

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION**

GREGORY SMYTH,)	
Petitioner,)	
)	Criminal Action No. 3:07-cr-00010
v.)	
)	By: Hon. Michael F. Urbanski
UNITED STATES OF AMERICA,)	United States District Judge
Respondent.)	

MEMORANDUM OPINION

Gregory Smyth (“Greg Smyth”) filed this motion to vacate, set aside, or correct his conviction and sentence pursuant to 28 U.S.C. § 2255. Greg Smyth challenges his conviction and 37 month sentence for conspiracy to commit wire fraud, and argues: (1) his court appointed attorney provided ineffective counsel by failing to advise the court of his mental incapacity to represent himself; (2) the court failed to conduct a proper hearing under Faretta v. California, 422 U.S. 806 (1975), before it allowed him to represent himself; and (3) the court erred in allowing him to enter a guilty plea due to his mental incompetence. At the evidentiary hearing held on March 30, 2011, Greg Smyth raised a fourth argument: (4) that an attorney for the Securities and Exchange Commission improperly removed a question and answer from the transcript of a deposition undertaken pursuant to a SEC investigatory subpoena.

At the evidentiary hearing, Greg Smyth asked to voluntarily withdraw his § 2255 motion and to dismiss his § 2255 claim.¹ As Greg Smyth’s four claims fail on the merits, the court agrees and **GRANTS** Greg Smyth’s oral motion to dismiss (Dkt # 507).

¹ Greg Smyth stated that he was housed at the Los Angeles Metropolitan Detention Center and wanted to return to a Bureau of Prisons facility. The court notes that Greg Smyth was temporarily housed at the Los Angeles facility because his permanent BOP assignment did not have video conference capabilities necessary for the evidentiary hearing. Out of an abundance of caution concerning Greg Smyth’s motivation for his oral motion, the court took his

I.

Between 1998 and 2001, Terry Dowdell (“Dowdell”) and others operated a Ponzi scheme under the auspices of the Vavasseur Corporation (“Vavasseur”), a Bahamian entity created by Dowdell in 1998. The SEC began investigating Vavasseur and Dowdell in 2001, and the FBI later joined the investigation. On November 19, 2001, the court issued a temporary restraining order freezing Dowdell’s assets. After the order was entered, Dowdell persuaded British co-conspirators to wire transfer to the United States \$850,000, which Greg Smyth and his brother Mark received in California. At Dowdell’s direction, Mark and Greg Smyth allocated \$350,000 to Dowdell and his family and kept the remaining \$500,000 for their own benefit.

On June 4, 2002, Dowdell admitted that Vavasseur was a fraudulent scheme, which brought in more than \$70 million from over 60 worldwide investors and allowed him to distribute millions to business associates, family members, and friends. On July 22, 2002, Fred Heblich, Dowdell’s attorney, asked the Smyths to return the \$500,000 they received from Vavasseur. On August 6, 2002, Greg Smyth faxed a letter to Heblich in which he explained that the money was a loan between old friends to provide seed capital for his company and that it would be repaid.² On November 15, 2002, Mark Smyth provided Dowdell with a false written accounting as to how the Smyths had used the money. Greg Smyth later testified to the inaccuracy of the accounting statement, stating that it “was not intended to be a truthful document.” (Govt’s Resp. to § 2255 Mot., hereinafter “Govt. Resp.,” Dkt. # 470 at 6, Ex. 4 at 112.)

oral motion to dismiss under advisement and proceeded to hear evidence on the § 2255 claims. On the day after the evidentiary hearing, the court entered an Order directing the BOP to transport Smyth back to his assigned BOP facility. To date, Smyth has not withdrawn his oral motion to dismiss his § 2255 motion.

² Although Greg Smyth’s letter is dated August 2, 2005, the accompanying fax cover sheet is dated August 6, 2002. It appears from the text of the letter and the evidence that 2002 is the correct year.

On February 28, 2007, a federal grand jury indicted Greg and Mark Smyth and several others on a variety of charges stemming from the SEC and FBI investigation. The grand jury returned a Superseding Indictment on April 17, 2007 that charged Greg Smyth and others with conspiracy to commit wire fraud in violation of 18 U.S.C. §§ 1343 and 1371.

The trial of Greg Smyth and Mary Dowdell began on November 26, 2007. Just before trial commenced, Greg Smyth, who at one time had been a practicing lawyer, appeared in chambers and asked the court if he could serve as counsel, along with his court-appointed attorney, at trial. (Govt. Response, Dkt. # 470, Ex. 6 at 2.) The court responded as follows:

I don't consider this a clear and unequivocal motion to proceed pro se. You're asking to proceed with a co-counsel and I'm not going to permit that. You have no constitutional right to do that. You have a right to represent yourself but you don't have any right to have a second chair counsel and be co-counsel with someone else. Based on what I have before me, I'm going to deny that motion.

Id. The following exchange ensued:

Defendant Smyth: Your Honor, I had hoped to participate as two lawyers from the same firm. I'm not at all suggesting that I have experience in trials as even remotely comparable.

The Court: That's beside the point. Nobody does.

Defendant Smyth: I would be incompetent representing myself, Your Honor.

The Court: Like I say, I can only allow you to represent yourself when I've got a clear and unequivocal waiver of counsel by you. Short of that, I'll deny the motion.

Id. at 2-3. Jury selection then proceeded, during which Greg Smyth was represented by court-appointed trial counsel.

Following jury selection, Greg Smyth's trial counsel informed the court that Greg Smyth had decided to proceed pro se. Id. at 4. The trial transcript reads as follows:

Defendant Smyth: I'm prepared to go just with myself and measure up. I don't want [counsel] to be – the Court has already denied allowing her to sit second chair and coach and I'm not asking for that. I would love it if she would be able to be here to consult, but I understand the Court's position. I feel strongly that this is my responsibility.

We have had a great deal of difficulty getting [counsel] up to speed on the case because of the distance involved and the time I've been able to spend with her. I am more familiar with the case than [counsel] and much like Mr. Levine, a member of the Security and Exchange Commission has been brought on for the Justice Department, I feel strongly that I'd be better off to represent myself and present my case more effectively, shooting from the hip when evidence is occurring.

I realize that this puts the Court in a lousy position. I don't expect any quarter from the Court as an inexperienced attorney. I don't expect I'm setting myself up for an appeal. I realize that I will be at a disadvantage and I'm willing to accept that fact and work accordingly in that regard.

The Court: Does the government have anything to say?

Ms. Hudson: Your Honor, ordinarily, I think this matter really would be one outside the government's view really and without a stake in it. My concern is that Mr. Smyth, in chambers, earlier this morning, made a statement to the Court in the context of his motion – my concern is that Mr. Smyth made a motion before the Court in chambers and during the course of that discussion, he stated to the Court that he was, in fact, incompetent to represent himself. I'm concerned that with that backdrop and that statement that there is an issue here bigger than one that would have been presented if he had taken this position from the beginning.

Defendant Smyth: Your Honor, I did, in fact, say that, and I have considered the entirety. I was incompetent for running voir dire, that is true. I also am not aware of how to examine myself when it comes to that. Those are the things I was thinking of. I'm still not completely square on how I would present evidence myself as representing myself, whether I could object or how I would ask myself questions. But I trust I will find out prior to that occurring.

(Govt. Response, Dkt. # 470, Ex. 6 at 4-6.)

The court then asked Greg Smyth a series of questions aimed at determining whether his waiver of counsel was knowing and voluntary. Smyth answered that he understood the charge against him; that he understood the penalty he faced if convicted; that he understood the advisory Sentencing Guidelines could affect his sentence; that he understood the court could offer him no legal advice; and that he had been a practicing attorney and was generally familiar with the Federal Rules of Evidence and Criminal Procedure. Id. at 6-9. The court then told Greg Smyth that it was unwise to represent himself and that a skilled lawyer in the practice of criminal law could provide better representation. Id. at 9. The court added: “I strongly urge you not to try to represent yourself.” Id. at 9. Greg Smyth, nonetheless, persisted in his request to proceed pro se. The court granted his request, but insisted that Greg Smyth’s lawyer remain in the courtroom during the trial as standby counsel. Id. at 11.

On the third day of trial, November 28, 2007, Greg Smyth changed his plea to guilty after talking to his brother Mark on the telephone. Greg Smyth had the assistance of counsel during plea discussions with the United States, and he testified that he had ample time to consult with his counsel during these negotiations. Although Greg Smyth entered his guilty plea without a formal plea agreement with the United States, counsel for the United States outlined for the court the discussion between the parties and the understandings they reached. The court engaged in an exhaustive guilty plea litany with Greg Smyth, including questions about his use of or addiction to drugs or alcohol, treatment by a psychiatrist and how he felt at the time of the plea. At no time did Greg Smyth or his counsel raise any concern about his mental state. (See Guilty Plea Tr., Dkt. # 421.)

Likewise, Greg Smyth raised no issue about any mental infirmity at sentencing. Greg Smyth was sentenced to 37 months incarceration and ordered to pay \$775,030.00 in restitution

on March 3, 2008. The Fourth Circuit affirmed Greg Smyth's judgment on January 5, 2009. On May 7, 2010, Greg Smyth filed a § 2255 petition challenging his conviction and sentence. An evidentiary hearing was held on March 30, 2011.

II.

Greg Smyth's § 2255 motion raises three claims: (1) that his court appointed attorney provided ineffective assistance of counsel by failing to advise the court of Greg Smyth's mental incapacity to represent himself; (2) that the court failed to conduct a proper hearing under Faretta before it allowed him to represent himself; and (3) that the court erred in allowing him to enter a guilty plea because of his mental incompetence. Additionally, Greg Smyth raised a fourth claim at the evidentiary hearing: (4) that an attorney for the SEC improperly removed a question and answer from the transcript of a deposition taken pursuant to a SEC investigatory subpoena. As set forth below, none of these claims has merit.

A.

Greg Smyth first contends that his trial counsel provided ineffective assistance because she failed to advise the court of his mental incapacity to represent himself. Greg Smyth asserts that his counsel was aware that he suffered from attention deficit disorder, and that she failed to fulfill her obligation of informing the court of his mental condition.

Criminal defendants have a Sixth Amendment right to "reasonably effective" legal assistance. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). To establish ineffective assistance of counsel, a defendant must show (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that counsel's defective performance prejudiced the defendant, and the errors were so serious as to deprive the defendant of a fair trial. Id. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting

effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Id. at 689. As such, there is a “strong presumption that counsel’s performance falls within a wide range of reasonable professional assistance; . . .” Id.

To establish prejudice, a defendant must demonstrate 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 reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. Courts cannot grant relief “solely because the outcome would have been different absent counsel’s deficient performance.” Sexton v. French, 163 F.3d 874, 882 (4th Cir. 1998) (citing Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993)). Rather, relief may be granted under the second prong of Strickland only “if the ‘result of the proceeding was fundamentally unfair or unreliable.’” Id. (quoting Lockhart, 506 U.S. at 369).

When a defendant raises an ineffective counsel claim following a guilty plea, the prejudice prong of the Strickland test is slightly different. Hooper v. Garraghty, 845 F.2d 471, 475 (4th Cir. 1988). “Such a defendant ‘must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’” Id. (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

There is no evidence that proves trial counsel’s performance fell below an objective standard of reasonableness in this case. Although Greg Smyth now claims to have been suffering from some kind of mental infirmity during his trial and at his guilty plea hearing, he never mentioned any mental incapacity during the trial, during the guilty plea hearing, or during the sentencing process, even though he had an opportunity to raise such an issue at all three

stages.³ Although Greg Smyth claims trial counsel knew he suffered from attention deficit disorder, at the March 30, 2011 evidentiary hearing trial counsel testified that she did not recall Greg Smyth ever telling her he suffered from ADD or any other condition that affected his ability to assist in his defense. She further testified that she did not believe Greg Smyth to be incompetent or incapable of representing himself. She said nothing he did indicated he might suffer from ADD. Although she said he appeared distracted at times, trial counsel testified that his level of distraction was no greater than that of a typical client.

The court credits trial counsel's testimony and concludes that she had no reason to believe that Greg Smyth was mentally incompetent to proceed with his own defense. Indeed, the court found Greg Smyth to be lucid, rational, and focused at the March 2011 evidentiary hearing. Trial counsel had no obligation to raise an issue of which she was unaware. There is simply no evidence that shows her representation fell below an objective standard of reasonableness. As such, Greg Smyth's ineffective assistance claim fails.

B.

In his second claim, Greg Smyth contends that the court failed to hold a proper hearing pursuant to Faretta v. California, 422 U.S. 806 (1975). In Faretta, the Supreme Court recognized that the Sixth Amendment implicitly guarantees a right to self-representation. A defendant choosing to represent himself "relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel" and must do so "knowingly and intelligently." Id. at 835 (quoting Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938)). Therefore, he must assert his right to self-representation in a manner that is (1) clear and unequivocal; (2) knowing, intelligent

³ While Greg Smyth did state in chambers during the hearing on his first motion to proceed pro se that he would be incompetent representing himself, he later clarified that statement in open court during the hearing on his second motion to proceed pro se, stating he was referring only to his inability to conduct voir dire. Greg Smyth never mentioned that he suffered from ADD or any other mental infirmity.

and voluntary; and (3) timely. United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000) (internal citations omitted). A defendant choosing to proceed pro se “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” Faretta, 422 U.S. at 835 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942)); accord United States v. Bush, 404 F.3d 270 (4th Cir. 2005).

Prior to the start of trial, Greg Smyth asked to serve as his own co-counsel. The trial court denied this request, finding that Greg Smyth had not made a “clear and unequivocal” waiver of counsel. (Govt. Resp., Dkt. # 470, Ex. 6 at 2-3.)

After voir dire was conducted and the jury selected, Greg Smyth asked to represent himself. Id. at 4. Greg Smyth told the court that he was much more familiar with the case than his lawyer and that he previously had practiced law in California. Id. at 5, 7. Although he had never tried a criminal case, id. at 7, Greg Smyth told the court, “I feel strongly that I’d be better off to represent myself and present my case more effectively, shooting from the hip when evidence is occurring.” Id. at 5. Greg Smyth indicated that he understood the charge against him as well as the penalties, and that he was choosing to represent himself voluntarily. Id. at 7-10. The court advised Greg Smyth that it was unwise to represent himself and that a skilled lawyer in the practice of criminal law could provide better representation. Id. at 9. Although the court strongly urged Greg Smyth not to represent himself, he chose to proceed pro se. Id. After a series of questions, the court ultimately allowed Greg Smyth to exercise his constitutional right to represent himself, finding that he had knowingly and voluntarily waived his right to counsel.

It is clear from the record in this case that the trial court appropriately questioned Greg Smyth about his request to represent himself, determined that his waiver of counsel was

unequivocal, knowing, voluntary, intelligent and timely. Not only did the court advise Greg Smyth of the danger of representing himself, he strongly urged Greg Smyth not to do it. Plainly, the court conducted an appropriate inquiry and discharged its obligation under Faretta by advising Greg Smyth of the risks inherent in proceeding without counsel. There is no merit to Greg Smyth's claim that the trial court erred failing to hold a proper hearing pursuant to Faretta.

C.

Greg Smyth next claims that the court erred in allowing him to enter a guilty plea despite his mental incapacity. The record does not support this claim.

At no point did Greg Smyth advise the court that he suffered from attention deficit disorder or any other condition that would prevent him from rationally weighing his options regarding his plea. While Greg Smyth might have been diagnosed with ADD at some point, nothing in the evidence suggests that this condition incapacitated him or rendered him unable to represent himself. At the guilty plea hearing, the court questioned Greg Smyth as follows:

Q: Have you been hospitalized or treated lately for narcotic addition?

A: No, Your Honor.

Q: Have you been under the care of a physician or a psychiatrist?

A: No, Your Honor.

Q: Are you presently under the influence of any drug or medication or alcoholic beverage of any kind?

A: I am not.

Q: How do you feel at this time, physically?

A: Physically, fine, Your Honor.

(Govt. Resp., Dkt. # 470, Ex. 5 at 2-3.)

Solemn declarations made in open court at a plea hearing “carry a strong presumption of verity.” Blackledge v. Allison, 431 U.S. 63, 74 (1977). “[C]ourts must be able to rely on the defendant’s statements made under oath during a properly conducted Rule 11 plea colloquy.” United States v. Lemaster, 403 F.3d 216, 221 (4th Cir. 2005) (citing United States v. Bowman, 348 F.3d 408, 417 (4th Cir. 2003)). Because the declarations carry such a presumption, they present a formidable barrier in any subsequent collateral proceedings. United States v. White, 366 F.3d 291, 295-96 (4th Cir. 2004) (quoting Blackledge, 431 U.S. at 74).

Greg Smyth’s actions indicate that he entered a plea of guilty in a knowing, voluntary and intelligent manner. During the trial, before he switched his plea to guilty, Greg Smyth had the opportunity to hear the government’s evidence for several days and to determine its strength. His decision to plead guilty constitutes a rational, strategic decision given the strength of the government’s evidence against him. Greg Smyth consulted his brother Mark before entering a plea of guilty. Greg Smyth’s ability to understand the impact his plea would have on his brother’s situation further indicates his aptitude to weigh options and think rationally. Additionally, Greg Smyth had the assistance of counsel during the plea negotiations.

Although he previously described himself as “incompetent,” referring to his ability to represent himself without counsel, Greg Smyth provided the court with a logical and persuasive explanation for this comment during the hearing on his request to proceed pro se at trial. In this explanation, Greg Smyth distinguished between voir dire proceedings and trial proceedings, referred to the difficulty of playing the role of defendant and attorney, and mentioned the awkwardness that asking himself questions could pose. After an exhaustive examination, the court found Greg Smyth capable of representing himself.

Greg Smyth rationally, intelligently, and articulately answered all questions the court posed at the guilty plea hearing. Before accepting Greg Smyth's plea, the court inquired as to his health and treatment history, and Greg Smyth indicated he was not under a doctor's care and felt physically fine. Greg Smyth provided no clue that he was unduly nervous, anxious or otherwise incapable of entering an informed plea. Greg Smyth's current claims of mental incapacity do not outweigh the "presumption of verity" that accompanies sworn statements made in court.

Blackledge, 431 U.S. at 74.

Finally, the court had an extended opportunity to observe Greg Smyth at the March 2011 evidentiary hearing and found him to be poised, intelligent and thoughtful. There was, in fact, nothing to suggest that Greg Smyth was anything other than fully competent. Plainly, Greg Smyth knowingly and voluntarily entered a plea of guilty and gave the court no indication that he was suffering from a mental deficiency rendering him incompetent or unstable. On this record, Greg Smyth's assertion that the court erred by accepting his guilty plea lacks merit.

D.

Greg Smyth raised a fourth claim at the March 2011 evidentiary hearing that SEC lawyers altered the deposition transcript. He represented that the missing question and answer was to the following effect:

Q. Surely you intended to defraud with the letter?

A. Defraud whom?

Greg Smyth filed a motion to suppress the SEC deposition in his criminal case, but at no time asserted that SEC lawyers had removed a question and answer from the deposition transcript. Indeed, Greg Smyth did not raise any concern at trial that counsel for the SEC had removed a question and answer from the deposition transcript. Greg Smyth likewise said

nothing to the court reporter who transcribed the SEC deposition about the missing question.

Testifying at the March 2011 evidentiary hearing, Steven Levine, the SEC lawyer who deposed Greg Smyth, denied that any questions or answers were removed from the deposition transcript.

Greg Smyth contends that he planned on raising the issue during Levine's cross-examination or during his own testimony at trial but changed his plea to guilty before he had an opportunity to do so. Because he chose to plead guilty before raising this issue at trial, however, he cannot now claim to be prejudiced by evidence he voluntarily declined to challenge. Further, as Greg Smyth waived his right to counsel and decided to proceed pro se, he cannot contend that his trial counsel was ineffective for failing to raise the issue of the missing question and answer.

Certainly, alteration of a sworn deposition is a troubling allegation with serious repercussions. Because allegations of evidence tampering threaten to undermine the very foundation of our justice system, they must be carefully assessed by a court conducting habeas review. After consideration of Greg Smyth's allegation, there is no basis upon which to grant habeas relief. Greg Smyth had an opportunity to raise his concern about the deletion of a question and answer both before and during trial, but never did so, electing instead to plead guilty. As such, Greg Smyth's concern about the missing question and answer provides no basis to undermine his guilty plea.

III.

For these reasons, the court finds that each of Greg Smyth's claims lack merit. Greg Smyth's oral motion to voluntarily dismiss his § 2255 petition is consistent with this conclusion.

Accordingly, Greg Smyth's oral motion to voluntarily dismiss his § 2255 petition (Dkt. # 507) is **GRANTED** and this case is **DISMISSED**.

Entered: August 29, 2011

/s/ Michael F. Urbanski

Michael F. Urbanski
United States District Judge