

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

SCOTT BRAITHWAITE,)	
Petitioner,)	
)	
v.)	Case No. 7:03-CV-00760
)	
UNITED STATES,)	By: Michael F. Urbanski
Respondent.)	United States Magistrate Judge

REPORT AND RECOMMENDATION

In this federal habeas corpus case, petitioner Scott Braithwaite (“Braithwaite”) contends that his conviction must be overturned because he pled guilty to a crime which lacked a factual basis as to an essential element. Additionally, he contends that his counsel failed to note an appeal even though he requested his counsel do so.

Braithwaite was charged in and pleading guilty to a one-count indictment for distribution of 50 grams or more of cocaine base in violation of 21 U.S.C. § 841(a)(1). Following his guilty plea, but prior to sentencing, it was learned that the actual amount of cocaine base in Braithwaite’s possession weighed only 47 grams. Because of the presence of currency and other controlled substances, the Presentence Investigation Report calculated that Braithwaite was responsible for no less than 69 grams of cocaine base. Understanding full well that only 47 grams of crack were found in his possession, Braithwaite nevertheless went through with the sentencing on the greater than 50 gram charge without pointing out the discrepancy to the court or otherwise raising the issue. The reason for Braithwaite’s reticence was the fact that he was at the time of sentencing hopeful that he would obtain a reduction for substantial assistance, which ultimately was not forthcoming.

Braithwaite now brings this action under 28 U.S.C. § 2255 to vacate his guilty plea alleging ineffective assistance of counsel because, his attorney failed (1) to bring to the court’s

attention the fact that the lab report confirmed the presence of only 47 grams of cocaine base; and; (2) failed to note an appeal.

The matter was referred to the undersigned for report and recommendation on the issue of ineffective assistance of counsel. On April 29, 2005, an evidentiary hearing was conducted at which petitioner, represented by new counsel, and his original trial counsel testified. Regarding petitioner's first argument, it is clear that Braithwaite and his counsel made a strategic decision not to raise the issue of the three gram discrepancy at or before sentencing in an effort to maximize the likelihood of a substantial assistance motion. Despite the three gram discrepancy, petitioner knowingly and willingly waived his right to appeal or to collaterally attack his guilty plea in the written plea agreement, at his guilty plea hearing and at sentencing. As such, it is the recommendation of the undersigned that respondent's motion to dismiss be granted regarding this claim. Because petitioner's claim that he requested his counsel note an appeal is patently incredible, it is the recommendation of the undersigned that respondent's motion to dismiss be granted regarding it as well.

I

The factual situation underlying petitioner's first claim is undisputed. Field tests indicated that petitioner possessed 56 grams of cocaine base in addition to a quantity of money and other drugs. Petitioner was charged in a one-count indictment with possession with intent to distribute of more than 50 grams of cocaine base, a violation of 21 U.S.C. § 841(a)(1). At petitioner's guilty plea hearing on May 29, 2003, a government agent testified that the search yielded more than 50 grams of cocaine base. The court therefore found that there was a sufficient basis for Braithwaite's guilty plea under Rule 11 of the Federal Rules of Criminal Procedure. Petitioner signed a plea agreement waiving his right to appeal and to collaterally

attack his conviction. At the guilty plea hearing, the court clearly explained this waiver to petitioner, a waiver he acknowledged that he understood. (Guilty Plea Hearing Tr. at 10)

Subsequent to the acceptance of petitioner's plea, but prior to his sentencing, a lab report dated May 30, 2003 revealed that the cocaine base weighed only 47 grams, and not 56 grams as initially thought. This fact was revealed in the Presentence Report dated July 9, 2003, and Braithwaite claims that he asked his attorney to point this out to the court at sentencing. Petitioner claims that counsel's failure to do so constituted ineffective assistance of counsel.

For his part, Braithwaite's attorney, Jay K. Wilk, indicated that he did not bring this matter to the court's attention because he believed that it might compromise petitioner's ability to secure credit for substantial assistance. Wilk also stated that he told petitioner that his sentence would be the same regardless of whether he possessed 47 or 56 grams of cocaine base, because, under the sentencing guidelines, the total weight of all of the drugs in Braithwaite's possession factored into the sentencing guidelines calculation. Therefore, Wilk explained that whether Braithwaite pled guilty to possession with intent to distribute 5 or 50 grams of cocaine base was immaterial to his ultimate sentence, as the total drug weight for which he was responsible under either charge yielded the same sentencing guidelines range. Attorney Wilk testified that he fully explained this issue and the July 9, 2003 Presentence Report to Braithwaite prior to sentencing, and that Braithwaite understood that because of the total amount of illegal controlled substances in his possession, the guidelines yielded the same range whether the underlying charge specified 5 or 50 grams of crack cocaine base. Attorney Wilk testified that he did not take up the issue of superseding the indictment with the United States, nor did anyone raise this issue at sentencing on August 28, 2003. No objections to the Presentence Report were raised by petitioner at the sentencing on August 28, 2003, nor did petitioner raise the issue of the three gram discrepancy at sentencing despite having an opportunity to do so.

This situation is compounded by the fact that petitioner admits that he would have pled guilty to the lesser charge of possession of five grams of cocaine base had the option been placed before him. Petitioner was eventually sentenced to serve a period of 121 months, a period at the low end of the applicable guideline range.

Petitioner's second argument is that he requested that his attorney file an appeal and that his attorney did not do so. Testimony at the evidentiary hearing makes petitioner's claims regarding this claim exceedingly unlikely. At the time of the sentencing, petitioner and his attorney both testified that they believed his best chance for a reduced sentence was through cooperation with the government. Petitioner testified that even after his sentencing, he believed that there was a possibility that he could get credit from the government for his help regarding several investigations and that he continued to hope for a reduction until a date well after his sentencing, when he received a letter indicating that no substantial assistance motion was forthcoming. Given this testimony, for petitioner to ask his attorney to note an appeal within the sixty-day period under Rule 4(a)(1) of the Federal Rules of Appellate Procedure seems highly unlikely as it could compromise the achievement of his express goal of receiving a motion for downward departure for substantial assistance.

II

A

In a brief filed following the evidentiary hearing, petitioner argues that the starting point for the evaluation of this case is Rule 11(b)(3) of the Federal Rules of Criminal Procedure, providing that "[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." Petitioner argues that once defense counsel or the government determined that the crack cocaine at issue was less than 50 grams, either defense counsel should

have moved to withdraw the guilty plea or the government should have moved to dismiss the charge as there was no longer a factual basis for it.

Petitioner points to the case of United States v. Fountain, 777 F.2d 351 (7th Cir. 1985), as instructive. In Fountain, defendant appealed the district court's refusal to withdraw a guilty plea to the charge of murder of a federal prison guard. Defendant also challenged the sufficiency of the factual basis of guilt established at his plea hearing held pursuant to Federal Rule of Criminal Procedure 11. On appeal, the Seventh Circuit held that "[i]n the rare case where the government's and the court's reliance on the other to discharge the duty [to establish a factual basis for a plea] is misplaced the Rule 11 system breaks down." Id. at 357. In Fountain, the Seventh Circuit vacated the guilty plea and remanded for repleading. Id.

The court stated that:

Rule 11 is designed to provide protection for the rights of defendants who for whatever motivation decide to plead guilty. While guilty pleas serve a vital role in the judicial processing of criminal defendants, it must be remembered that those persons who plea are sacrificing, albeit voluntarily, important constitutional protections. See McCarthy v. United States, 394 U.S. 459, 466 (1969) (defendant who pleads waives his "privilege against self incrimination, his right to trial by jury, and his right to confront his accusers.").

Id. at 354. Courts "must scrupulously check to guarantee the facts presented on the record encompass the offense to which . . . defendant pleads." Id. Because the record did not establish a factual basis for the guilty plea, the Seventh Circuit vacated the conviction and remanded. Id. at 357.

Petitioner argues that the same thing should happen here irrespective of whether petitioner would have pled guilty to possession with intent to distribute of five grams of crack cocaine and thus have received the same sentence. If the evidence was not sufficient to convict him of the more serious offense, petitioner should not have been convicted, and this is true

regardless of whether the sentences for the offenses would have been the same. Petitioner states that what is at stake is not the involved sentence, but instead the integrity of the federal criminal justice system.

For its part, the United States contends that the lack of factual basis for the initial plea does not matter because first, petitioner's choice resulted from an informed, strategic decision made by petitioner and his counsel, and second, because the identical sentences negate the possibility petitioner can make the required showing of actual prejudice. Regarding petitioner's trial counsel's judgment, the government argues that petitioner's counsel's decision not to point out that petitioner had not in fact possessed 50 grams of crack cocaine, but instead had only possessed 47 grams, was reasonable under "prevailing professional norms." See Strickland v. Washington, 466 U.S. 668, 687-91 (1984).

Analysis in this case begins with the Supreme Court's decision in Strickland v. Washington, 466 U.S. 668, 687 (1984). Strickland presents a two-part test for ineffective assistance. Id. Under the first prong, petitioners must show that "counsel's representation fell below an objective standard of reasonableness," considering circumstances as they existed at the time of the representation. Id. Under the second prong, petitioner must show that prejudice resulted from counsel's defective performance. Id. at 692. Petitioner must overcome a strong presumption that counsel's performance was within the range of competence demanded from attorneys defending criminal cases. Id. at 689 (stating that defendant must overcome presumption that, "under the circumstances, the challenged action might be considered sound trial strategy"); Lockhart v. Fretwell, 506 U.S. 364, 378-79 (1993) (same). When assessing counsel's performance, courts should defer to counsel's tactical decisions. Strickland, 466 U.S. at 689.

To succeed on an ineffective assistance of counsel claim in the plea context, the Supreme Court stated that the movant must show that his counsel's performance was deficient and 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. Hill, 474 U.S. at 59; see also United States v. Lambey, 974 F.2d 1389, 1394 (4th Cir. 1992). Thus, the prejudice inquiry focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.

Regarding the first prong, the court finds that petitioner's trial counsel's failure to point out that petitioner had only 47 grams of crack cocaine, and not the required 50 grams, was not objectively unreasonable. Both petitioner and his counsel testified that their entire strategy was predicated on obtaining a substantial assistance motion, and it is reasonable for petitioner and his counsel not to raise his point to preserve what opportunity they had to make such a motion. This is particularly true where the guidelines range, calculated on the basis of total drug weight, would be the same regardless of whether the charge was 5 or 50 grams. Counsel explained this to petitioner, and he testified that they agreed not to raise the point at sentencing. Moreover, despite petitioner's significant criminal history (Category 4), he was sentenced at the lowest end (121 months) of the applicable guidelines range (121 to 151 months).

At the same time, had petitioner gone to trial on the crime charged in the indictment, he would have won as the government could only prove that he possessed 47 grams, and drug weight is an element of the offense. See Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000). The responsibility to raise the discrepancy between the evidence and the guilty plea does not lie solely with counsel for defendant. In this case, both Braithwaite and the United States had the responsibility to advise the sentencing court of the problem posed by the lab test or, in the case of the United States, to correct the infirmity obtaining a superseding indictment

for a charge at the five gram level. Had such a charge been lodged, petitioner testified that he would have plead guilty to it.

B

While to be sure there is a problem with the factual basis for the drug volume in the crime charged, there is a fundamental reason why it is recommended that this petition be denied. That is because in his written plea agreement, Braithwaite waived not only his right to appeal, but his right as well to file this § 2255 collateral attack on his conviction. The plea agreement provides in clear terms that “I further agree to waive my right to collaterally attack, pursuant to Title 28, United States Code, Section 2255, the judgment and any part of the sentence imposed upon me by the Court.” (Plea Agreement at 4-5.) In explaining the essential terms of the plea agreement, counsel for the government outlined that “[t]he plea agreement also provides that the defendant will be waiving his right to appeal his sentence, unless there’s an upward departure, and is also waiving his right to any habeas corpus relief under 28 U.S.C. § 2255.” (Guilty Plea Hearing Tr. at 4.) This waiver was further addressed by the court, and Braithwaite indicated that he understood that he was waiving his right to maintain a federal habeas corpus action.

The Court:	Do you understand that under certain circumstances you and the government would ordinarily have the right to appeal any sentence that I would impose, but pursuant to your plea agreement, you have waived, that is, given up your right to appeal certain guideline sentencing issues, and your right to collaterally attack your plea and sentence. Do you understand that?
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The Defendant:	Yes, sir.
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(Guilty Plea Hearing Tr. at 10.)

The Fourth Circuit Court of Appeals has held that “a criminal defendant may waive his right to attack his conviction and sentence collaterally, so long as the waiver is knowing and

voluntary.” United States v. Lemaster, 403 F.3d 216, 220 (4th Cir. 2005). Here, counsel for Braithwaite thoroughly explained the waiver provisions in the plea agreement prior to his execution of it, and both the government and the court specifically discussed this waiver during the plea colloquy. As the Fourth Circuit noted in Lemaster, “a defendant’s solemn declarations in open court affirming [a plea] agreement . . . ‘carry a strong presumption of verity,’” because courts must be able to rely on the defendant’s statements made under oath during a properly conducted Rule 11 plea colloquy. “Indeed, because they do carry such a presumption, they present ‘a formidable barrier in any subsequent collateral proceedings.’” 403 F.3d at 221, quoting Blackledge v. Allison, 431 U.S. 63, 74 (1977), and United States v. White, 366 F.3d 291, 295-96 (4th Cir. 2004); and citing United States v. Bowman, 348 F.3d 406, 417 (4th Cir. 2003).

There are no extraordinary circumstances presented in this case which refute Braithwaite’s written plea agreement and acknowledgment on the record that he understood and agreed to waive any collateral attack on his conviction such as presented by this § 2255 action. This waiver was discussed in open court at Braithwaite’s plea hearing and he assented to its terms both verbally and in writing. (See Guilty Plea Hearing Tr. at 10.) As such, the court therefore finds petitioner’s representations at the plea colloquy support a finding that the waivers in the written agreement were knowingly and voluntarily made.

Finding that the waiver is valid, the court must now determine whether petitioner’s claims are included within the scope of the waiver. Applying the same principles that the Fourth Circuit has applied in its analyses of waivers of appeal rights, claims asserting that the waiver was unknowingly or involuntarily made, that the sentence imposed was in excess of the maximum penalty provided by law, or that the sentence was imposed based on a constitutionally

impermissible factor, such as race would be outside the scope of the waiver. See United States v. Attar, 38 F.3d 727, 732-33 (4th Cir. 1994).

After reviewing the record, the court finds that none of these factors are applicable here. The imposed sentence is within the range provided under the law, indeed, at the low end, and petitioner does not contend it was based on any constitutionally impermissible factor. Indeed, it is probable that even under the facts as the parties now believe they are, petitioner would likely receive the same sentence. As such, petitioner's claim falls within the scope of the plea agreement waiver and is therefore not cognizable for post conviction relief in a motion brought pursuant to 28 U.S.C. § 2255.

C

The court rejects petitioner's argument that he requested his attorney to file an appeal and the attorney did not do so because it finds petitioner's contentions, given the context in which they arose, entirely incredible. Petitioner claims that he requested his attorney file an appeal following his sentencing. "An attorney who fails to file an appeal after being instructed by his client to do so is per se ineffective." United States v. Witherspoon, 231 F.3d 923, 926-27 (4th Cir. 2000) (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000)). The aggrieved inmate need only show that "counsel was ineffective and ... but for counsel's ineffectiveness, an appeal would have been filed." Id. The inmate need not show a reasonable probability of success on appeal. See id.

Petitioner's claims that he instructed his attorney to appeal are not credible. The record indicates that petitioner acknowledged in open court that he was waiving his right to appeal. At the evidentiary hearing, petitioner's trial counsel claimed that petitioner never communicated with him regarding an appeal following his sentencing. There were no letters in the attorney's file where petitioner had written him requesting that he appeal. Wilk testified that he discussed

an appeal and waiver prior to the guilty plea hearing, and nothing transpired at sentencing that would have required further discussion on this subject as the game plan to obtain substantial assistance was still in play. Wilk explained that noting an appeal within the required period was inconsistent with obtaining a substantial assistance motion. Indeed from a sentencing standpoint, petitioner's major problem is that such a motion was not forthcoming.

The testimony clearly establishes that petitioner was aware that he had waived his rights to appeal in his plea agreement. Petitioner did not want to rock the boat and jeopardize his chances of the more lenient sentence he would receive had the government moved for a downward departure. Requesting an appeal would have done this, and petitioner did not credibly provide any reason as to why he would have done so. As such, it is the recommendation of the undersigned that the government's motion to dismiss be granted regarding petitioner's claim that his attorney failed to note an appeal.

III

For the foregoing reasons, the undersigned recommends that respondent's motion to dismiss be granted. The Clerk of the Court is directed immediately to transmit the record in this case to the Honorable Samuel G. Wilson, United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note any objections 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 of the Court is hereby directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTER: This 3rd day of August, 2005.

/s/ Michael F. Urbanski
United States Magistrate Judge