

IN THE
SUPREME COURT OF THE UNITED STATES

MARCO WHITLEY, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S APPENDIX B

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

MARCO WHITLEY SR.,)
Movant,)
v.) Civil No. 4:17-CV-00493-DGK-P
UNITED STATES OF AMERICA,) Crim. No. 4:15-CR-00059-DGK-1
Respondent.)

ORDER

Movant Marco Whitley pleaded guilty to being a felon in possession of a firearm. Now before the Court is Movant's *pro se* motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 (Doc. 1). Because the Court finds that the motion, files, and record conclusively show that Movant is not entitled to relief, Movant's motion is DENIED. Furthermore, a Certificate of Appealability is DENIED and this case is DISMISSED.

I. Background

On June 23, 2015, Movant was charged by way of a four-count Superseding Indictment with: being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2); possession with intent to distribute marijuana in violation of 21 U.S.C. § 841 (a)(1) and (b)(c)(1); possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C); and possessing a firearm during a drug-trafficking crime in violation of 18 U.S.C. § 924(c). (Crim. Doc. 33).¹

On April 13, 2015, Movant filed a motion to suppress all evidence and statements obtained during the February 3, 2015, traffic stop that led to his arrest. (Crim. Doc. 21). After a

¹ “Crim. Doc.” refers to the docket number entries in Movant’s criminal case, Case No. 4:15-cr-00059-DGK-1. “Doc.” refers to the docket number entries in Movant’s civil case, Case No. 4:17-cv-00493-DGK.

hearing, the United States Magistrate Judge issued a report and recommendation denying the suppression of evidence despite Movant's objections. (Crim. Doc. 38).

On July 19, 2015, Movant filed a motion seeking appointment of new counsel and requesting a hearing on the motion. (Crim. Doc. 42). In support of his motion, Movant alleged that he had not had the opportunity to review the discovery because defense counsel had only visited him twice in person and was not properly communicating with him, and that he filed a civil suit against defense counsel for violating his civil and constitutional rights. *Id.* On July 30, 2015, after a hearing on the motion, the United States Magistrate Judge found that appointment of new counsel was not appropriate, but advised Movant that he was free to request that the Court order meetings to prepare for trial with counsel to be held at the courthouse, which would be granted, if he wished. (Crim. Doc. 40).

On August 13, 2015, Movant appeared before this Court for a change-of-plea hearing. (Crim. Doc. 52). Prior to pleading guilty to being a felon in possession of a firearm, the Court found Movant was competent to enter a guilty plea and that it was his decision to plead guilty. *Id.* Movant stated he would have liked additional time with defense counsel, but that he was happy with the outcome and wanted to proceed with the change-of-plea hearing. *Id.* After the Government proffered a summary of the trial evidence, Movant admitted to the elements of the crime and confirmed he was guilty of the offense. *Id.* Having explained the statutory range of punishment, sentencing procedures, and Movant's rights, the Court accepted the guilty plea. *Id.*

On August 17, 2015, this Court received and filed a civil complaint from Movant against his appointed defense counsel. *See Whitley v. Holloman-Hughes*, No. 4:15-cv-00653-FJG-P. Movant asserted again that he had been unable to review the discovery, and he took exception

with statements made by defense counsel. The Court dismissed the case under 28 U.S.C. § 1915A(b)(1) & (2) for failure to state a claim upon which relief may be granted. *Id.* at Doc. 10.

On November 13, 2015, a Presentence Investigation Report (“PSR”) was issued, setting forth the factual account of the offense conduct. (Crim. Doc. 55, pp. 4-5, ¶¶ 3-11). In calculating the criminal offense level, the PSR found Movant was subject to a base offense level of 22 based on a prior conviction for attempted robbery and possession of a large capacity magazine. *Id.* at pp. 6-9 ¶¶ 16-32. The PSR also attributed Movant with possessing a firearm in connection with another felony offense resulting in a four-level enhancement and a three-level reduction for acceptance of responsibility. *Id.* at p. 6, ¶¶ 16-17. The PSR calculated an advisory Sentencing Guidelines range of 57 to 71 months’ imprisonment, and a statutory range of punishment of up to ten years’ imprisonment. *Id.* at p. 15, ¶¶ 61-62. Movant filed *pro se* objections to the PSR, which the probation office addressed in the addendum to the PSR. Additionally, Movant filed a *pro se* sentencing memorandum, discussing his personal view of the factors under 18 U.S.C. § 3553(a) that this Court should consider at sentencing. (Crim. Doc. 58).

On February 16, 2016, the Court held a sentencing hearing, following a 30-day continuance to allow Movant additional time to file a response to the Government’s sentencing memorandum. (Crim. Docs. 59, 61). The Court overruled Movant’s *pro se* objections to the PSR. (Crim. Doc. 61). The Court overruled the objection to the base offense level based on the prior crime of violence, and the remaining objections related to the Guidelines before adopting the calculations in the PSR. (Crim. Doc. 67). As a result of the guilty plea, Respondent agreed to dismiss the remaining counts, and Movant was sentenced to an 85-month term of imprisonment. (Crim. Doc. 63). Movant filed a *pro se* notice of appeal arguing that the Court erred by varying upward and sentencing him to an above-Guidelines-range prison term. (Crim. Doc. 64). The

Eighth Circuit issued its mandate affirming the judgment of the Court on December 6, 2016, after an independent review of the record pursuant to *Penson v. Ohio*, 488 U.S. 75, 80 (1988). (Crim. Docs. 73, 74).

II. Legal Standard

Title 28 U.S.C. § 2255 provides that an individual in federal custody may file a motion to vacate, set aside, or correct his or her sentence by alleging “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[.]” A motion under this statute provides a statutory avenue through which to address constitutional or jurisdictional errors and errors of law that “constitute[] a fundamental defect which inherently results in a complete miscarriage of justice.” *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (citations omitted).

A claim of ineffective assistance of counsel may be sufficient to attack a sentence under § 2255; however, the “movant faces a heavy burden.” *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996). In such cases, the Court must scrutinize the ineffective assistance of counsel claim under the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* Under *Strickland*, a prevailing defendant must prove “both that his counsel’s representation was deficient and that the deficient performance prejudiced the defendant’s case.” *Cheek v. United States*, 858 F.2d 1330, 1336 (8th Cir. 1988). As to the “deficiency” prong, the defendant must show that counsel “failed to exercise the customary skills and diligence that a reasonably competent attorney would [have] exhibit[ed] under similar circumstances.” *Id.* (quoting *Hayes v. Lockhart*, 766 F.2d 1247, 1251 (8th Cir. 1985)). As to the “prejudice” prong, the 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.” *Cheek*, 858 F.2d at 1336 (quoting *Strickland*, 466 U.S. at 694). To be sure, “[c]ounsel’s failure to advance a meritless argument cannot constitute ineffective assistance.” *Rodriguez v. United States*, 17 F.3d 225, 226 (8th Cir. 1994).

A § 2255 motion “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.” *Sanders v. United States*, 341 F.3d 720, 722 (8th Cir. 2003) (citation omitted). Additionally, a petition that consists only of “conclusory allegations unsupported by specifics [or] contentions that, in the face of the record, are wholly incredible,” is insufficient to overcome the barrier to an evidentiary hearing on a § 2255 motion. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

III. Analysis

Movant brings four grounds for relief. In the first ground, Movant argues that counsel was ineffective regarding the forfeiture of the firearm that he was convicted of illegally possessing. In Ground Two, Movant argues his “Sixth Amendment right to counsel was violated when CCA staff recorded privileged communications between [Movant] and his counsel.” (Doc. 2, p. 7). In Ground Three, Movant claims that counsel failed to report to the Court the existence of a civil lawsuit initiated by him and for misleading him into entering a plea agreement. In Ground Four, Movant asserts “[t]he court failed to investigate the serious allegations and denied the defendant[’]s request for new counsel.” *Id.* at p. 17. As a result, Movant claims counsel

stopped assisting with the preparation for sentencing and was ineffective throughout the sentencing hearing.

A. Movant's claims of ineffective assistance of counsel are without merit

In Grounds One, Three and Four, Movant raises three claims of ineffective assistance of counsel. He contends that defense counsel: (1) failed to challenge the forfeiture of the firearm to federal authorities; (2) failed to report to the Court the existence of a civil lawsuit initiated by him and misled him into entering a plea agreement; and (3) failed to object to any of the PSR enhancements, file a sentencing memorandum, and challenge the factual basis the Court relied upon at his sentencing hearing (Doc. 1). Additionally, Movant contends that prejudice resulted from the Court's decision ordering counsel to continue to represent him.

In *Hill v. Lockhart*, 474 U.S. 52, 58 (1985), the United States Supreme Court held that the *Strickland* standard was applicable to guilty pleas. Under *Hill*, Movant carries the burden of establishing that his counsel's performance was deficient (i.e., professionally unreasonable) and that counsel's deficient performance "affected the outcome of the plea process." *Id.* at 59. Typically, to establish prejudice under *Hill*, a petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would . . . have pleaded [not] guilty and would . . . have insisted on going to trial." *Id.*

1. Ground One is denied as moot

In Ground One, Movant claims the federal firearm forfeiture was illegal. In his reply, Movant states,

After review of the situation in regards to the forfeiture, Mr. Whitley humbly agrees with the government. Therefore Mr. Whitley respectfully request[s] this court to withdraw his claim of ineffective assistance of trial counsel as it relates to forfeiture of the firearm.

(Doc. 8, p. 22).

Therefore, Ground One is denied as moot.

2. Ground Three is without merit

Movant argues that counsel “proceeded to represent [Movant] even after she knew there was a clear conflict of interest between the two.” (Doc. 8, pp 16-19). Movant asserts that prior to his change-of-plea hearing, he informed the Court that he had filed a civil suit against defense counsel, and that she was required to inform the Court. *Id.* at p. 16. Movant further asserts that counsel utilized dishonest tactics to induce a guilty plea and that he should have been appointed new counsel. *Id.* at p. 18. As a result, Movant argues that but for counsel’s errors, he would not have pleaded guilty. *Id.* at p. 19.

The Court notes Movant filed a civil action against defense counsel on August 17, 2015. However, upon review of the record, neither the Court nor counsel could have known of the pending lawsuit because the Court did not receive and docket Movant’s complaint until four days after his August 13, 2015, change-of-plea hearing. (Case No. 4:15-cv-00653-FJG-P, Doc. 10). The record also indicates that Movant did not bring the pending lawsuit to the Court’s attention at the change-of-plea or the sentencing hearings. (Crim. Docs. 66, 67).

Additionally, Movant has not set forth sufficient evidence to support the conclusion that counsel misled him into entering the plea agreement. Movant testified to the Court that he was satisfied with counsel’s work and insisted on going forward with the change-of-plea hearing, despite assurance from the Court if he was not ready and needed additional time with counsel that they could continue the hearing to a later date. (Crim. Doc. 66, p. 10).

Therefore, because Movant’s contention is contrary to the record and neither the Court nor defense counsel did, in fact, have knowledge of the pending lawsuit, Movant has failed to

establish deficient performance and prejudice. Thus, Movant's claim of ineffective assistance of counsel is without merit.

3. Ground Four is without merit

Movant alleges counsel was ineffective at the sentencing hearing. Specifically, Movant argues that defense counsel failed to object to the base offense level, based on *Johnson v. United States*, 576 U.S. —, 135 S.Ct. 2551 (2015); failed to object to the base offense level based on the large-capacity magazine; failed to challenge the four-level enhancement for possessing the firearm in relation to drug trafficking crimes; failed to file a written sentencing memorandum; failed to draw attention to Movant's medical issues; and failed to challenge the factual basis utilized by this Court to vary upward at sentencing.

Here, Movant has not demonstrated prejudice regarding any of his claims. The record shows that this Court conducted a thorough analysis of the § 3553(a) factors when imposing the sentence. Movant has also failed to provide any evidence that there is a likelihood of a different outcome or a reasonable probability that this Court would have imposed a lesser sentence. Conversely, after discussing the § 3553(a) factors, the Court concluded as follows:

THE GOVERNMENT: Just to clarify, Judge, since this is an above-the-guideline sentence, this was imposed in consideration of the 3553 factors, and would the Court have imposed this sentence regardless of the guideline calculation?

THE COURT: The guidelines are just one of the things that we look at, and they're not -- they don't drive any of these sentences. But they do -- are consideration in conjunction with the other -- all the remaining 3553(a) factors. And that's what we -- what I did here.

And even if -- even if I would have sustained all of Ms. Holloman-Hughes' objections, if she would have won each of those objections I would still sentence at this -- at this level.

(Crim. Doc. 69, pp. 21-22).

Because Movant's contention is contrary to the record and the Court did, in fact, consider the objections, Movant has failed to establish deficient performance and prejudice. Even if counsel's representation was ineffective, Movant has failed to establish that, but for counsel's errors, the outcome would have been different. Accordingly, Ground Four is denied.

B. Ground Two – Movant's claim of prosecutorial misconduct is without merit

Lastly, Movant seeks relief on the ground that Corrections Corporation of America (“CCA”) staff members violated Movant's rights by recording phone calls and visitation room meetings between counsel and Movant. (Doc. 1). Movant contends Respondent may have obtained the content of his private conversations with his attorney, which he believes were recorded by CCA and turned over to multiple government agencies. (Doc. 8, pp. 19-21).

The only claims that are cognizable under § 2255 are claims of constitutional or jurisdictional errors or errors of law that “constitute[] a fundamental defect which inherently results in a complete miscarriage of justice.” *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (quoting *Hill*, 368 U.S. at 428). In a § 2255 proceeding, the Movant shoulders the burden of proof regarding each ground for relief. *See Kress v. United States*, 411 F.2d 16, 20 (8th Cir. 1969). Moreover, to obtain habeas relief based on an allegation of prosecutorial misconduct, the petitioner must show “the misconduct infected the trial with enough unfairness to render a petitioner's conviction a denial of due process.” *Stringer v. Hedgepeth*, 280 F.3d 826, 829 (8th Cir. 2002) (quoting *Louisell v. Dir. of Iowa Dept. of Corr.*, 178 F.3d 1019, 1023 (8th Cir. 1999)) (noting that if petitioner can show “there is a reasonable probability that the error complained of affected the outcome” of the proceeding, federal habeas relief is proper).

Here, Movant presents no evidence that any impropriety occurred in his case, or that Respondent improperly received the content of any communication between Movant and his

defense counsel. As noted above, “conclusory allegations unsupported by specifics [or] contentions that, in the face of the record, are wholly incredible,” are insufficient to overcome the barrier and warrant relief. *Blackledge*, 431 U.S. at 74; *Apfel*, 97 F.3d at 1077 (unsupported and self-serving statements do not establish a basis for relief). Therefore, Movant’s conclusory claim that his communications were recorded and might have been disclosed to Respondent is without merit. Accordingly, Ground Two is denied.

IV. Evidentiary Hearing and Certificate of Appealability

Because the Court finds Movant has failed to demonstrate that a fundamental defect occurred that resulted in a complete miscarriage of justice, and his contentions are contrary to the record and without merit, Movant’s motion to vacate his sentence is denied. Additionally, since the motions, files, and records conclusively show Movant is not entitled to relief, Movant’s request for an evidentiary hearing is denied. *See Roundtree v. United States*, 751 F.3d 923, 925 (8th Cir. 2014) (“A Section 2255 movant is entitled to an evidentiary hearing . . . unless the motion, files, and record conclusively show he is not entitled to relief.”).

Additionally, pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, the Court must issue or deny a certificate of appealability when it enters a final order adverse to Movant. A certificate of appealability may be issued “only if [Movant] has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). Because Movant has made no such showing, the Court declines to issue a certificate of appealability.

V. Conclusion

For the reasons explained above, Movant's motion is DISMISSED, and a Certificate of Appealability is DENIED.

IT IS SO ORDERED.

/s/ Greg Kays
GREG KAYS, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated: February 7, 2018

IN THE
SUPREME COURT OF THE UNITED STATES

MARCO WHITLEY, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S APPENDIX C

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

No: 18-1400

Marco D. Whitley, Sr.

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:17-cv-00493-DGK)

JUDGMENT

Before BENTON, KELLY and GRASZ, 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.

Appellant's motion to proceed on appeal in forma pauperis is denied as moot.

July 12, 2018

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

/s/ Michael E. Gans

IN THE
SUPREME COURT OF THE UNITED STATES

MARCO WHITLEY, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S APPENDIX D

Marco D. Whitley, Sr., Appellant v. United States of America, Appellee
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
2018 U.S. App. LEXIS 26341
No: 18-1400
September 17, 2018, Decided

Editorial Information: Prior History

Appeal from U.S. District Court for the Western District of Missouri - Kansas City. (4:17-cv-00493-DGK).

Counsel

Marco D. Whitley, Sr., Petitioner - Appellant, Pro se, Leavenworth, KS.
For United States of America, Respondent - Appellee: Bruce E. Clark, Assistant U.S. Attorney, U.S. Attorney's Office, Kansas City, MO.

Opinion

ORDER

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

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