

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

SCOTT BRAITHWAITE,)	
Petitioner,)	
)	Civil Action No.: 7:03cv00760
v.)	
)	<u>MEMORANDUM OPINION</u>
UNITED STATES OF AMERICA,)		
Respondent.)	By: Samuel G. Wilson
)	United States District Judge
)	

This is a motion pursuant to 28 U.S.C. § 2255 by Scott Braithwaite, a federal inmate proceeding pro se, challenging his conviction and sentence for possession with intent to distribute fifty grams or more of crack cocaine. Braithwaite maintains that he was unconstitutionally deprived of a substantial assistance motion, that he was denied effective assistance of counsel in connection with his guilty plea, and that his attorney failed to appeal. The court finds Braithwaite’s claim regarding the government’s failure to make a substantial assistance motion lacks merit and the court dismisses it. However, the court finds further that Braithwaite’s claims that his attorney was ineffective in connection with his guilty plea and that his attorney failed to appeal merit further consideration and, therefore, orders an evidentiary hearing on these claims.

I.

On May 29, 2003, Braithwaite pleaded guilty to a one-count indictment charging him with possession with intent to distribute fifty grams or more of crack cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The charges arose out of government agents’ search of Braithwaite’s home on February 12, 2003, during which agents seized illegal narcotic, \$2,310 in U.S. currency, and

several pieces of stolen property.¹ Braithwaite entered the guilty plea pursuant to a signed plea agreement. During the plea colloquy, Braithwaite confirmed that he had consulted with his attorney and acknowledged his understanding of the terms of the agreement, indictment, and sentencing guidelines.

The record reveals that Braithwaite and his attorney spoke to the United States Attorney regarding a possible proffer and substantial assistance motion. The plea agreement indicated that Braithwaite was aware that “the determination as to whether or not [his] efforts constitute[d] ‘substantial assistance’ [would] be solely within the discretion of the United States Attorney’s Office.” He further agreed that his guilty plea was not “contingent in any way on the United States making a substantial assistance motion” and that “no one [had] promised [him] that such a ‘substantial assistance’ motion [would] be made on [his] behalf.” On August 28, 2003, the court sentenced Braithwaite to a term of 121 months imprisonment, at the low end of the applicable guideline range of 121-151 months. The United States informed Braithwaite’s attorney on October 20, 2003, that Braithwaite’s assistance was not needed and that the government did not intend to file a substantial assistance motion. Braithwaite did not file a direct appeal.

Braithwaite raises three claims in his petition. First, he claims that he was unconstitutionally deprived of a substantial assistance motion. Second, Braithwaite alleges that his counsel was ineffective because he advised Braithwaite to plead guilty despite lab reports indicating that the crack cocaine seized from his home weighed 47 grams, not 50 grams or more as charged in the indictment. Third, Braithwaite alleges that his attorney provided ineffective assistance by failing to appeal or to consult

¹Lab reports revealed that at the time of his arrest, Braithwaite possessed 47 grams of cocaine base, 10 grams of cocaine hydrochloride, 5 grams of marijuana, and 0.189 grams of heroin.

with Braithwaite about filing an appeal.

II.

The court finds Braithwaite's claim concerning the government's failure to move for a downward departure meritless. Under both 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1, the government has a "*power, not a duty* to file a motion when a defendant has substantially assisted." Wade v. United States, 504 U.S. 181, 185 (1992) (emphasis added). Braithwaite's plea agreement imposed no binding obligation on the government to make a substantial assistance motion. Because the plea agreement explicitly reserved discretion to the government, even if Braithwaite provided information and cooperated fully, the government was within its rights not to make a substantial assistance motion. See United States v. Wallace, 22 F.3d 84, 87 (4th Cir. 1994). The district court may review the government's decision not to file a substantial assistance motion only on the grounds of bad faith or unconstitutional motive. Wade, 504 U.S. at 185. To merit an evidentiary hearing on the issue, the defendant must make a "substantial threshold showing" that the government's refusal to move was "not rationally related to any legitimate government end." Id. at 186. Here, Braithwaite has not made any showing of impropriety. This claim is therefore dismissed.²

III.

Second, Braithwaite alleges that he was denied effective assistance of counsel in connection

²The government argues that Braithwaite's claim that he was unconstitutionally denied a substantial assistance motion should be dismissed because the claim has been procedurally defaulted. See U.S. v. Frady, 456 U.S. 152, 167-69 (1982). Here, Braithwaite did not file a direct appeal. However, his attorney's failure to file an appeal may provide sufficient cause to excuse the default. Because the claim can be dismissed on its merits, the court assumes without deciding that the procedural default has been excused.

with his guilty plea because his attorney advised him to plead guilty without questioning the drug weight attributed to him. Under the two-pronged Strickland v. Washington standard, 466 U.S. 668 (1984), to establish ineffective assistance of counsel the petitioner must show not only that his attorney's performance was inadequate, but also 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." Hill v. Lockhart, 474 U.S. 52, 59 (1985). Braithwaite claims that, because the lab reports indicated that only 47 grams of cocaine base were found in his possession, rather than the "50 grams or more" charged in the indictment, his attorney should not have counseled him to plead guilty. Under § 2255, the district court must conduct an evidentiary hearing "unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." Possession of "50 grams or more" of crack cocaine is an element of the offense. The government's witness testified at Braithwaite's guilty plea that agents determined that there were at least fifty grams of crack cocaine present in Braithwaite's residence by weighing the crack cocaine. However, Braithwaite argues that lab reports established that the government seized only 47 grams of crack cocaine. Because quantity is an element of the offense, Braithwaite claims that his attorney should have questioned the government's ability to prove its case against him and should not have counseled him to plead guilty.³ Because, on the record before it, the

³ Braithwaite's pre-sentence report attributed possession of 69 grams of cocaine to him and the court sentenced him based on this amount. The court cannot determine from the pre-sentence report how the drug quantity attributed to Braithwaite was calculated. For purposes of establishing an element of the offense, the determination of whether the defendant is in possession of a particular amount of a controlled substance on a given occasion is simply a matter of determining whether the defendant actually or constructively possessed it. For purposes of sentencing, "relevant conduct," if any, may bring within its orbit additional factors affecting quantity. See U.S.S.G. § 1B1.3. "Relevant conduct" cannot be considered, however, in establishing drug weight as an element of the offense.

court is unable to determine whether the attorney's deficient performance prejudiced Braithwaite, the court orders an evidentiary hearing on this claim.

IV.

Finally, Braithwaite claims that his attorney's failure to file an appeal constituted ineffective assistance of counsel. "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 (4th Cir. 2000). If the defendant has not expressly instructed his attorney to file an appeal, the determination of whether counsel has rendered ineffective assistance turns on "whether counsel in fact consulted with the defendant about an appeal." Id. Braithwaite alleges that his attorney indicated that he would appeal the conviction and has not been in contact with him since. Braithwaite's attorney states that Braithwaite did not inform him of his desire to appeal. The court finds that the factual issue of whether counsel consulted with Braithwaite regarding the possibility of appeal merits further consideration and therefore orders an evidentiary hearing on this claim.

V.

For the reasons stated, the court dismisses Braithwaite's claim that he was unconstitutionally denied a substantial assistance motion. Braithwaite's allegations that he was denied effective assistance of counsel in relation to his guilty plea and that his attorney failed to appeal raise disputed issues of material fact and the court, therefore, orders an evidentiary hearing as to these claims.

ENTER: This _____ day of November, 2004.

UNITED STATES DISTRICT JUDGE

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

SCOTT BRAITHWAITE,)	
 Petitioner,)	
)	Civil Action No.: 7:03cv00760
v.)	
)	<u>ORDER</u>
UNITED STATES OF AMERICA,))	
 Respondent.)	By: Samuel G. Wilson
)	United States District Judge
)	

In accordance with the memorandum opinion entered on this day, it is hereby **ORDERED** and **ADJUDGED** that Braithwaite's claim that he was unconstitutionally denied a substantial assistance motion is **DISMISSED**. The court will hold an evidentiary hearing on the issues of whether Braithwaite was denied effective assistance of counsel in relation to his guilty plea and whether Braithwaite consulted with his attorney regarding an appeal.

The Clerk of the Court is directed to send certified copies of this Order and the accompanying Memorandum Opinion to petitioner and to the United States Attorney.

ENTER: This _____ day of November, 2004.

UNITED STATES DISTRICT JUDGE