

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

DOUGLAS JAY RANKIN,)	Criminal Action No. 5:09CR00013-1
)	Civil Action No. 5:10CV80253
Petitioner,)	
)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
)	
UNITED STATES OF AMERICA,)	
)	By: B. WAUGH CRIGLER
Respondent.)	U.S. MAGISTRATE JUDGE

On May 20, 2010, Douglas Jay Rankin (“petitioner”) filed a petition to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (“petition”). The United States moved to dismiss, and on December 30, 2010, the case was referred to the undersigned under the authority of 28 U.S.C. § 636(b)(1)(B), to conduct an evidentiary hearing on petitioner’s claim that counsel failed to file a direct appeal despite being requested to do so and render to the presiding District Judge a report setting forth findings, conclusions of law and recommendations for the disposition of all of petitioner’s claims. For the reasons that follow, the undersigned will RECOMMEND that the presiding District Judge enter an Order DENYING petitioner’s motion to vacate his sentence and DISMISSING this action from the docket of the court.

FACTUAL BACKGROUND

On March 19, 2009, petitioner and his wife were indicted in a five-count indictment returned by the Grand Jury for the Western District of Virginia. Petitioner was charged in Count One with conspiring to distribute 500 grams or more of a mixture or substance containing

methamphetamine, in violation of 21 U.S.C. § 846. In Count Two he was charged with possessing with intent to distribute 500 grams or more of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), and 18 U.S.C. § 2. Count Three charged petitioner with possessing a firearm after having been convicted of a crime punishable by a term of imprisonment exceeding one year, in violation of 18 U.S.C. § 922(g)(1). Count Four charged him with possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1). The government moved for a \$5000,000.00 money judgment and for forfeiture of \$169,874.00 in cash, as well as certain real estate and other property it had seized. On May 15, 2009, the government filed an Information For Sentencing pursuant to 21 U.S.C. § 851. The Information charged that petitioner was subject to an enhanced punishment of a minimum mandatory provision of twenty years imprisonment because of a prior conviction of possession with intent to distribute cocaine in Augusta County, Virginia on August 8, 1994.

Petitioner entered into a plea agreement with the government. The plea agreement provided that he would plead guilty to Counts One and Four of the Indictment, and that the remaining counts against him would be dismissed on motion of the government. The government agreed to file motion under U.S.S.G. §5K1.1 (“5K Motion”) seeking a sixty-month reduction in his sentence based on petitioner’s substantial assistance. Petitioner stipulated that he was responsible for at least 500 grams but less than 1.5 kilograms of methamphetamine, and that he was subject to enhanced penalties under 21 U.S.C. § 851 (“851”) as the result of a 1994 state drug conviction. Petitioner agreed to waive his right to a direct appeal of his sentence or to file a collateral attack. The plea agreement acknowledged that Count One carried a mandatory minimum sentence of twenty years (240 months), and that Count Four carried a mandatory

minimum sentence of five years (60 months). The agreement provided that any sentence imposed under Count Four would run consecutive to any other sentence imposed.

On August 24, 2009, a Rule 11 hearing was held before a United States Magistrate Judge. At that time, petitioner entered a plea of guilty to Counts One and Four of the indictment. A Report recommending the acceptance of the guilty plea was entered. That Report subsequently was adopted by the presiding District Judge.

On December 8, 2009, a sentencing hearing was held before the presiding District Judge. The court granted the government's motion for substantial assistance and sentenced petitioner to 180 months for Count One and 60 months on Count Four. The two sentences were set to run consecutive, for a total sentence of 240 months.

On May 20, 2010, petitioner filed the instant petition to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255. He alleges that his retained counsel, Aaron L. Cook, provided ineffective assistance in the following ways: (1) failing to file a direct appeal despite being requested to do so; (2) failing to file any discovery motions; (3) failing to challenge the use of a prior conviction as a predicate for a statutory enhancement under 21 U.S.C. § 851; and (4) failing to challenge his sentence under the United States Sentencing Guidelines.

On October 13, 2010, the government moved to dismiss the petition. The presiding District Judge took the petition under advisement and referred the case to the undersigned to conduct proceedings on the claim that counsel failed to note an appeal despite being instructed to do so. Thereafter, the presiding District Judge amended the referral to include all claims raised by petitioner. The undersigned appointed Frederick T. Heblich, Jr., Esq. to represent petitioner, and on February 25, 2011, an evidentiary hearing was conducted.

As detailed in the opening statement presented by petitioner's counsel, the factual issue he seeks to resolve in these proceedings pertains to what occurred in a meeting between petitioner and his counsel shortly after the judgment in this criminal case was entered by the presiding District Judge and after sentence was imposed. Because the evidence was limited to that time frame, the undersigned directed the parties to file post-hearing briefs addressing all claims raised by petitioner.

Petitioner's post-hearing brief is rather laconic and essentially summarizes the claims he has asserted in addition to his initial claim that Cook failed to file an appeal, namely: (1) counsel failed to file discovery motions; (2) counsel failed to challenge the notice of enhancement on the ground that he did not receive active incarceration as a result of the conviction, thus rendering it ineligible as a predicate offense for a statutory enhancement under 21 U.S.C. § 851; and (3) counsel failed to argue for the application of a lower Guideline sentence as opposed to that set forth in the plea agreement and failing to preserve an appeal on that issue. While petitioner makes certain factual representations in support of those claims, no evidence was offered at the hearing in support of any of these assertions. (Petitioner's April 5, 2011 Response.)

The government's response is equally laconic and straightforward. First, it asserts Rankin's counsel requested and received discovery of the "entirety of the evidence in the possession of the United States." (United States' May 10, 2011 Response, p. 1.) Next, it asserts that the prior drug-related conviction was a felony, and that neither the statute nor the Guidelines require an active period of incarceration on the prior conviction in order to constitute a predicate offense. Finally, the government points out the axiomatic law, namely, that the statutory minimums control even where the Guidelines would allow for a lower sentence. Of course, the

government persists in its opposition to petitioner's contention that Cook failed to either counsel about or file an appeal as directed on the evidence offered at the hearing.

EVIDENCE PRESENTED

DOUGLAS JAY RANKIN

Douglas Ray Rankin ("Rankin") testified that he recalled Cook's visiting with him at the central Virginia Regional Jail ("CVRJ") in 2009, within a week after sentence had been imposed. While he could not recall all the papers Cook brought with him, petitioner remembered that among them were the forfeiture papers for him to sign. He also remembered receiving the formal Judgment in a Criminal case.

Petitioner stated that he and Cook had a conversation which ended with Cook's indicating that he would "stay with me" in case if anything should arise in the future that would benefit him. He revealed that the two discussed potential options under Rule 35. Rankin explained that there were not too many options left to him, and that he did not have a "whole lot of hope" for the future. Rankin further testified that he asked Cook whether he could appeal. While Rankin first recalled that Cook told him he was "not allowed" to appeal, he later explained that Cook actually informed him there were no grounds for appeal in light of the plea agreement and his plea of guilty.¹

Rankin testified that he could not remember whether he ever instructed Cook to appeal after they discussed the waiver of his right to appeal. Upon further reflection, petitioner stated that Cook "didn't say anything more about it." Rankin remembered something being said about "10 days," but he neither recalled the advice given by the sentencing judge during the sentencing colloquy nor Cook's informing him that he could appeal on his own.

¹ It is undisputed that the plea agreement provided that petitioner waived his right to appeal his sentence or collaterally attack either his conviction or his sentence.

Rankin expressed before this court the difficulty he still has accepting the fact that his sentence in this case was enhanced under 21 U.S.C. § 851 (“851”) by a prior conviction of a crime for which he did not receive incarceration. He believes he paid the penalty for that crime once and simply desires an opportunity to challenge whether the enhancement in this case amounts to being punished twice for the same offense.

On cross examination, Rankin reiterated that Cook informed him of the appeal waiver in the plea agreement. He also acknowledged that without the plea agreement, he faced 300 months on the two charges (240 months on the drug charge and 60 consecutive months on the gun charge), but that under the agreement he expected to receive a total of 240 months. He also admitted that he received “exactly what the plea agreement called for.”

Rankin further reiterated his chief complaint, namely the “851” enhancement. He recalled the sentencing judge’s discussion about it, but continued to espouse a failure to understand it. Petitioner, likewise, acknowledged that the sentencing judge informed him of his appeal rights, and that he never filed an appeal on his own and never asked the clerk to do so on his behalf. Finally, Rankin recalled that the post-sentencing meeting with Cook at the CVRJ lasted some fifteen to twenty minutes.

AARON L. COOK, ESQ.

Aaron L. Cook (“Cook”) testified that he has been practicing law for approximately 16 years both in State and federal court. He was retained to represent petitioner in March 2009, after petitioner had been indicted.²

² Petitioner’s wife also was charged in the same indictment. It came to light that a considerable factor in Rankin’s decisions to enter into a plea agreement was the favorable treatment the government would give his wife in return.

At first, Cook and Rankin “wrestled” with whether Rankin should or would cooperate with the government. Later, after the government filed the “851” notice, and after a “long meeting” with the government in which the defendant made proffers, the government offered a plea agreement with a recommendation of 300 months on Counts One and Four. Nevertheless, Cook explored whether there were factual and legal bases to challenge the “851” enhancement. Eventually, however, Cook’s research led him to the conclusion that no bases existed upon which the enhancement could be “kicked out.” He so informed Rankin.

Further negotiations produced an agreement in which the government agreed to a limited reduction from 300 months (240 and 60) to 240 months (180 and 60) in exchange for Rankin’s not challenging forfeiture and his disclosure of other evidence. The government also agreed to consider making a later motion to reduce sentence should one of the persons targeted in the investigation be charged and convicted. That never matured, and the government never exercised its discretion to move for a reduction in Rankin’s sentence.

Cook testified that petitioner’s sentence was consistent with the plea agreement, and that he received exactly what he “bargained for.” While it was his normal practice simply to send a letter to his clients enclosing the judgment order and explaining the client’s appeal rights, Cook stated that he had such a good relationship with petitioner that he (Cook) wanted to personally meet with his client.

Cook visited petitioner at CVRJ on December 15, 2009 for a period of between fifteen and twenty minutes. The purpose of the meeting was three-fold: to make sure Rankin understood the sentence; to provide him with a copy of the final judgment; and to discuss his appeal rights. According to Cook, he (Cook) raised the appeal issue and verbally explained to

Rankin what he (Cook) spelled out in his customary post-judgment letters to his clients, namely: (1) the client had waived his right to appeal; (2) if the client did appeal, he may suffer the consequences of the government moving to vacate the plea agreement; and (3) the client could ignore the consequences and appeal anyway within ten days of judgment. Cook specifically recalled telling Rankin that he believed “we got the best outcome and to file an appeal would be damaging.” Part of Cook’s reasoning centered on Rankin’s desire to limit his wife’s exposure to incarceration and to make sure she received the most favorable outcome possible. While Cook could not remember the exact words he used with Rankin, he specifically remembered discussing the propriety of the path taken in accepting a plea agreement, the favorable outcome this produced for Rankin’s wife and children, and the hope held out that the government later would move for a Rule 35 reduction.

Cook testified that, after discussing these matters with Rankin, he had no questions and never commented about or alluded to appealing. Cook made a note in his papers that Rankin was “sad but satisfied.” When Cook returned to his office after the visit, he filed a notice with the court indicating that he remained counsel of record and requested that he be notified should a Rule 35 motion be filed. Cook stated without hesitation that, despite the fact that financial arrangements for his handling an appeal would have needed to be settled later on, he would have noted an appeal for Rankin, anyway, had he been asked to do so. Cook offered that continued representation on the Rule 35 matter already was covered by the fee Rankin had paid.

On cross examination, Cook admitted that his testimony relating to the post-sentencing conversation with petitioner was based on his best recollection of the events together with his standard practice of covering the identical specific items reflected in his customary post-

sentencing letters sent to clients. Cook specifically recalled talking with Rankin about the appeal issues and the potential negative impact of an appeal. Cook denied, however, telling Rankin either: “You can’t appeal;” or “You are not allowed to appeal.” Cook acknowledged a pre-plea note to his file concerning Rankin’s understanding of and satisfaction with the plea agreement (Petitioner’s Hearing Exhibit 1) and reconfirmed the note to his file after his post-sentencing meeting with Rankin at CVRJ stating that Rankin was “sad but satisfied” (Petitioner’s Hearing Exhibit 2).

Much of the balance of Cook’s cross examination was a reiteration of the discussions with his client both before and after sentencing. Specifically, Cook could not recall much discussion about an appeal until the December meeting at CVRJ. He did recall talking with Rankin on August 14, 2009 specifically about the consequences of his breaching the plea agreement, emphasizing that if Rankin did so, he could face being re-sentenced.

In response to more a general or historical question posed by Rankin’s counsel, Cook stated that he could not recall ever filing an appeal for a client after the client had executed a waiver in a plea agreement. Nor could he recall whether the U.S. Attorney’s office ever had sought to enforce a waiver of appeal by moving for a new trial or for the court to re-sentence the defendant because of a breach of the plea agreement.

DISCUSSION AND APPLICABLE PRINCIPLES

Before setting forth the relevant principles, the undersigned is constrained to make several observations. First, petitioner adduced no evidence and presented no authority supporting his claim that the state drug conviction could not constitute a predicate offense for an “851”

enhancement. Rankin has failed to demonstrate either by the preponderance of the evidence or as a matter of law the validity of this claim.

Moreover, no authority was cited to support his claim that Cook was ineffective because he failed to argue and preserve on appeal that Rankin should have been sentenced according to the advisory Guideline range of 87 to 108 months, which was both below the statutory minimum and in derogation of his plea agreement. It is now axiomatic that courts have a limited ability to impose a sentence below the statutory minimum mandatory sentence set forth in the statute. *United States v. Hood*, 556 F.3d 226, 233 (2009); *United States v. Gonzales*, No. 05-4176, 2005 WL 2764749, at *2 (4th Cir. October 26, 2005). Here, too, the record fully establishes that Rankin knowingly and voluntarily entered into a plea agreement which provided for a sentence that, in some respects, called for a sentence below the statutory minimum on one count to offset the effects of the “851” enhancement. The agreement also contained a waiver of Rankin’s right to collaterally attack the sentence, while holding out the prospect that the government would later move for a further reduction based on post-sentencing substantial assistance. It is clear from the Rule 11 proceedings that Rankin’s waiver was both knowing and voluntary. *See United States v. Lemaster*, 403 F.3d 216, 220 (4th Cir. 2005) (holding that it is well-settled that “a criminal defendant may waive his right to attack his conviction and sentence collaterally, so long as the waiver is knowing and voluntary”). Therefore, apart from his claim that Cook was ineffective in failing to appeal, his claim related to Cook’s failure to press for a sentence according to the Guidelines, as opposed to the one for which he bargained, cannot hold water.

The undersigned also declines to accept as evidence in this case the competing facts by both sides only in their post-hearing briefs as they relate to petitioner’s discovery claim.

Moreover, Rankin waived his right to appeal his guilt on those charges by knowingly and voluntarily pleading guilty to the substantive charges, thus rendering moot any claim related to the sufficiency of discovery.³ This claim, therefore fails under the weight of the uncontested evidence in the case.

The evidence relating to the issue raised concerning an “851” predicate offense was adduced during Cook’s testimony, and it was not contradicted. He testified that he researched whether the enhancement charge could be “kicked out” and that rather extensive research disclosed nothing to support a challenge. He so advised his client, after which he and Rankin began negotiating a plea agreement. This evidence shows more diligence than neglect and falls short of establishing ineffective assistance of counsel relating to any advice given Rankin concerning the “851” predicate offense.

Therefore, these claims should be dismissed for lack of both *prima facie* factual and authoritative legal support. The remaining claims will be assessed under the general heading of ineffective assistance of counsel.

In that connection, criminal defendants have a Sixth Amendment right to “reasonably effective” legal assistance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish ineffective assistance of counsel, a defendant must first show that counsel’s representation fell below an objective standard of reasonableness, and second, that counsel’s defective performance prejudiced defendant. *Id.* at 688, 694. This same test is applicable to those situations where trial counsel is alleged to have been ineffective by failing to file a notice of appeal. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). To establish a Sixth Amendment violation based on counsel’s failure to appeal, a defendant must prove that counsel was ineffective and, but for that

³ It has been the experience of the court that the United States Attorney’s office customarily engages in open-file discovery.

ineffectiveness, an appeal would have been filed. *United States v. Witherspoon*, 231 F.3d 923, 926 (4th Cir. 2000) (citing *Flores-Ortega*, 528 U.S. 470). The defendant need not show a reasonable probability of success on appeal. *See Peguero v. United States*, 526 U.S. 23, 28 (1999).

Where a defendant instructs his attorney to file an appeal and counsel fails to do so, counsel's representation is *per se* ineffective. *Witherspoon*, 231 F.3d at 926; *accord Flores-Ortega*, 528 U.S. at 477 (“We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.”) However, where the defendant neither instructs his attorney to note an appeal nor explicitly states that he does not wish to appeal, counsel's deficiency in failing to appeal is determined by asking whether counsel consulted with defendant about an appeal. *See Flores-Ortega*, 528 U.S. at 478. Consult means “advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes.” *Id.* When counsel has consulted with the defendant, counsel performs in a professionally unreasonable manner only by failing to follow defendant's express instructions with respect to an appeal. *Id.* If counsel has not consulted with defendant, the court must determine whether counsel's failure to consult with the defendant itself constitutes deficient performance. *Id.*

Not every failure to consult is constitutionally ineffective. *Id.* at 479. Rather, counsel only has a duty to consult where there is reason to think either (1) that a rational defendant would want to appeal or (2) that the defendant reasonably demonstrated to counsel that he was interested in appealing. *Id.* at 480. While not dispositive, “a highly relevant factor in this

inquiry will be whether the conviction follows a trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings.” *Id.* Nonetheless, and despite the fact that a defendant pleaded guilty, the court also will consider whether the defendant received the sentence bargained for as part of the plea and whether the plea agreement waived his right to appeal. *Id.*

FINDINGS AND CONCLUSIONS

It is clear from Rankin’s own testimony at the plenary hearing that the gravamen of this action is the enhanced incarceration he received in this case under 21 U.S.C § 851. The enhancement was the result of a State court drug-related conviction some twenty years old for which no incarceration was imposed. Rankin admitted commission of the offense when he appeared before the sentencing District Judge, and he has not since contested the existence of this prior conviction. His complaint is premised on his belief that it is not right to require him now to serve a period of incarceration for a conviction that is twenty years old and for which he received no incarceration. He simply desires an opportunity to present that grievance to the Court of Appeals.

There is no dispute in the evidence that considerable efforts were exerted by both Cook and Rankin before reaching the threshold decision to begin negotiations for a plea agreement with the government. When that decision was made, Rankin know full well that the government would seek the “851” enhancement. At no time in these proceedings has Rankin ever given the undersigned the impression that he was dissatisfied with Cook’s representation, even during those last minutes when he met with Cook at the CVRJ after sentencing. The preponderance of

the evidence, if not the clear and convincing evidence, demonstrates to the undersigned that Rankin received not only the precise benefits for which he bargained in the plea agreement, but even more than what the terms of that agreement could address. While he received the precise sentence called for in the agreement, a sentence which accounted for the “851” enhancement by a concurrent reduction on the substantive drug charge, he also achieved an unstated purpose. He was able to minimize his wife’s exposure to a lengthy prison sentence, and thus benefit both his wife and children by his accepting responsibility and abandoning any opposition to forfeiture as called for in the plea agreement.

Here, the hearing evidence focused solely on the contested issue of whether Cook was ineffective by not appealing on his client’s behalf. While Rankin testified that Cook told him he could not appeal and never informed him he could appeal on his own, the undersigned does not believe that Cook’s advice to Rankin took that form. Rankin never denied the advice of rights offered at sentencing by the presiding District Judge. Moreover, he suffered almost an entire failure of recollection concerning the events surrounding the post-sentencing meeting with Cook at CVRJ. By the same token, he was aware that Cook had offered to “stick with” him if anything developed in the future in relation to his providing post-sentencing assistance to the government. Nothing in petitioner’s testimony tied his future assistance to the government to his filing an appeal. In fact each was antithetical to the other, for an appeal could not be construed as assisting the government. Finally, Rankin did not testify or offer any evidence that he instructed Cook to file an appeal.

Cook’s testimony, on the other hand, painted a more believable picture of the post-sentencing events. These events were the product of a good relationship between an attorney and

his client, which the undersigned finds to have existed at the relevant time. It was because of this relationship that Cook desired to meet personally with his client rather than sending the standard post-judgment letter with its customary advice of rights. In addition, the prospect that Rankin could provide meaningful assistance to the government and receive the benefit of a post-sentencing motion precipitated Cook's remaining counsel of record.

The undersigned accepts Cook's testimony to the effect that he was the one who addressed the issue of appeal. The undersigned finds that he discussed both the effect of Rankin's waiver of his right to appeal and the consequences Rankin could face should he decide to breach his plea agreement waiver by appealing. Cook punctuated his recollection of the discussions with his client by revealing how satisfied Rankin was about his decision because it both protected his wife and children and gave him some hope for a future sentence reduction. The undersigned believes that Cook's notes to the file to the effect that the defendant had "no questions" and was "sad but satisfied" both accurately summarize it all, and corroborate Cook's testimony. Moreover, Cook's notice to the clerk that he would remain counsel of record for any post-sentencing motions gives credence to his testimony that, had Rankin wished to appeal, he would have filed the appeal notice with the understanding that financial arrangements relating to his actual representation on the appeal could be made later, after the appeal was once preserved.

From this, the undersigned concludes that Cook both counseled Rankin about his appellate rights and did not tell Rankin he could not file an appeal. There is no evidence that Rankin instructed Cook to appeal and that Cook failed to follow that instruction. Cook's post-sentencing conduct did not constitute ineffective assistance of counsel.

RECOMMENDATION

For the forgoing reasons, the undersigned hereby RECOMMENDS that an Order enter DENYING petitioner’s motion to vacate his sentence and DISMISSING this action from the docket of the court.

The Clerk is directed to immediately transmit the record in this case to Honorable Glen E. Conrad. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within (14) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

The Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: _____
U. S. Magistrate Judge

Date