

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12863-K

DARYL MINGO,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Daryl Mingo is a federal prisoner, serving a total 180-month sentence after pleading guilty to possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g) (Count 1), carrying a firearm in the commission of a drug-trafficking offense, in violation of 18 U.S.C. § 924(c) (Count 2), and possession with intent to distribute and distribution of heroin, in violation of 21 U.S.C. § 841(a) (Count 3). He seeks a certificate of appealability (“COA”) and leave to proceed *in forma pauperis* (“IFP”), in order to appeal the district court’s denial of his 28 U.S.C. § 2255 motion to vacate sentence. In order to obtain a COA, a § 2255 movant must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The movant must demonstrate that “reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Ground 1

Mr. Mingo first argued that his plea was involuntary due to counsel's incorrect advice with regard to the likelihood that he would be convicted on Count 2 if he proceeded to trial. Specifically, he pointed to counsel's assurance that his attempted sale of a firearm during the drug transactions in question would, if proven, have been sufficient to support a conviction for carrying a firearm in furtherance of a drug-trafficking offense. Reasonable jurists would not debate the district court's rejection of this claim.

As an initial matter, Mr. Mingo cannot show that his plea was involuntary, as the district court conducted a thorough plea colloquy, during which he never expressed any disagreement with the factual basis for Count 2, instead repeatedly affirming that he understood the charges, was voluntarily entering the plea, and was satisfied with counsel's advice. His representations to the court constitute "a formidable barrier" to the post-conviction relief that he seeks, and he has not sufficiently demonstrated that his prior statements should be overlooked. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977). Moreover, Mr. Mingo claims that his sale of a firearm during the course of a drug transaction does not satisfy the requirement that the firearm be carried "in furtherance" of the drug offense, but this Court has indicated otherwise. *See, e.g., United States v. Miranda*, 666 F.3d 1280, 1283-84 (11th Cir. 2012). Thus, counsel did not perform deficiently in advising Mr. Mingo that his conduct could support a conviction under § 924(c).

Ground 2

Mr. Mingo next asserted that counsel failed to argue that his convictions on Counts 1 and 2 violated double jeopardy, as he could not constitutionally be convicted of both possession of a firearm by a convicted felon and carrying a firearm in furtherance of a drug trafficking crime where

the convictions arose out of the same set of operative facts. Reasonable jurists would not debate the district court's rejection of this claim.

Section 922(g) requires proof of elements not required for conviction under § 924(c), and vice versa. Therefore, the Double Jeopardy Clause is not implicated. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932). Accordingly, counsel would have had no reason to raise a double jeopardy objection, and, therefore, he did not perform deficiently.

Ground 3

Mr. Mingo next argued that counsel was ineffective for advising him to accept a plea when his conduct could not have supported a conviction under § 924(c). Reasonable jurists would not debate the district court's rejection of his claim. As discussed above, this underlying assertion is without merit, and, therefore, counsel did not perform deficiently in advising Mr. Mingo to plead guilty to Count 2. Furthermore, Mr. Mingo failed to show that he would have insisted on proceeding to trial absent counsel's allegedly erroneous advice.

Ground 4

Finally, Mr. Mingo argued that the district court erred when it found that he qualified as an armed career criminal, as his convictions for sale and delivery of a controlled substance do not qualify as serious drug offenses under the Armed Career Criminal Act ("ACCA") because Florida's statute criminalizing the sale of controlled substances is broader than the ACCA's definition of serious drug offense. However, this Court has held that the language of the state statute need not "exactly match" the specific acts listed in the ACCA definition. *United States v. White*, 837 F.3d 1225, 1233 (11th Cir. 2016). Moreover, Mr. Mingo's assertion is foreclosed by binding Circuit precedent. *See United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014).

Accordingly, reasonable jurists would not find debatable or wrong the district court's denial of Mr. Mingo's § 2255 motion, and his motion for a COA is DENIED. His motion for leave to proceed IFP on appeal is DENIED AS MOOT.


UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DARYL MINGO,

Petitioner,

v.

CASE NO. 6:16-cv-521-Orl-40TBS
(6:15-cr-63-Orl-40TBS)

UNITED STATES OF AMERICA,

Respondent.

_____ /

ORDER

This cause is before the Court on an Amended Motion to Vacate, Set Aside, or Correct Sentence ("Amended Motion to Vacate," Doc. 14) filed pursuant to 28 U.S.C. § 2255 and Memorandum in Support of Motion to Vacate Sentence Pursuant to 28 U.S.C. § 2255 ("Memorandum," Doc. 15). The Government filed a Response to Petitioner's Amended Motion to Vacate (Doc. 17) in compliance with this Court's instructions. Petitioner filed a Reply to the Government's Response. (Doc. 21).

Petitioner alleges four claims for relief. For the following reasons, the Amended Motion to Vacate is denied.

I. PROCEDURAL HISTORY

On March 11, 2015, a criminal complaint was filed against Petitioner, accusing him of committing the following offenses: possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1) (Count One), carrying a firearm in the commission of a drug trafficking offense in violation of 18 U.S.C. § 924(c) (Count Two), and possession

II. LEGAL STANDARD

Section 2255 provides federal prisoners with an avenue for relief under limited circumstances:

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 attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence

28 U.S.C. § 2255. If a court finds a claim under Section 2255 to be valid, the court “shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” *Id.* To obtain this relief on collateral review, however, a petitioner must clear a significantly higher hurdle than would exist on direct appeal. *See United States v. Frady*, 456 U.S. 152, 166 (1982) (rejecting the plain error standard as not sufficiently deferential to a final judgment).

III. ANALYSIS

A. Claim One

Petitioner contends that his plea was involuntary due to defense counsel’s incorrect advice with regard to Count Two. (Doc. 14 at 4). Petitioner states that counsel told him he could be convicted of Count Two due to the fact that he attempted to sell a firearm during the drug trafficking offense. (*Id.*). However, Petitioner argues that he never used or carried a firearm, and “mere presence of a firearm” during a drug offense cannot constitute a conviction under § 924(c). (*Id.*).

In reviewing the constitutional adequacy of a guilty plea, the Eleventh Circuit has indicated that a federal reviewing court may not set aside a guilty plea if the record demonstrates that the defendant understood the charges against him and the consequences of the plea and voluntarily chose to enter the plea without being coerced to do so. *Stano v. Dugger*, 921 F.2d 1125, 1141 (11th Cir. 1991) (citation omitted). As discussed by the Fifth Circuit in *United States v. Gaitan*, 954 F.2d 1005 (5th Cir. 1992):

The consequences of a guilty plea, with respect to sentencing, mean only that the defendant must know the maximum prison term and fine for the offense charged. As long as [the defendant] understood the length of time he might possibly receive, he was fully aware of his plea's consequences.

Id. at 1012 (quotation and citation omitted).

The Court conducted a thorough and comprehensive plea colloquy. At the outset of the plea hearing, the Court advised Petitioner that if he did not understand something that he was permitted to ask for clarification or additional time to speak with his attorney. (Doc. 6-2 at 4). Petitioner advised the court that he did not have any mental health issues that would affect his ability to understand or appreciate the proceedings. (*Id.* at 4-5). The Court asked Petitioner to review the plea agreement and ensure each page had been initialed and that the agreement was signed. (*Id.* at 6-7). Petitioner affirmed that he had read and signed the agreement. (*Id.* at 7-8). Petitioner stated that he had discussed the terms and conditions of the plea agreement with counsel and understood the agreement. (*Id.* at 8).

Petitioner next advised the Court that there were no additional promises or

representations made by the Government that were not contained in the plea agreement. (*Id.* at 9-10). Furthermore, Petitioner stated that he had not been threatened or coerced into entering the plea. (*Id.* at 10). The Court advised Petitioner of the maximum penalty he faced, life imprisonment, and the minimum mandatory sentence, fifteen years in prison. (*Id.* at 11-15). The Court also stated that there was no guarantee as to what his guideline range would be until after until after a presentence investigation report was completed. (*Id.* at 15-16). Petitioner stated that he understood that it was unlikely his counsel could be specific as to his guidelines range at this time. (*Id.* at 16).

Additionally, Petitioner was informed that he would not be able to withdraw his plea if it turned out that his guideline range was higher than he anticipated. (*Id.*). Petitioner further acknowledged that he understood he was waiving his right to appeal his sentence directly or collaterally. (*Id.* at 17-18). The Assistant United States Attorney discussed the elements of each offense, and with regard to Count Two, the parties noted that the sale of a firearm during a drug trafficking offense was sufficient for a conviction under § 924(c). (*Id.* at 20-21). Petitioner agreed to the factual basis as set forth in the plea agreement and stated that the facts were true and correct. (*Id.* at 23-26). The Court concluded that Petitioner was competent, aware of the nature of the charges, and had knowingly and voluntarily entered the plea. (*Id.* at 27).

During the plea colloquy, the Court discussed whether the sale of a firearm was sufficient for a conviction under § 924(c), and noted that the case law supported such a conviction. (*Id.* at 21). Petitioner did not at any time disagree or tell the Court that counsel

had given him incorrect or different advice with regard to this matter. Instead, Petitioner stated that he was voluntarily entering into the plea and that he was satisfied with counsel's services. (*Id.* at 5). Petitioner's representations to the Court constitute a "formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 432 U.S. 63, 73-74 (1977). Petitioner has not demonstrated that the Court should overlook his representations made during the plea colloquy.

Furthermore, Petitioner fails to argue that counsel's advice with regard to Count Two was incorrect. 18 U.S.C. § 924(c) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime. . . uses or carries a firearm, or who, in furtherance of such crime, possesses a firearm. . ." is subject to a minimum mandatory five-year term of imprisonment. The Eleventh Circuit Court of Appeals has stated that to prove the "furtherance" element of § 924(c), the Government must "show 'some nexus' between the gun and the drug trafficking offense." *United States v. Cunningham*, 633 F. App'x 920, 922-23 (11th Cir. 2015) (citing *United States v. Timmons*, 283 F.3d 1246, 1253 (11th Cir. 2002)). Federal courts have held that the bartering, selling, or buying of firearms in connection with a drug trafficking crime is sufficient for a conviction pursuant to § 924(c). See *United States v. Miranda*, 666 F.3d 1280, 1283-84 (11th Cir. 2012); *Calloway v. United States*, No. 2:15-cv-783-WKW, 2018 WL 1598947, at *6 (N.D. Ala. Feb. 13, 2018). Therefore, Petitioner's conviction for Count Two was proper because the sale of a firearm during a drug trafficking offense is sufficient to prove the

“furtherance” element of § 924(c). Thus, Petitioner cannot demonstrate that his plea was involuntarily entered due to counsel’s advice. Claim One is denied.

B. Claim Two

Petitioner alleges that counsel was ineffective for failing to argue that his convictions for Counts One and Two violate the Double Jeopardy Clause of the Fifth Amendment. (Doc. 14 at 5).

The Double Jeopardy Clause protects criminal defendants from being subjected to cumulative punishments for a single offense. *See United States v. Gonzalez*, 244 F. App’x 316, 318 (11th Cir. 2007) (citing *Missouri v. Hunter*, 459 U.S. 359 (1983)). Therefore, “it is unconstitutional to indict a defendant on two charges stemming from one offense absent an indication that Congress intended this charging scheme. . . .” *Id.* In the absence of clear evidence of legislative intent, federal courts will rely on the test introduced in *Blockburger v. United States*, 284 U.S. 299 (1932). The *Blockburger* Court held that where the same act or transaction constitutes a violation of two distinct statutory provisions, cumulative punishment is permissible if each statute “requires proof of an additional fact which the other does not.” 284 U.S. at 304.

Federal courts have held that convictions pursuant to § 922(g) and § 924(c) do not violate double jeopardy because first, there is clear evidence that Congress intended for criminal defendants to be sentenced to cumulative punishments for each offense. *See United States v. Walker*, 91 F.3d 136 (4th Cir. 1996); *United States v. Lawrence*, 928 F.2d 36 (2d Cir. 1991); *Smith v. United States*, No. CIVA 1:06CV3151 JOF, 2008 WL 187395, at *7

(N.D. Ga. Jan. 17, 2008). Moreover, §§ 922(g) and 924(c) each require proof of a different element, and consequently satisfy the *Blockburger* test. Therefore, Petitioner has not demonstrated that counsel's failure to raise this matter amounts to deficient performance or that prejudice resulted. Accordingly, Claim Two is denied.

C. Claim Three

Petitioner asserts that trial counsel was ineffective for advising him to accept a plea when the sale of a firearm during a drug offense could not constitute a violation of § 924(c). (Doc. 14 at 7). This claim is related to Claim One. In its discussion of Claim One, the Court concluded that Petitioner was properly convicted of Count Two because the sale of a firearm in connection with a drug trafficking crime is sufficient to satisfy the elements of § 924(c). See *Miranda*, 666 F.3d at 1283-84; *Calloway*, 2018 WL 1598947, at *6. Defense counsel did not act deficiently because he did not give Petitioner incorrect advice. Furthermore, Petitioner cannot demonstrate prejudice, or that but for counsel's actions, he would not have entered the plea and instead would have gone to trial. Petitioner was facing a life sentence with a fifteen-year minimum mandatory term if convicted at trial. Moreover, his guidelines range, including a reduction for acceptance of responsibility, was 322 to 387 months imprisonment, which is substantially more than the fifteen-year sentence that Petitioner received after entering the plea and cooperating with the Government. Accordingly, Claim Three is denied..

D. Claim Four

Petitioner contends that the Court erred when it found that he qualified as an

armed career criminal. (Doc. 14 at 8). Petitioner states that his prior convictions for sale and delivery of controlled substances in Florida no longer qualify as predicate convictions. (Doc. 14 at 8; Doc. 15 at 16-17).

Petitioner was found to be an armed career criminal based in part on his prior convictions for (1) sale and delivery of a controlled substance in 1990; (2) aggravated assault with a weapon in 1994; (3) burglary of a dwelling with an assault and battery in 1996; and (4) sale of cocaine in 2011.² (Criminal Case, Doc. 27). Florida convictions for sale or delivery of a controlled substance qualify as serious drug offenses under the ACCA, and therefore, Petitioner's claim is foreclosed by binding Eleventh Circuit precedent. *United States v. Felix*, 715 F. App'x 958, 965 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 1711 (2018) (citing *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014) (holding that a violation of Florida Statute § 893.13(1) for sale, manufacture, delivery, or possession with intent to sell a controlled substance is a serious drug offense under the ACCA)).

Although Petitioner cites to *United States v. Hinkle*, 832 F.3d 569 (11th Cir. 2016) (holding conviction for delivery of a controlled substance offense in Texas does not qualify as a serious drug offense under the career offender enhancement), to support his claim that his convictions do not qualify for ACCA purposes, the Court notes that the

² The Court notes Petitioner does not challenge his other prior convictions. In any event, aggravated assault qualifies as crimes of violence under the ACCA. *See Flowers v. United States*, 724 F. App'x 820 (11th Cir. 2018). Thus, Petitioner still has three qualifying convictions for ACCA purposes.

Fifth Circuit decision is not binding on this Court. Additionally, the Court is not permitted to ignore binding Eleventh Circuit precedent. Accordingly, Petitioner is not entitled to relief on this claim.³

Any of Petitioner's allegations not specifically addressed herein are without merit.

IV. CERTIFICATE OF APPEALABILITY

This Court should grant an application for a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Petitioner fails to make such a showing. Thus, the Court will deny Petitioner a certificate of appealability.

Accordingly, it is hereby **ORDERED AND ADJUDGED**:

1. Petitioner's amended motion to vacate, set aside, or correct an illegal sentence pursuant to 28 U.S.C. § 2255 (Doc. 14) is **DENIED**.
2. The Clerk of the Court shall enter judgment accordingly and is directed to close this case.
3. The Clerk of Court is directed to file a copy of this Order in criminal case number 6:15-cr-63-Orl-40TBS and terminate the pending Motions to Vacate (Criminal Case, Doc. Nos. 43 and 44) in that case.
4. Petitioner is **DENIED** a certificate of appealability.

³ Additionally, the Court notes that while Petitioner qualifies as an armed career criminal, he received a departure sentence that was below the fifteen-year minimum mandatory for Count One.

DONE AND ORDERED in Orlando, Florida, this 21 day of June, 2018.



PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record
Daryl Mingo