

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

JERMAINE M. CALLUM,)	CASE NO. 7:06CV00472
)	
Petitioner,)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	By: B. WAUGH CRIGLER U.S. MAGISTRATE JUDGE

On August 3, 2006, Jermaine M. Callum (“petitioner”) filed a Petition to Vacate, Set Aside or Correct his Federal Sentence (“petition”) under 28 U.S.C. § 2255. The United States moved to dismiss, and on February 20, 2007, the presiding District Judge denied the motion and referred the case to the undersigned under the authority of 28 U.S.C. § 636(b)(1)(B) to conduct an evidentiary hearing and render to the presiding District Judge a report setting forth findings, conclusions and recommendations for the disposition of petitioner’s claims. For the reasons that follow, the undersigned will RECOMMEND that the presiding District Judge enter an Order, DENYING the petition, GRANTING judgement to the respondent, and DISMISSING this action from the docket of the court.

FACTUAL BACKGROUND

On July 15, 2004, petitioner was indicted by the Grand Jury for the Western District of Virginia. Counts One and Two charged petitioner with distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1). *U.S. v. Jermaine M. Callum*, Criminal No. 3:04CR00048. Count Three charged petitioner with intimidation or force against a witness in violation of 18 U.S.C. § 1512(b)(1), and Count Six charged petitioner with criminal contempt, in violation of 18 U.S.C. § 402. On February 22, 2005 petitioner declined to plead guilty to Counts One and Two before the Honorable Judge Norman K. Moon, despite having initialing and signing a Plea Agreement (“First

Plea Agreement”). On May 12, 2005, petitioner plead guilty to Counts One, Two, Three, and Six of the First Superseding Indictment, in accordance with a second written Plea Agreement (“Second Plea Agreement”). In the Second Plea Agreement, the government agreed to recommend a two-level sentencing reduction for acceptance of responsibility, as well as to dismiss the remaining counts on the First Superseding Indictment at the time of sentencing. (Petr.’s Ex. 2 at § 3.) In exchange, petitioner waived his right to appeal sentencing guideline issues, as well as the right to collaterally attack the judgement and sentence imposed by the court, “excepting appeal...based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the [petitioner] at the time of [petitioner’s] guilty plea.” (*Id.* at § 6.)

On August 2, 2005, petitioner was sentenced to 120 months imprisonment on Counts One, Two, and Three, and 6 months imprisonment as to Count Six, all to run concurrently. Petitioner did not appeal his conviction or sentence. At all relevant times, petitioner was represented by assigned counsel, Pamela R. Johnson, Esq. (“Johnson”).

Petitioner now asserts that his attorney was ineffective for failing to file a notice of appeal, and more specifically, that even though he asked his attorney to file a notice of appeal, she failed to do so. On March 14, 2007, the undersigned appointed counsel to represent petitioner under Rule 8, Rules Governing Section 2255 Proceedings, and, on May 22, 2007, an evidentiary hearing was held before the undersigned on the claim referred by Judge Moon.

EVIDENCE PRESENTED

In addition to the record of criminal proceedings below which are judicially noticed, the undersigned heard testimony presented by both petitioner and Johnson. That evidence is summarized below.

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Petitioner testified that, in January, 2005, just a week or two before his trial date, he and trial counsel discussed the weight of the government's evidence against him, and, as a result, she sought permission to discuss the potential of a plea. Johnson further recommended that the trial be postponed to further the negotiation of a plea, which postponement occurred.

While there was a period in January and early February when petitioner "did not know what was happening," he was informed by Johnson that the government was in the process of offering a Plea Agreement. That agreement was faxed to petitioner on February 18, 2005. (Petr.'s Ex. 1.) According to petitioner, the original was presented to him just ten minutes prior to the case being called on February 22, 2005. Again, petitioner declined to plead and the case was continued.

Later, in March, 2005, petitioner received from counsel a copy of a third Plea Agreement ("Third Plea Agreement").¹ (Petr.'s Ex. 2.) Johnson reviewed it with petitioner, whereupon he initialed at the bottom of each page and signed the final page. Petitioner testified that, during this review, he and Johnson discussed all six counts to which he was pleading guilty, and the penalties for those counts. Petitioner told the undersigned that upon Johnson's advice that the Plea Agreement was in his best interest because he "could never win the case," he signed the Third Plea Agreement. Petitioner's plea hearing under F. R. Cr. Pr. 11, was conducted on May 12, 2005. The transcript of that proceeding is in the record. Sentencing was deferred until August 2, 2005, and, during the interim, a presentence report was prepared.

While petitioner agreed to the provisions recommending reductions in the sentence levels, as well as to the waivers of his rights to appeal or collaterally attack the judgement or sentence, he

¹ The Third Plea Agreement was substantially similar to the Second Plea Agreement, except that petitioner was offered the opportunity to receive a reduction in sentence under Rule 35, F.R.Cr.Pr., for substantial assistance.

had strong objections to potential sentencing enhancement points resulting from for his past criminal conduct. Johnson presented those objections, thus preserving them for argument at sentencing.

On August 2, 2005 petitioner was sentenced. Petitioner testified that he was dissatisfied with the sentence, and that he desired to appeal the sentence, which he communicated to Johnson in the courthouse. According to petitioner, Johnson advised she would contact him “in a couple days.” According to petitioner, later that day he asked his girlfriend to type a letter to Johnson expressing his desire to appeal, which he signed and forwarded to his counsel on August 4, 2005.² (Petr.’s Ex. 3.) According to petitioner, he then talked with Johnson, who advised him he “could not appeal” as he had “waived the right” in his Plea Agreement. Moreover, petitioner related that, on the night of August 4, 2005, he telephoned Johnson from the jail and left a message expressing his desire to “appeal.”

Petitioner also testified that he received a letter from Johnson, dated August 9, 2005, which references receiving “your message requesting a motion to reconsider your sentence.” (Petr.’s Ex. 4, ¶ 1.) Petitioner testified that he understood Johnson’s statement that “[he] specifically gave up...[his] right to appeal in certain cases” to mean that he could not appeal at all. (*Id.* at ¶ 1) In addition to his letter to Johnson, petitioner stated that he handwrote a letter to the presiding judge, dated August 18, 2005, expressing dissatisfaction with his sentence, but not expressly mentioning anything about an opportunity to appeal. (Petr.’s Ex. 5.) The next contact between Johnson and

² The letter expresses petitioner’s dissatisfaction with the sentence, details his satisfaction with counsel’s objections to the presentence report, demonstrates second thoughts about his rejection of the First Plea Agreement, but accuses Johnson of ineffectiveness regarding the development of identification evidence and accuses the government of retaliation for refusing to provide substantial assistance before pleading, and reminds Johnson that the Plea Agreement allowed an appeal for “prosecutor misconduct, and vindictive prosecution.” (Petr.’s Ex. 3, at 1-2.)

petitioner was a September 19, 2005 letter where petitioner requested transcripts. (Petr.'s Ex. 6.) However, by then, it was too late to appeal.

Cross examination first focused on the typewritten letter from petitioner to Johnson dated August 4, 2005. (Petr.'s Ex. 5.) He acknowledged that, while he requested Johnson to visit him "in prison," had the letter had been written on the date reflected, he could not have been "in prison" because he remained detained in jail at the Charlottesville-Albemarle County Regional Jail. He further acknowledged that the letter shows a copy being sent to "JC/TS." (*Id.* at 2.) While petitioner identified "TS" as Teka Saylor, the mother of his child, he had no explanation for why the letter would show a copy going to himself, "JC," as well as to Saylor. Petitioner admitted that he could not produce the original or any handwritten version from which he claimed the letter was typed by another person.

Moreover, petitioner eventually acknowledged that while he complained in this letter that Johnson was ineffective for failing to investigate the author of a threatening letter sent to a witness for which he was the subject of Count Three, at the time the letter was written, he already had admitted to threatening the witness. He also acknowledged that while his jail-drafted letter to Judge Moon on August 18, 2005 was handwritten, the purported August 4, 2005 letter to Johnson was typed. (Compare Petr.'s Exs. 3 and 5.)

Petitioner further identified Government's Exhibit 1 as a copy of his fully executed Third Plea Agreement, and conceded that the marks on his copy of this document probably were placed there another inmate serving as his jailhouse lawyer after he had been transferred to the Bureau of Prisons. (See Govt.'s Ex. 1, § 6.) He denied Johnson explained his appeal rights, though he admitted she told him he had no appeal rights under the Third Plea Agreement. He further specifically remembered striking any reference to future 5(k) motions, because he never intended

to cooperate with the government out of concerns about reprisals in prison should inmates learn he had cooperated. Petitioner failed to recall any explanations relating to waiver of appeals rights offered by the AUSA or the court at sentencing. Through all this, however, petitioner held to his testimony that he verbally requested Johnson to appeal in the courthouse immediately after sentencing but before being returned to the local jail.

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Johnson, a licensed Virginia attorney, was appointed on July 30, 2004 to represent the petitioner-defendant in the trial court case. She remembered that, as she does with every Plea Agreement, she discussed the provisions of the First Plea Agreement with petitioner in person. Likewise, she also went over the Third Plea Agreement, which had eliminated any provisions calling for petitioner's cooperation with or assistance to the government. Johnson recalled that petitioner feared repercussions in prison if the agreement reflected any cooperation.

Johnson also recalled discussions about petitioner's "giving up" his appeal rights. She knew how important this provision was because a number of her clients "don't understand." As a result of that common lack of understanding, she never fails to have such discussion with her clients, especially since most develop thoughts of appealing after sentence is imposed.

Johnson recalled "many discussions" with petitioner over the course of her representation, and remembered he would "read through" the proposal agreements "pretty carefully." She also remembered a "very brief" meeting with petitioner in the lower holding area of the courthouse after sentencing. He was "not happy" with the sentence because the sentence was longer than he desired. She denied receiving any verbal request from petitioner to appeal at that time, for had he done so, she would have noted an appeal despite the provisions of the Third Plea Agreement waiving his appellate rights.

Johnson testified that, following sentencing, she received many phone messages from petitioner, including one in which he expressly sought to discuss having the court “reconsider” his sentence. However, petitioner never asked her “to appeal.” Johnson responded to his message by letter dated August 9, 2005. (Petr.’s Ex. 4.) She testified that, the letter was intended to explain or counsel petitioner that he had no grounds for a motion to reconsider and to remind him that he waived his right to appeal according to Paragraph 6 of the Third Plea Agreement, which she quoted. (*Id.* at ¶ 1.) Johnson denied ever receiving petitioner’s letter of August 4, 2005, for had she received it, she would have honored his request, no matter how frivolous the appeal would be. (Petr.’s Ex. 3.) She also testified that had petitioner verbally requested an appeal before she wrote the letter of August 9, 2005, the letter would have referenced such a request and would not have been couched in the terms seeking reconsideration by the sentencing judge.

Moreover, Johnson testified that the very first time she had seen Petitioner’s Exhibit 3 was when the AUSA in the instant case forwarded it to her after this action was filed. She stated that she never has experienced difficulty receiving “jail mail,” inferring that had the letter been sent from the Charlottesville jail, she would have received it.

Johnson also related that quite a number of events occurred between the original offer of a plea by the government and petitioner’s later entry of a plea. After petitioner had declined the first offer, but before his second trial date, the indictment was superseded. The new indictment added a charge of witness tampering.³ The superseding indictment followed on the heels of events before the court in which he had been ordered to provide a handwriting exemplar, but tore up the sample before delivering it to the supervising agents.

³*United States v. Callum*, Crim. No. 3:04CR00048, Dkt. No. 52 (April 6, 2005).

On cross examination, Johnson acknowledged that she did not keep a log of every contact she had with petitioner, despite the fact that the log was designed to reflect the time spent on the case. She had no record of any contact from January 18, 2005 to February 22, 2005, nor could she recall any. While she “definitely remembered” petitioner not asking her to appeal while still in the courthouse after sentencing, she had no recollection of whether she promised petitioner to see him at some later time at the jail.

Johnson further testified that while her notes reflected a ten minute telephone call from petitioner on August 16, 2005, she did not recall the event. Moreover, she acknowledged that those notes do not reflect any work on the August 9, 2005 when she wrote the letter to petitioner. (Petr.’s Ex. 4.) She further related that her September 19, 2005 letter to petitioner likely was precipitated by a phone call from him after he was imprisoned in Texas. She testified that, at that time, she had no idea why he wanted a transcript, but nevertheless responded with information about the process of obtaining such and the costs thereof. (Govt.’s Ex. 6.)

On further cross, Johnson revealed she never had appealed a case when the defendant waived appeal under a plea agreement. In her experience, she has only had one client ask, and that occurred some period of time after petitioner was sentenced. Johnson stated that she knew defendants could pursue an appeal even if frivolous or in derogation of his Plea Agreement, noting, however, the potential consequences on how the government perceived a defendant’s acceptance of responsibility or honoring the terms of the agreement. According to Johnson petitioner never asked, and she never counseled him about these matters or any matters relating to post-conviction relief. Notwithstanding, Johnson recalled telling petitioner that he could file an appeal, as did the District Judge at sentencing.

APPLICABLE LAW

Ineffective Assistance of Counsel Standard

Where the representation of defense trial counsel in a criminal case falls below objective standards of reasonableness, and this deficient performance has prejudiced the defendant, the defendant's Sixth Amendment right to effective assistance of counsel has been violated. *Strickland v. Washington*, 466 U.S. 668 (1984). While that standard applies to cases where, as here, the former defendant, now the petitioner, claims his trial counsel failed to file a notice of appeal, though, in applying the standard, the court must scrutinize counsel's conduct as of the time it occurred with a high degree of deference. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

Counsel's conduct falls below the standard where he/she ignores specific instructions to file an appeal. *Flores-Ortega*, 528 U.S. at 477. By the same token, no defendant could complain when no appeal is taken because the defendant has so instructed trial counsel. *Id.* However, where it is unclear that the defendant clearly communicated a desire to appeal, the question becomes "whether counsel in fact consulted with the defendant about an appeal." *Flores-Ortega*, 528 U.S. at 478. The term "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.* If counsel does so consult, then his/her performance cannot be considered deficient, unless, after consultation, counsel fails to follow the client's instructions regarding an appeal. *Id.* However, if counsel does not so consult, the court then must determine whether such failure, itself, constitutes deficient performance. *Id.*

There is no bright line or per se rule in answering this inquiry. *Id.* Generally, however, there is a constitutional duty to consult about an appeal when "there is reason to think either (1) that a rational defendant would want an appeal..., or (2) that this particular defendant reasonably demonstrated to counsel that he[/she] was interested in appealing." *Id.* at 480 (quoted and applied

in *U.S. v. Witherspoon*, 231 F.3d 923, 926 (4th Cir. 2000)).⁴ The court must examine counsel’s actions based upon all information which trial counsel knew or should have known at the time, and while reasonable strategic choices by counsel ordinarily would be afforded some deference, failing to consult about an appeal “cannot be [considered] a strategic choice.” *Id.* at 480-481.

Ordinarily under *Strickland*, when the court determines that the lawyer’s performance constitutionally is deficient, as a result of which there has been an unfair judicial review, the assessment turns to whether the defendant has shown that he/she was prejudiced by such deficient performance. *Id.* Where the claim is premised on alleged deficient performance in failing to perfect an appeal, however, the defendant is prejudiced by a forfeiture of the appellate process altogether, not simply a fair judicial review. *Flores-Ortega*, 528 U.S. 470, 481. Nevertheless, prejudice is not presumed, and the defendant-petitioner still must show “a reasonable probability that, but for counsel’s deficient failure to consult with him/[her] about an appeal, he/[she] would have timely appealed.” *Id.* at 484.⁵

FINDINGS AND CONCLUSIONS

From the evidence presented at the plenary hearing and the record as a whole, the undersigned finds as follows:

1. Petitioner has failed to prove by a preponderance of the evidence that he, in fact, asked Johnson to appeal, either immediately after sentencing or at a later time.

⁴ The Fourth Circuit Court of Appeals has adopted the *Flores-Ortega* standard for a petitioner seeking to establish a Sixth Amendment violation based on counsel’s failure to appeal. *U.S. v. Witherspoon*, 231 F.3d 923, 926 (4th Cir. 2000).

⁵ Just like assessing what counsel knew during the relevant time frame, the undersigned believes the court should assess the probability of whether the defendant-petitioner likely would have appealed based on what he knew at the time rather than by the use of 20/20 hindsight.

The undersigned does not believe that, upon his return to the jail after sentencing on August 4, 2005, he caused letter to be typed and sent to Johnson. (Petr.'s Ex. 5.) Neither the original nor the purported handwritten version from which it allegedly was typed by petitioner's girlfriend was produced. Moreover, there are certain earmarks, particularly its style, vocabulary and scope of content which raise an inference that this document was produced by a person with considerable experience in the post-conviction process, such as a jailhouse lawyer. Then, there is the fact that a copy is being shown sent to petitioner and his girlfriend which tends to corroborate such inference. The undersigned cannot conclude that this letter was written or sent as petitioner described. As a result, a pall is placed on the balance of the petitioner's other testimony touching on whether he instructed Johnson to appeal, especially his alleged request immediately after he was sentenced while still in the courthouse.

By the same token, the undersigned finds that petitioner and Johnson did have discussions about other aspects of his case as is evidenced by Johnson's letter of August 9, 2005 and his subsequent handwritten letter to the presiding judge dated August 18, 2005. (Petr.'s Exs. 4, 5.) Nevertheless, the undersigned does not find that petitioner instructed Johnson to appeal. A "motion to reconsider" is addressed to the most recent decision-maker, whereas an "appeal" asks other decision-makers to review the most recent. These qualitatively are different pleadings, and the undersigned declines to place the burden on Johnson to somehow have construed petitioner's request as one to note an appeal. Had he given such instructions, the great weight of the evidence demonstrates that Johnson would have followed them irrespective of other consequences petitioner might have suffered under the Plea Agreement upon filing a notice of appeal.

2. Petitioner received reasonable and effective counsel once sentenced.

Few people, whether convicted felons or not, like to receive advice from counsel they do

not want to hear. However, providing unpalatable advice is a far cry from providing ineffective assistance, especially under the circumstances of this case.

The great weight of the evidence demonstrates that petitioner had significant contact with Johnson between the time when the government first considered offering any plea agreement in January, 2005, and when he signed the final version and, then, entered his plea on May 12, 2005. Even though the voluntariness of the plea is not in issue here, the point here is that petitioner was aware of each term of the agreement, had taken the position that he would not agree to some proffered terms, such as providing substantial assistance, acutely was aware that his conduct while awaiting trial had increased his exposure under the superseding indictment and knew the rights he was and was not waiving in the agreement. He confirmed this during the Rule 11 proceedings. Once sentenced, the court once more informed petitioner of his right to appeal, as well as the risk he ran of violating his Plea Agreement should he appeal. While the undersigned does not find he instructed Johnson to appeal, both did have communication after sentencing which included petitioner's receipt of Johnson's August 9, 2005 letter further counseling petitioner. (Petr.'s Ex. 4.)

The undersigned finds that petitioner received reasonable and effective counsel to the extent that he was aware of his appellate rights and, had he expressed a desire to appeal or given instructions to do so, his desire or instructions would have been carried out.

RECOMMENDATION

For the foregoing reasons, the undersigned hereby **RECOMMENDS** that an Order enter **DENYING** petitioner's motion to vacate his sentence, **GRANTING** judgement to the respondent, and **DISMISSING** this action from the docket of the court.

The Clerk is directed to immediately transmit the record in this case to the presiding District Judge. 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 ten (10) 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