

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-2887

Susan Elizabeth Walker

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:16-cv-03977-MJD)

JUDGMENT

Before COLLOTON, BOWMAN and SHEPHERD, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

February 06, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-2887

Susan Elizabeth Walker

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:16-cv-03977-MJD)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

May 22, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
District of Minnesota

United States of America,

Case No. 14-cr-305 (1) MJD

Plaintiff

v.

JUDGMENT IN A CRIMINAL CASE

Susan Elizabeth Walker

Defendant.

-
- ☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED THAT:

1. Defendant's Motion to Vacate, Set Aside or Correct a Sentence by a Person in Federal Custody [Docket No. 77] is **DENIED**.
2. The Court denies a Certificate of Appealability in this case.
3. This matter is **DISMISSED WITH PREJUDICE**.

Date: June 28, 2017

RICHARD D. SLETTEN, CLERK

s/Lynnette Brennan

By: Lynnette Brennan
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MEMORANDUM OF LAW & ORDER
Criminal File No. 14-305 (MJD)

(1) SUSAN ELIZABETH WALKER,

Defendant.

Timothy C. Rank, Assistant United States Attorney, Counsel for Plaintiff.

Dan L. Cogdell, Cogdell Law Firm, PLLC, Counsel for Defendant.

I. INTRODUCTION

This matter is before the Court on Defendant's Motion to Vacate, Set Aside or Correct a Sentence by a Person in Federal Custody. [Docket No. 77]

II. BACKGROUND

On October 15, 2014, Defendant Susan Elizabeth Walker pled guilty to Count 1 of the Amended Information, Mail Fraud, in violation of 18 U.S.C. § 1341, and Count 2 of the Amended Information, Tax Evasion, in violation of 26 U.S.C. § 7201.

The Court determined that the applicable Guidelines were as follows:

Total Offense Level:	28
Criminal History Category:	I
Imprisonment Range:	78 to 97 months
Supervised Release:	1 to 3 years
Fine Range:	\$12,500 to \$125,000
Special Assessment:	\$200

The Court sentenced Defendant to a term of custody of 88 months, followed by 3 years supervised release. Defendant did not appeal her sentence.

On December 30, 2015, Defendant filed a Motion to Modify Sentence requesting that the Court modify her sentence from 88 months in custody to a term of probation based on hardship in her family. [Docket No. 59] On January 5, 2016, the Court denied the motion for lack of jurisdiction and noted that, even if the Court had authority to amend Defendant's sentence, on the merits, it would not do so. [Docket No. 67]

On November 22, 2016, Defendant filed the current Motion to Vacate, Set Aside or Correct a Sentence by a Person in Federal Custody. [Docket No. 77] Defendant asserts two grounds for her motion: 1) defense counsel was ineffective because he stipulated to and failed to object to the application of a 4-level sentencing enhancement for securities law violations; and 2) counsel was

ineffective because he failed to present character witnesses or letters for mitigation at sentencing.

III. DISCUSSION

A. Standard for Relief under 28 U.S.C. § 2255

28 U.S.C. § 2255(a) provides:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and, if uncorrected, would result in a complete miscarriage of justice. A movant may not raise constitutional issues for the first time on collateral review without establishing both cause for the procedural default and actual prejudice resulting from the error.

United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996) (citation omitted).

Alternatively, the procedural default can be excused if the defendant can demonstrate that she is actually innocent. Bousley v. United States, 523 U.S. 614, 622 (1998).

A petitioner is entitled to an evidentiary hearing on a § 2255 motion, “[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.” 28 U.S.C. § 2255(b).

[A] petition can be dismissed without a hearing if (1) the petitioner’s allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.

Engelen v. United States, 68 F.3d 238, 240 (8th Cir. 1995) (citations omitted).

B. Ineffective Assistance of Counsel Standard

In order to gain relief for ineffective assistance of counsel, Defendant must establish both that her counsel’s performance “fell below an objective standard of reasonableness,” and that the deficient performance prejudiced her defense.

Strickland v. Washington, 466 U.S. 668, 688, 692 (1984). The burden is on Defendant to establish a “reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.” Id. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. “Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” Thai v. Mapes, 412 F.3d 970, 978 (8th Cir. 2005) (quoting Strickland, 466 U.S. at 687). The Court “need not address the

reasonableness of the attorney's behavior if the movant cannot prove prejudice."

United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996).

Counsel's performance is deficient if it falls outside of the "wide range of reasonable professional assistance," although there is a strong presumption that counsel's conduct falls within this broad spectrum. Strickland, 466 U.S. at 689. "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. "Counsel's performance is deficient when it is less competent than the assistance that should be provided by a reasonable attorney under the same circumstances." Chambers v. Armontrout, 907 F.2d 825, 828 (8th Cir. 1990) (citing Strickland, 466 U.S. at 687).

C. Application of U.S.S.G. § 2B1.1(b)(19)(A)(iii)

In calculating Defendant's total offense level under the Sentencing Guidelines, the Court applied a 4-level enhancement under U.S.S.G. § 2B1.1(b)(19)(A)(iii). This Guidelines provision provides for an enhancement "[i]f the offense involved — a violation of securities law and, at the time of the offense,

the defendant was . . . an investment adviser, or a person associated with an investment adviser.” Id.

In the Plea Agreement, Defendant had stipulated that the securities enhancement applied because she was a person associated with an investment adviser and the offense involved a violation of securities law. (Plea Agreement ¶ 7(b).) At sentencing, defense counsel objected to certain aspects of the Guidelines calculations, but did not object to the application of the securities enhancement.

Defendant argues that her counsel’s advice to stipulate to the application of the securities enhancement was deficient and prejudicial because she did not violate a securities law because her fraud was not “in connection with the purchase or sale of any security.” 15 U.S.C. § 78j(b). Defendant does not dispute that she was a person associated with an investment advisor. The Court concludes that her offense involved a violation of securities law. Thus, the securities enhancement was properly applied, and Defendant can show neither deficiency nor prejudice in her counsel’s performance.

Under the Guidelines, a defendant need not be convicted under a securities law for the securities enhancement to apply. See U.S.S.G. § 2B1.1, n.15(B). The enhancement applies when a defendant is convicted under a

general fraud statute if the defendant's conduct violated securities law. Id.

“‘Securities law’ (i) means 18 U.S.C. 1348, 1350, and the provisions of law referred to in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)); and (ii) includes the rules, regulations, and orders issued by the Securities and Exchange Commission pursuant to the provisions of law referred to in such section.” U.S.S.G. § 2B1.1, n.15(A).

In this case, Defendant's conduct violated 17 C.F.R. § 240.10b-5, enacted under 15 U.S.C. § 78j.

Section 10b of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), makes illegal the use of a manipulative or deceptive device in connection with the sale or purchase of a security by any instrumentality of interstate commerce. 17 C.F.R. § 240.10b-5 implements § 10b, and establishes two kinds of liability: false statement liability (17 C.F.R. § 240.10b-5(b)) and scheme liability (17 C.F.R. § 240.10b-5(a), (c)). Scheme liability concerns the use of “any device, scheme, or artifice to defraud” and “any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.” 17 C.F.R. § 240.10b-5(a), (c).

W. Virginia Pipe Trades Health & Welfare Fund v. Medtronic, Inc., 845 F.3d 384, 389 (8th Cir. 2016) (citation omitted).

Here, Defendant did not merely “embezzle[] cash from a client's account.”

SEC v. Zandford, 535 U.S. 813, 825 n.4 (2002)). Defendant's sophisticated

conduct, all taken in furtherance of Defendant's scheme to defraud, is precisely the type of conduct found to violate Rule 10b-5 by the Supreme Court, where the defendant's fraud "coincided with the sales [of securities] themselves." Id. at 820. Defendant sold shares of stocks and mutual funds from client accounts in order to obtain the proceeds of the sales and surreptitiously direct them into her accounts. (Turner Aff. ¶¶ 4-7; Turner Aff., Exs. D-J.) Cf. Zandford, 535 U.S. at 820-21 ("[E]ach sale was made to further respondent's fraudulent scheme; each was deceptive because it was neither authorized by, nor disclosed to, the [victims]."). Defendant also executed "mirrored transactions" in which she purchased shares of Fidelity mutual funds in clients' accounts at the same time and in the same amounts as the money that she was stealing out of their accounts through her false Fidelity accounts in order to conceal her theft. (Turner Aff. ¶ 8; Turner Aff., Exs. K-N; Sentencing Tr. 43-44.) Defendant issued fraudulent checks from client brokerage accounts that were funded by the sale of securities from clients' brokerage accounts. (Turner Aff. ¶ 3; Turner Aff., Exs. A-C.) Cf. Zandford, 535 U.S. at 821 ("With regard to the sales of shares in the [the victims'] mutual fund, respondent initiated these transactions by writing a check to himself from that account, knowing that redeeming the check would require the

sale of securities.”). The Court concludes that the securities enhancement was properly applied under the Guidelines, and defense counsel’s advice to stipulate to the application of the enhancement was neither deficient nor prejudicial.

D. Discovery

In her brief, Defendant also asserts that her attorney was ineffective when he advised her to accept the Plea Agreement before receipt and review of all discovery. The plea hearing transcript reflects that Defendant’s attorney clearly explained – and Defendant understood and voluntarily agreed – that she was giving up her right to full discovery by pleading guilty. (Plea Tr. 26-27.)

Defendant agreed to this strategy and trade-off after a clear explanation from her attorney. Defendant has not made any showing that his strategic decision to recommend acceptance of the early plea deal in exchange for, among other things, giving up the right to pursue discovery, was anything other than advice that fell within the “wide range of reasonable professional assistance.”

Strickland, 466 U.S. at 689. Moreover, Defendant cannot show a reasonable probability that, but for defense counsel’s conduct, the result would have been different.

E. Mitigation Evidence

Defendant argues that her counsel was ineffective for failing to present character letters or witnesses to the Court. She claims that she asked her counsel if character letters were needed, but he told her that they were not. ([Docket No. 81-1] Walker Aff.) She asserts that, if asked, friends and clients would have written on her behalf to show that she was a person deserving leniency. (See id.; [Docket No. 62] Jeffrey Walker Aff.; [Docket No. 63] N.W. Aff.; [Docket No. 64] Barbara Stark Aff.; [Docket Nos.99-100] Character Letters.) Defendant claims that there is a reasonable probability that submission of such letters would have led to a lower sentence and tempered weight given to the age and vulnerability of Defendant's victims.

"Inasmuch as the District Court sentenced [Defendant], its view of this matter [the probable effect of character witnesses at sentencing] is entitled to great weight" Drew v. United States, 46 F.3d 823, 827 (8th Cir. 1995). Here, the Court concludes that, even had the Court received the character letters now submitted by Defendant or similar letters or testimony, the sentence would have been the same. Overall, the proffered letters generally demonstrate that Defendant has been a friend or relative to the letter writer and assert claims of which the Court was already apprised before or during the sentencing, namely,

that Defendant is remorseful (Def. Sentencing Brief at 5, 8; PSI ¶ 36; Sent. Tr. 79); Defendant was willing to help others and was involved in her community ([Docket No. 28] Def. Letter); Defendant was involved in and needed by her family (Def. Sentencing Brief at 6; PSI ¶¶ 78-79; Sent. Tr. 78); Defendant was previously law-abiding (Def. Sentencing Brief at 7; Sentencing Tr. 76); Defendant managed money for some clients and did not steal from them; (Sent. Tr. 50); and Defendant will not repeat her crime and will be a productive member of her community upon her release (Def. Sentencing Brief at 7-8; ([Docket No. 28] Def. Letter).

The Court thoroughly considered Defendant's personal characteristics and background, in conjunction with all of the other relevant factors under the sentencing statute, before arriving at her sentence. (See, e.g., Statement of Reasons at 9-11.) Defendant can point to no new information or letter that would have changed the Court's assessment of the proper sentence for Defendant's crime, which involved preying on vulnerable and trusting victims in order to further Defendant's own greed. Defendant has failed to show a reasonable probability that character letters would have altered the Court's thorough analysis and ultimate sentence.

Defendant further argues that defense counsel's statements in the sentencing memorandum concerning Defendant's childhood relied solely on facts already in the PSI. Defendant claims that a more thorough investigation would have revealed more mitigation evidence and that there is a reasonable probability that it would have impacted her sentence. Defendant has failed to show prejudice because she has not pointed to any particular mitigation evidence that would have been discovered during a more thorough investigation of her past that had the possibility of altering the sentence imposed. Moreover, the Court did consider Defendant's childhood circumstances when it imposed her sentence. (See, e.g., Statement of Reasons at 10.)

F. Certificate of Appealability

With regard to the Court's procedural rulings, the Court concludes that no "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right;" nor would "jurists of reason . . . find it debatable whether the district court was correct in its procedural ruling." Slack v. McDaniel, 529 U.S. 473, 484 (2000). With regard to the Court's decision on the merits, it concludes that no "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. Therefore, the Court denies a Certificate of Appealability in this case.

Accordingly, based upon the files, records, and proceedings herein, **IT IS**

HEREBY ORDERED:

1. Defendant's Motion to Vacate, Set Aside or Correct a Sentence by a Person in Federal Custody [Docket No. 77] is **DENIED**.
2. The Court denies a Certificate of Appealability in this case.
3. This matter is **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 26, 2017

s/Michael J. Davis
Michael J. Davis
United States District Court

**Additional material
from this filing is
available in the
Clerk's Office.**