

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

MANUEL MALDONADO AGUILAR

PETITIONER

v.

CASE NO. 4:11CR00190 BSM

UNITED STATES OF AMERICA

RESPONDENT

ORDER

Petitioner Manuel Maldonado Aguilar's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 [Doc. No. 215] is denied. Maldonado presents eight arguments in support of his position that his Sixth Amendment right to the effective assistance of counsel was violated. Having conducted the pretrial and observed both of Maldonado's trials, and having reviewed the entire record, including but not limited to the government's response [Doc. No. 218] and Maldonado's reply [Doc. No. 221], the motion is denied because Maldonado has satisfied neither prong of the analysis under *Strickland v. Washington*, 466 U.S. 668 (1984).

I. BACKGROUND

In a March 7, 2012, Superseding Indictment, Maldonado was charged with conspiracy to possess with intent to distribute methamphetamine. LaTonya Austin was initially appointed to defend Maldonado, but he retained the services of Leonardo Monterrey and Robert Tellez. On March 12, 2012, Maldonado changed his plea from not guilty to guilty, but a few weeks before his sentencing hearing, Maldonado moved to withdraw his guilty plea. Maldonado's motion was granted, and he proceeded to trial. Prior to trial, Monterrey

and Tellez were permitted to withdraw as counsel, and James Phillips was appointed to defend Maldonado.

Maldonado was found guilty by a jury on April 30, 2013; however, due to an absolute oversight, an alternate juror was improperly permitted to remain in the jury room during deliberations. Therefore, the Eighth Circuit remanded for a new trial. *See United States v. Aguilar*, 752 F.3d 1148 (8th Cir. 2014). On August 21, 2014, a second jury found Maldonado guilty. Maldonado timely filed this motion to vacate, set aside, or correct sentence, arguing that his lawyer was ineffective at numerous stages throughout representation.

II. LEGAL STANDARD

An ineffective assistance of counsel claim is considered according to the framework provided by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). According to *Strickland*, two steps are required to succeed on an ineffective assistance of counsel claim: deficient performance and prejudice. As for deficient performance, the defendant must show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687. As for prejudice, the defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*

III. DISCUSSION

Maldonado makes eight arguments in support of his ineffective assistance of counsel claim. Although Maldonado’s Section 2255 motion sets out eight grounds for the ineffective assistance of counsel, *see Pet’r’s Mot. 4-16, Doc. No. 215*, his memorandum in support of

his motion sets out seven arguments. Moreover, the numbering in his memorandum does not always match up to the numbering in his motion. Thus, this order will address the eight arguments set out in the motion, although the memorandum has also been considered.

First, Maldonado argues that his lawyers were ineffective for failing to investigate DEA agent Brad Abbott's affidavit and was also ineffective for waiving his probable cause hearing. The affidavit to which Maldonado is referring was an affidavit for a criminal complaint, not an affidavit for a search warrant. The decisions not to investigate Abbott's affidavit and to waive Maldonado's probable cause hearing were strategic, and strategic decisions do not rise to the level of ineffective assistance of counsel. *Strickland*, 466 U.S. at 689 ("Even the best criminal defense attorneys would not defend a particular client in the same way."). Even if these decisions amounted to deficient performance, such a strategic decision was not prejudicial to Maldonado, as he was indicted on the same offense eleven days later. Because Maldonado is unable to prove deficient performance or prejudice, ground one fails.

Maldonado's second argument is that his lawyers were ineffective for failing to challenge government witnesses testifying at his suppression hearing because their names were not presented to the magistrate judge in an affidavit. The affidavit in question, however, was an affidavit for a criminal complaint, not an affidavit for a search warrant. Thus, such a challenge would have been frivolous, and lawyers are not required to make frivolous challenges. *Rodriguez v. United States*, 17 F.3d 225, 226 (8th Cir. 1994). Maldonado's lawyers had no basis to argue that these witnesses could not testify at the hearing.

Additionally, Maldonado is unable to prove prejudice because he gave the police officers consent to enter and search his home. Because Maldonado is unable to prove deficient performance or prejudice, this ground also fails.

Maldonado's third argument is that his lawyers were ineffective for failing to challenge at the suppression hearing the consent to search his residence based on the totality of the circumstances. After Maldonado was arrested, officers conducted a protective sweep of his residence, and DEA Group Supervisor Moreman asked Maldonado if he would give consent to search the residence. Maldonado agreed, and Moreman then offered Maldonado a consent form in English and Spanish. Maldonado chose the Spanish form, read it, and then signed the form. Agents spoke with Maldonado in English and noted that he spoke English effectively. Agents searched Maldonado's residence based on this consent form.

This argument fails. First, it is unclear what Maldonado wanted his counsel to do differently. His counsel filed a motion to suppress in which they argued that the evidence was obtained by an illegal search of Maldonado's residence, his consent was not knowing and voluntary, and his *Miranda* waiver was not knowing and voluntary. The motion was denied. Although his counsel did not specifically include a challenge to the protective sweep in the motion to suppress, it was acknowledged at the suppression hearing that the sweep was valid. Mot. Suppress Hr'g Tr. 71.

Fourth, Maldonado argues that his representation was ineffective because his counsel failed to withdraw after the first trial. This argument is wholly without merit. Maldonado's argument seems to be based on the result and not based on the process. The purpose of a

Section 2255 motion is to ensure that the defendant received a fair trial. *See Strickland*, 466 U.S. at 689. Counsel is not ineffective simply because he loses at trial, wins on appeal, and then loses a second trial.

Maldonado's final four arguments contend that counsel was ineffective for not raising certain issues on appeal. Maldonado's sixth argument, that counsel was ineffective for not raising the sufficiency of the evidence on appeal, is dismissed because this issue was raised during both appeals. *See United States v. Aguilar*, 617 F. App'x 603, 606 (8th Cir. 2015); *United States v. Aguilar*, 743 F.3d 1144, 1148 (8th Cir. 2014). The remaining three arguments, that counsel should have argued double jeopardy on appeal and two arguments concerning counsel's failure to challenge the sufficiency of the evidence of possession with intent to distribute methamphetamine, fail. This is true because, "absent contrary evidence, [it is assumed] that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." *United States v. Brown*, 528 F.3d 1030, 1033 (8th Cir. 2008).

The question at this stage is whether a lawyer's decision "was an unreasonable one which only an incompetent attorney would adopt." *Anderson v. United States*, 393 F.3d 749, 754 (8th Cir. 2005). Because these matters would have been frivolous to raise, and because counsel has great discretion when choosing the issues to challenge on appeal, these final four arguments are denied.

IV. NO HEARING REQUIRED

Finally, no hearing is required. Although the Eighth Circuit has explained that hearings in Section 2255 cases are "preferred," *Thomas v. United States*, 737 F.3d 1202,

1206 (8th Cir. 2013), a hearing is not required 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. *United States v. Sellner*, 773 F.3d 927, 929-30 (8th Cir. 2014). A hearing is not necessary because Maldonado's claims for the ineffective assistance of counsel are conclusory and contradicted by the record. Further, when entering a final order adverse to a petitioner, a certificate of appealability must be issued or denied. *See* Rule 11 of the Rules Governing Section 2255 Cases in the United States District Court. Because Maldonado has not made a substantial showing of the denial of a federal constitutional right, a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c) (2012); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000).

V. CONCLUSION

For the reasons set forth above, Maldonado's motion is denied, and a certificate of appealability is denied.

IT IS SO ORDERED this 19th day of August 2016.



UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-3666

Manuel Maldonado Aguilar

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Little Rock
(4:16-cv-00062-BSM)

JUDGMENT

Before WOLLMAN, MURPHY and COLLTON, 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.

April 11, 2017

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

/s/ Michael E. Gans

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

MANUEL MALDONADO AGUILAR

PETITIONER

v.

CASE NO. 4:11-CR-00190 BSM

UNITED STATES OF AMERICA

RESPONDENT

ORDER

Petitioner Manuel Maldonado Aguilar's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. section 2255 [Doc. No. 240], motion for disclosure [Doc. No. 239], and motion for entry of default judgment [Doc. No. 241] are denied.

Aguilar concedes that the claims he is raising were raised in his earlier habeas petition [Doc. No. 215]. He, however, argues that this habeas petition is not successive because the order on his previous petition did not reach the merits. Doc. No. 240 at 28. Notwithstanding his argument, the previous order addressed the merits of each of his claims. *See* Doc. No. 222. Consequently, Aguilar's motion to vacate, set aside, or correct his sentence is a successive motion under section 2255(h) and, since he has not sought authorization from the Eighth Circuit before filing this motion, it is dismissed without prejudice. *See United States v. Lee*, 792 F.3d 1021, 1022 (8th Cir. 2015).

Aguilar also requests production of photographs taken of his residence during the investigation because those photographs contain exculpatory information. Doc. No. 239. A habeas petitioner is not entitled to discovery as a matter of ordinary course, but most show good cause for the discovery. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). To establish

good cause, a petitioner must specifically allege facts that give the court “reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is ... entitled to relief.” *Newton v. Kemna*, 354 F.3d 776, 783 (8th Cir. 2004). Aguilar alleges that these photographs were concealed from the defense and would provide “key details to his benefit.” Doc. No. 239. This bare assertion fails to establish good cause and the motion is denied.

Accordingly, Aguilar’s motions [Doc. No. 239-41] are denied.

IT IS SO ORDERED this 14th day of November 2018.

Brian S. Miller
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-3699

Manuel Maldonado Aguilar

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Eastern District of Arkansas - Little Rock
(4:18-cv-00493-BSM)

JUDGMENT

Before COLLTON, BOWMAN, and KOBES, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a). The motion of the appellant for leave to proceed on appeal in forma pauperis is granted.

May 09, 2019

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

/s/ Michael E. Gans

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