defenses would not apply in this case.

The defendant asserts that the government engaged in sentencing entrapment or sentencing manipulation when a special agent asked the defendant's co-conspirator, who was acting as a confidential informant for the government at the time, to arrange the purchase of cocaine rather than marijuana. Perez contends that there was no evidence to show that he had previously sold cocaine. Rather, the government overcame Perez's unwillingness to sell cocaine

by making “many phone calls” through the confidential informant. Def.’s Mot. to Vacate 11, Docket No. 730.

While the defendant testified that he never sold cocaine and only sold marijuana on one occasion, the jury did not find him to be a credible witness. As such, there is no credible evidence in the record to suggest that Perez was not a willing seller of cocaine, and his sentencing entrapment claim must fail. See, e.g., United States v. Brown, 69 F. App’x 175, 177 (4th Cir. 2003) (concluding that the defendant’s sentencing entrapment claim must fail because “there was no evidence suggesting that [the defendant] was not a willing seller of crack cocaine”). With respect to the defendant’s claim of sentencing manipulation, an undercover agent does not engage in “outrageous conduct” by using a confidential informant to arrange a cocaine transaction. See Jones, 18 F.3d at 1155 (“[I]t is not outrageous for law enforcement authorities proceeding in an undercover ‘buy’ to attempt to bargain with a seller of narcotics into selling an amount which constitutes a crime for the sole purpose of obtaining a conviction.”). This is especially true where, as here, the defendant is already a willing seller of drugs. See, e.g., Knight v. United States, 2005 WL 1081343, at *5 (E.D. Va. May 6, 2005) (“[I]t is not likely that the confidential informant’s persistent requests that Petitioner sell him crack cocaine instead of powder cocaine is so outrageous as to merit a downward departure. The record shows that Petitioner was predisposed to commit [a] drug crime and was not coerced into making a drug deal.”).

Further, as the government points out in its motion to dismiss, the 50-kilogram quantity of cocaine attributed to the defendant in calculating his base offense level was entirely historical. Gov.’s Mot. to Dismiss 9, Aug. 9, 2013, Docket No. 740. The court relied on the testimony of Isidro Hernandez-Hernandez and Kelly Tharp, both of whom testified about Perez’s cocaine

dealing prior to any government involvement. Perez’s offense level was not affected by the phone calls or arranged purchase mentioned in the defendant’s motion to vacate nor by any other government conduct. Since neither sentencing entrapment nor sentencing manipulation are viable legal theories under the facts of this case, counsel did not perform deficiently by failing to raise them at Perez’s sentencing hearing.⁴

II. Resentencing Under Alleyne v. United States

In his supplemental motion, the defendant asserts that he is entitled to resentencing in light of Alleyne v. United States, in which the Supreme Court of the United States held “that facts that increase mandatory minimum sentences must be submitted to the jury.” 133 S. Ct. 2151, 2163 (2013). Perez argues that his sentence is unconstitutional because the court determined at sentencing—over the defendant’s objection and without submitting the question of precise drug weight to a jury—that the defendant was responsible for 50 kilograms of cocaine. This drug weight resulted in a base offense level of 36 under the advisory sentencing guidelines.

As a preliminary matter, the court notes that the Supreme Court has not made its ruling in Alleyne retroactively applicable to cases on collateral review. See United States v. Stewart, 540 F. App’x 171, 172 n.* (4th Cir. 2013). Even if Alleyne applied retroactively, the ruling offers Perez no relief. A jury found Perez “guilty beyond a reasonable doubt of knowingly conspiring to manufacture, distribute or possess with intent to distribute more than 5 kilograms of a mixture

⁴ Although the defendant claims ineffective assistance based on counsel’s failure to raise sentencing entrapment or sentencing manipulation during his sentencing proceeding, Perez cites to law relating to the affirmative defenses of entrapment and solicitation. To the extent that the defendant’s motion could be construed to include an ineffective assistance claim based on counsel’s failure to raise an entrapment or solicitation defense during trial, the court similarly finds that counsel’s performance did not fall below an objective standard of reasonableness. At trial, the defendant testified that he never sold cocaine. Arguing, in the alternative, that the defendant sold cocaine only because of government inducement would have directly contradicted the defendant’s testimony. Counsel was not objectively unreasonable for failing to do so. See Strickland, 466 U.S. at 690 (“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.”).

or substance containing cocaine powder.” Verdict Form, Sept. 16, 2008, Docket No. 450. This jury determination subjected the defendant to a mandatory minimum sentence of ten years and a maximum sentence of life imprisonment. 21 U.S.C. § 841(b)(1)(A).

The facts found by the court at sentencing, including the precise drug weight attributable to Perez, did not increase the ten-year mandatory minimum sentence applicable to the defendant’s offense. Rather, the court’s findings merely established the appropriate custody range under the advisory sentencing guidelines. The Supreme Court’s ruling in Alleyne does not require all facts that influence a defendant’s sentence to be submitted to a jury. 133 S. Ct. at 2163 (“Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.”). The 262-month sentence initially imposed and the 168-month sentence imposed upon remand were both well within the statutory range of ten years to life imprisonment. See id. (“Our decision today is wholly consistent with the broad discretion of judges to select a sentence within the range authorized by law.”). Accordingly, the defendant’s § 2255 motion to vacate, set aside, or correct his sentence in light of the Alleyne decision must be denied.

Conclusion

For the reasons stated, the court will grant the government's motion to dismiss and deny Perez's motion to vacate, set aside, or correct his sentence. Additionally, because Perez has failed to demonstrate "a substantial showing of the denial of a constitutional right," the court will deny a certificate of appealability. See 28 U.S.C. § 2253(c).

The Clerk is directed to send certified copies of this memorandum opinion and the accompanying order to the defendant and all counsel of record.

ENTER: This 17th day of June, 2014.

/s/ Glen E. Conrad
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

UNITED STATES OF AMERICA)	Criminal Action No. 5:07CR00063-018
)	Civil Action No. 5:13CV80592
v.)	
)	<u>FINAL ORDER</u>
JOSE LUIS JAIME PEREZ,)	
)	By: Hon. Glen E. Conrad
Defendant.)	Chief United States District Judge

For the reasons set forth in the accompanying memorandum opinion, it is now

ORDERED

as follows:

1. The defendant's motion for leave to file an out of time reply (Docket No. 747-1) is **GRANTED**;
2. The government's motion to dismiss (Docket Nos. 740 & 744) is **GRANTED**;
3. The defendant's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Docket Nos. 730 & 742) is **DENIED** and this action shall be **STRICKEN** from the active docket of the court; and
4. A certificate of appealability is **DENIED**.

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to the defendant and all counsel of record.

ENTER: This 17th day of June, 2014.

/s/ Glen E. Conrad
Chief United States District Judge