

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

ROBERT PRICE, JR,)	
)	
Petitioner,)	Civil Action No. 7:00cv00422
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	By: Samuel G. Wilson
)	Chief United States District Judge

This is a motion pursuant to 28 U.S.C. § 2255 by Robert Price, Jr. challenging his plea of guilty to six counts of distribution of cocaine and two counts of distribution of cocaine base and his resulting sentence of 142 months. Price claims that the court violated Fed. R. Crim. P. 11(e), rendering his plea involuntary; that there was not sufficient evidence to support a two-level increase in his offense level for possession of firearms; and that his counsel rendered ineffective assistance in connection with the entry of his plea and sentencing. The court finds that Price has defaulted his claim that the court violated Fed. R. Crim. P. 11(e) and his claim that his plea was involuntary; that Price may not relitigate the two-level increase in his offense level in this § 2255 proceeding; and that his effective assistance of counsel claims lack merit.

I.

Following a full day of evidence at trial, which included videotapes of Price selling cocaine, Price's counsel informed the court that Price intended to plead guilty pursuant to a signed written plea agreement. The plea agreement provided that Price would plead guilty to Counts One through Eight of the indictment, that the government would stipulate that Price would be held accountable for less than fifty grams of cocaine base, and that the government

would stipulate that Price accepted responsibility. Price acknowledged that he understood the maximum possible penalties provided by law for the offenses, that he understood the elements of the offenses, that he was voluntarily pleading guilty and waiving his right to plead not guilty as well as those various rights associated with a not guilty plea, that he understood that his sentence would be determined presumptively in accordance with the guidelines, that he willingly stipulated that there was a “sufficient factual basis to support each and every material factual allegation contained within the counts in the indictment to which [he] was pleading guilty,” that he had not “been coerced, threatened, or promised anything other than the terms of [the] plea agreement . . . in exchange for [his] plea of guilty,” that he had discussed the terms of the “plea agreement with [his] attorney and [was] satisfied with [his] attorney and his advice and counsel;” and that he was “aware of all the possible consequences” of his plea and had “independently decided” to enter the plea of his “own free will.”

The essential terms of Price’s plea agreement were detailed in open court before the court began its plea colloquy with Price. The court then questioned Price in accordance with Rule 11 of the Federal Rules of Criminal Procedure. Price stated that he was not satisfied with his counsel’s representation when the court asked about the matter. The court attempted to discern the reason for Price’s dissatisfaction and, discerning none, told Price:

. . . I have to assure myself that your plea is voluntary. I can state that the evidence the Court has heard to this time, to this point in time, is just absolutely overwhelming, including videotapes of you.

It’s hard to perceive of a lawyer being able to attain a favorable resolution in this matter from a jury. I mean, it’s hard to conceive of that, and I haven’t seen anything that the Court concludes in any way, shape, or form as deficient performance. In fact, Mr. Cargill seems to be making the very best he can of a very bad situation.

But that’s my observation, and I’ve asked you whether or not you were

satisfied with him. You have indicated some dissatisfaction. I want to, before we go any further, assure myself that that dissatisfaction is not based upon a deficient performance, and I haven't seen any deficient performance here.

So is there something in particular that you think he should have done that he didn't do?

(Tr. Guilty Plea at 6-7.)

Price then responded, and from that response the court deduced that Price was primarily concerned about drug weight, and the following dialogue occurred:

The Court: Essentially, it seems to me that the disagreement has to do with the amount and quantity of drugs for which you could be held accountable, and there was some disagreement about that.

Under this plea agreement, apparently, that is resolved, and you're being held responsible only for the specific quantities and drugs involved in each of these separate transactions.

Is that the situation to which you are referring?

The Defendant: Yes, but more in detail. It's done now, so more in detail, if I was guilty of whatever you can see from the evidence, I felt that I may have been guilty of that. But I wasn't guilty of the rest of what the witnesses, the witness, rather, was stating. Therefore, in this plea agreement, I'm accepting guilt for everything that I'm being accused of and which I'm still saying that I'm not guilty of all of that, Your Honor.

The Court: Well, I mean, I'm not going to accept a plea if you're not guilty of something. I mean, your're welcome to have this jury and have them decide your guilt or innocence on these eight charges. The evidence is overwhelming, but it's up to you. And you have that absolute right, and I won't hold it against you in any way, shape, or form at the time I enter up – if you are found guilty, I won't hold it against you in any way, shape, or form.

You have an absolute constitutional right to proceed to trial, and if that's what you want to do, you are absolutely free to do it. And you should have no fear or should not feel intimidated in any way, shape, or form if you want to go back and finish this jury trial. I have them back there waiting.

The Defendant: Like I said, that was, that was, that was what I wanted to do. That's why I didn't plead at the beginning. But after my lawyer explained to me that I am more than likely, as you say, going to be found guilty, I could accept that. But I don't want to subject myself to being found guilty of even more that I know I'm not guilty of. I don't want to put that weight on myself.

The Court: My question to you is – well, I'm going to hold this point under advisement for a minute. We're going to continue on here with the rest of the questions, and I'm going to try to determine whether this plea is freely and

voluntarily and intelligently entered. I'm going to come back to this situation of you and your counsel in a moment.

(Tr. Guilty Plea at 8-10.)

The court continued its Rule 11 colloquy, intending to return to Price's dissatisfaction with his counsel before reaching a decision as to whether to accept Price's plea. As the colloquy continued Price stated that he was guilty of two of the counts to which he was pleading but not guilty of the rest. He said he had "accepted a plea" because he did not want to "subject" himself to the possibility that he would be held accountable for "historical" drug weights. (Tr. Guilty Plea at 12.) The court informed Mr. Price that it did not "accept pleas of guilty from people who don't admit their guilt" and that the court was going to bring the jury back in and conclude the case. (Tr. Guilty Plea at 12.) The court then recessed briefly. During the brief recess the court was informed that Price wanted to continue with his guilty plea. The following dialogue occurred in open court:

The Court: Mr. Price, I was told – I asked them to bring the jury in, and they hadn't brought the jury in yet. And I asked why and they said, well, you want to enter a plea of guilty.

I just want to make – before we go any farther in this thing, I want to make something plain, and I'll make it even plainer if we go farther with this. It doesn't matter to the Court whether you plead guilty or don't plead guilty. You have the absolute right to trial by a jury and have the jury decide all of these issues about your guilt or innocence.

I understand, from having reviewed the plea agreement and seeing the sentencing information that has been filed in this case, that you are facing a considerable period of time of incarceration. And I understand that the fact that you are facing that considerable period of time of incarceration gives you a great amount of conflict internally as to what you should do, but you have the absolute right to plead not guilty.

The Court will not hold that against you in any way, shape, or form. You may assert your constitutional rights to the full extent of the law, and there would be absolutely no adverse repercussions as far as this Court is concerned. Do you understand that?

The Defendant: Yes.

The Court: I want to make sure that you understand that, because it does not matter to me. But what I must do is I must ensure myself that if you enter a plea of guilty that it is because you recognize that it is in your interest to do so, that you are guilty of the offenses with which you are charged, and it is your own voluntary and intelligent decision to do it. Do you understand what I'm doing here?

The Defendant: Yes.

The Court: It cannot be the decision of your lawyer. It cannot be done because your lawyer thinks you should do it. You have to understand your alternatives, and you have to make that decision. No one can make it for you. And with the time that you are facing, I understand the conflict that you sense. Do you understand?

The Defendant: Yes.

The Court: Now, are you telling me – I mean, we've got the jury back there waiting. You're welcome to finish, but are you telling me that what you want to do is that you want to enter a plea of guilty at this time?

The Defendant: Yes.

(Tr. Guilty Plea at 12-14.)

Satisfied that it would be appropriate to continue with Price's guilty plea, the court asked Price whether he was pleading guilty because he was in fact guilty. Price stated that he was, and the court continued and completed the Rule 11 colloquy. (Tr. Guilty Plea at 15.) Price at no time during the remainder of the Rule 11 colloquy showed reluctance to plead or gave any hint that his decision to plead was anything but voluntary and intelligent. Accordingly, the court accepted Price's plea stating:

I want the record to reflect, in addition to my finding that the defendant is fully competent and capable of entering an informed plea and that his plea of guilty to each of these respective counts is a knowing and voluntary plea, supported by an independent basis in fact, containing each of the essential elements of these offenses, I want to make it plain that I have carefully examined this plea, knowing that this particular defendant has some reservations about entering it.

I have determined that those reservations are based on the fact that this offense carries substantial penalties, and he has an understandable reluctance. But after having carefully examined him on this matter, I have determined that he is entering this plea freely and voluntarily after he has been fully apprised of all the

consequences and understands those consequences. Accordingly, his plea is now accepted. He is now adjudged guilty of each of those respective offenses.

(Tr. Guilty Plea at 27-28.)

The court set the case for sentencing, and the probation officer prepared a presentence report. The amended presentence report stated that with 31.62 grams of cocaine base, Guideline § 2D.1.1(c)(6) called for a base offense level of twenty-eight, that Price should receive a two-level increase pursuant to guideline § 2D1.1(b)(1) for possession of a firearm, because two pistols were found in the search of a vehicle that was connected with a defendant and it was not “clearly improbable” that the weapons were related to the offenses,¹ and that he should receive a two-level decrease for acceptance of responsibility pursuant to guideline § 3E1.1(a). This resulted in a total offense level of twenty-eight. Price’s criminal history category was V, producing a guideline range of 130 to 162 months. Price objected to the presentence report on several grounds, including the two-level increase for possession of the pistols. The court overruled Price’s objections and sentenced him to 142 months imprisonment. Price appealed on two grounds, including the ground that the court improperly increased his offense level for possession of the firearms, and the Court of Appeals affirmed. Price, in turn, filed this § 2255 motion.

II.

Price claims that his plea was involuntary and that the court impermissibly engaged in plea negotiations in violation of Fed. R. Crim. P. 11(e). “[T]he voluntariness and intelligence of a

¹ The United States objected to the initial presentence report, in part, because it failed to assess a two-level increase for possession of two pistols found in a search of a vehicle at Price’s residence. Substantial circumstantial evidence tied the pistols to Price: the vehicle was at his residence; Price removed drugs from it in connection with an earlier sale; the pistols were found in the trunk together with triple beam and electronic scales; and the police found documents relating to the vehicle bearing Price’s name when they searched his residence.

guilty plea can be attacked on collateral review only if it is first challenged on direct review.” *See Bousley v. United States*, 523 U.S. 614, 620-21 (1998). A petitioner who fails to press on direct appeal the claim that his plea was involuntary defaults that claim. *Id.* at 621-622. The same also is true for alleged violations of Fed. R. Crim. P.11(e).

The court can relieve Price from his default if he shows cause and prejudice or actual innocence. However, Price points to nothing that would permit him to challenge collaterally the voluntariness of his plea or the court’s alleged Rule 11(e) violations. Although price complained about his lawyer during the plea colloquy and continues to press effective assistance complaints here, he offered no real particulars when the court questioned him during his plea colloquy, and he still offers no particulars. Moreover, since the court heard the factual basis for his complaints and resolved them on the record, that resolution was for all intents and purposes both a resolution of the voluntariness of his plea and a resolution of his current vague, effective assistance claims. Price simply offers nothing to excuse his default. It follows, that Price defaulted his claim that his plea was involuntary and, alternatively, that the claim is meritless. Likewise, Price defaulted his Rule 11(e) claim and, alternatively, the record also discloses that it is meritless, as well.

III.

According to Price’s next claim, the court improperly increased Price’s offense level under guideline § 2D1.1(b)(1) which requires a two-level increase for firearm possession unless it was “clearly improbable” that the firearm was related to the offense. Price raised the same claim on direct appeal to the Court of Appeals. The Court of Appeals reviewed the evidence, and found that the court properly applied the guideline. Price cannot relitigate the claim. *Boeckenhaupt v. United States*, 537 F.2d 1182 (4th Cir. 1976). Moreover, even if Price could relitigate the claim,

it is frivolous.

IV.

Lastly, Price claims that his counsel rendered ineffective assistance in connection with his plea and sentencing. Claims of ineffective assistance of counsel are governed by the familiar two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the defendant “must show that counsel’s performance was deficient.” *Id.* at 687. To prove deficiency, the defendant “must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. Second, the defendant must show that the deficient performance actually prejudiced him. To show prejudice in connection with a guilty plea, the defendant must show that there is a reasonable probability that, but for the alleged ineffective assistance, the defendant would have insisted on going to trial instead of pleading guilty. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The defendant must show that, but for the unprofessional errors, there is a reasonable probability that a reasonable defendant in defendant’s position would have insisted on going to trial instead of pleading guilty. *See Hopper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988). To show prejudice in connection with a sentencing a defendant must show “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *See Strickland*, 466 U.S. at 694. Price points to nothing that demonstrates that his counsel committed unprofessional errors either in connection with his guilty plea or his sentencing that prejudiced him.

The court found that Price’s plea was a knowing and voluntary plea . Price has done nothing to dispel that finding. Clearly, Price understood the consequences of his plea and made an informed, voluntary decision. A defendant who, when faced with overwhelming evidence,

makes an informed, voluntary decision to plead guilty has a heavy burden to show that, but for the alleged ineffective assistance, the defendant would have insisted on going to trial instead of pleading guilty. Price has made no such showing.

Price's claim that his counsel was ineffective in his handling of the two-level enhancement recommended by the probation officer is frivolous. The circumstantial evidence tied Price to the two firearms such that it was not "clearly improbable," in the words of the guideline, that those firearms had no relation to Price's offenses. The evidence suggests that counsel acted wisely, not ineffectively, in his handling of the issue. Once again, Price points to nothing suggesting that had counsel acted differently the result of the proceeding would have been different.

It follows, that Price's effective assistance claims are meritless.

V.

For the reasons stated, the court denies Price's motion for relief pursuant to 28 U.S.C. § 2255.

ENTER: This January _____, 2002.

CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
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)

ROBERT PRICE, JR.,)	
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v.)	<u>FINAL ORDER</u>
)	
UNITED STATES OF AMERICA,)	
)	By: Samuel G. Wilson
Respondent.)	Chief United States District Judge

In accordance with the written Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that Robert Price, Jr.'s motion pursuant to 28 U.S.C. § 2255 challenging his plea of guilty is hereby **DISMISSED** with prejudice. This case will be stricken from the active docket of the court.

The Petitioner is advised that he may appeal this decision pursuant to Rule 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within sixty (60) days of the date of entry of this Order, or within such extended period as the court may grant pursuant to Rule 4(a)(5).

The clerk is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to all parties.

ENTER this January _____, 2002.

CHIEF UNITED STATES DISTRICT JUDGE