FILED: March 19, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6965
(1:15-cr-00193-CCE-1)
(1:16-cv-01090-CCE-JEP)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

TAVIS LABRON HOUPE

Defendant - Appellant

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: November 28, 2017

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Plaintiff - Appellee

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J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

PER CURIAM:

Tavis Labron Houpe seeks to appeal the district court's order adopting the magistrate judge's report and recommendation and denying relief on his 28 U.S.C. § 2255 (2012) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(B) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the motion states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Houpe has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

TAVIS LABRON HOUPE,	)	
	)	
Petitioner,	)	
	)	1:16-CV-1090
v.	)	1:15-CR-193
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondant.	)	

ORDER AND JUDGMENT

On June 12, 2017, the United States Magistrate Judge's Recommendation was filed and notice was served on the petitioner pursuant to 28 U.S.C. § 636. The petitioner timely filed objections, Doc. 39, to the Recommendation.

To the extent that the petitioner raises a new claim challenging a search and seizure at his residence, such a claim is not properly raised on collateral review. He waived such constitutional challenges by pleading guilty. Moreover, the Presentence Report reflects that the search was undertaken by consent, and in any event, the petitioner admitted to even greater quantities of cocaine base beyond those used in the Guideline calculation, as set out in the Recommendation.

Having reviewed the Recommendation *de novo* to the extent of the petitioner's objections, the Court agrees with the Recommendation and adopts it in full.

IT IS THEREFORE ORDERED AND ADJUDGED that the petitioner's motion to vacate, set aside or correct sentence, Doc. 26, is **DENIED**, and this action is **DISMISSED**, and that, finding no substantial issue for appeal concerning the denial of a

constitutional right affecting the conviction, nor a debatable procedural ruling, a certificate of appealability is **DENIED**.

This the 19th day of July, 2017.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

TAVIS LABRON HOUPE,	)	
	)	
Petitioner,	)	
	)	1:16CV1090
v.	)	1:15CR193-1
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Petitioner, a federal prisoner, filed a Motion [Doc. #26] to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Petitioner pled guilty to one count of possession with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C). The Factual Basis [Doc. #13] supporting his plea, to which Petitioner stipulated through his attorney during his guilty plea (Plea Tr. [Doc. #32] at 27), states that police used a confidential informant to purchase cocaine base from Petitioner on two occasions. They then arrested him and recovered a further unidentified amount of drugs. Petitioner spoke with officers and admitted to obtaining a total of three ounces of cocaine base from a source he met while recently incarcerated in federal prison. At sentencing, the Presentence Report [Doc. #19] detailed undercover buys of one and seven grams of cocaine base and the recovery of another one gram on Petitioner's person at the time of his arrest. A search of a residence connected to Petitioner resulted in the recovery of a further 22 grams of cocaine base, eight grams of marijuana, $3,136 in cash, and a set of digital scales from a safe that Petitioner admitted

owning. The Presentence Report noted that none of the drug amounts had been confirmed via a laboratory report, but attributed a total of 31 grams of cocaine base and eight grams of marijuana to Petitioner for purposes of sentencing. The Presentence Report did not include the entire three ounces of cocaine base to which Petitioner stipulated in the Factual Basis or attribute any amount of drugs to Petitioner in relation to the large amount of cash found in the safe. The drug amounts plus other adjustments listed in the Presentence Report resulted in an advisory sentencing range of 57 to 71 months of imprisonment under the United States Sentencing Guidelines. At sentencing, Petitioner's defense counsel noted the lack of laboratory reports but stated that he was not filing a specific objection to the drug quantities in light of Petitioner's admission to larger quantities. Petitioner's attorney did raise a separate argument that removed a two-level enhancement and resulted in a sentencing range of 46 to 57 months. (Sentencing Tr. [Doc. #28] at 9.) Petitioner then received a sentence of 56 months of imprisonment.

Petitioner's § 2255 Motion raises a single claim for relief in which he challenges the amount of drugs attributed to him at sentencing. Petitioner states that, at some point after his sentencing, he obtained the laboratory reports that were not available at the time of his sentencing. According to him, these reports show that authorities recovered a total of only about one gram of cocaine base and four grams of cocaine hydrochloride. He asks to be resentenced using the lower drug amount reflected in the reports to calculate his advisory Guidelines range. The Government filed a Response [Doc. #33] opposing relief.

Petitioner's contention is essentially that the sentencing judge used the amount of 31 grams of cocaine base to determine his advisory sentencing range, but that this determination is erroneous or unsupported in light of the laboratory reports he now possesses. To the extent that Petitioner alleges error in calculating his sentencing range under the Guidelines, it is questionable whether or not Petitioner can even raise this claim on collateral review. See generally United States v. Foote, 784 F.3d 931 (4th Cir. 2015). However, even if Petitioner's claim is cognizable on collateral review, it still fails in light of the Factual Basis, to which Petitioner stipulated, which clearly states that he admitted to authorities upon his arrest that he had purchased three ounces of cocaine base, or roughly 85 grams. This is far more than the 31 grams attributed to him at sentencing. Even now, Petitioner does not deny making that statement or that the statement is true. Instead, he argues that he was "not being charged with commenting on the amounts of controlled substance," but only with the amount he possessed with intent to distribute. (Reply [Doc. #35] at 2.) Petitioner's charges, i.e. his Indictment [Doc. #1], did not specify any particular amount of cocaine base. Rather, the amount of the drugs he possessed with intent to distribute came into play only at sentencing for the purposes of determining his advisory sentencing range under the Guidelines. At that point, his statements, as detailed in the Factual Basis and stipulated to during his plea, could certainly be considered as support for his sentencing range. Petitioner admitted to purchasing three ounces of cocaine base, he was caught distributing some quantity of cocaine base, and he had just under an ounce of it still in his possession, along with a large amount of cash. He also denied using cocaine during preparation of the Presentence Report (Presentence Report, ¶ 44).

The clear inference is that Petitioner possessed with intent to distribute the entire three ounces of cocaine base. Therefore, even if the laboratory reports partially call some of the smaller amounts of the drug into question, Petitioner's sentencing range remains fully supported by the record. His claim should be denied.[1]

IT IS THEREFORE RECOMMENDED that Petitioner's Motion to vacate, set aside or correct sentence [Doc. #26] be denied and that this action be dismissed.

This, the 12th day of June, 2017.

/s/ Joi Elizabeth Peake
United States Magistrate Judge

[1] The Government treats Petitioner's claim as one alleging ineffective assistance of counsel. Although Petitioner does not actually appear to make such a claim, even if he does, it still fails. To prove ineffective assistance, Petitioner would have to show, first, that his attorney's performance fell below a reasonable standard for defense attorneys and, second, that he was prejudiced by this performance. See Strickland v. Washington, 466 U.S. 668 (1984). Given Petitioner's admission that he purchased three ounces of cocaine base and the clear evidence that he was dealing that drug and had about an ounce left, his attorney did not fail to meet a reasonable standard for defense attorneys by not contesting the amount involved at sentencing and could not have prejudiced Petitioner by failing to raise the meritless argument.