W.D.N.Y.
16-cv-6764
Geraci, C.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of November, two thousand eighteen.

Present:

Reena Raggi,
Peter W. Hall,
Richard J. Sullivan,
Circuit Judges.

Ronald Tuttle,

Petitioner-Appellant,

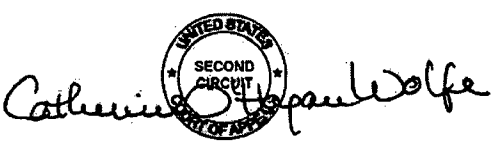
v. 18-1995

United States of America,

Respondent-Appellee.

Appellant, pro se, has filed motions seeking a certificate of appealability, in forma pauperis status, and various other relief. Upon due consideration, it is hereby ORDERED that the motions are DENIED and the appeal is DISMISSED because Appellant has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c); *see also Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of April, two thousand nineteen.

Ronald Tuttle,

Petitioner - Appellant,

v.

United States of America,

Respondent - Appellee.

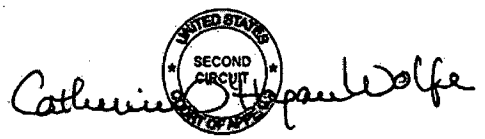
ORDER

Docket No: 18-1995

Appellant, Ronald Tuttle, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



PS/CD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RONALD TUTTLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

13-CR-6109-FPG
16-CV-6764-FPG

DECISION AND ORDER

INTRODUCTION

Before the Court is *pro se* Petitioner Ronald Tuttle's Motion to Vacate, Set Aside, or Correct the Sentence pursuant to 28 U.S.C. § 2255. ECF No. 128.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On July 30, 2013, Tuttle was charged by a four-count federal indictment with conspiracy and substantive offenses related to 3, 4–methylenedioxypyrovalerone ("MDPV"), a Schedule I controlled substance as of October 21, 2011, including two counts of conspiracy, one count of importation, and one count of attempted possession of a controlled substance. ECF No. 10. The conspiracies charged in Counts One and Two of the indictment were alleged to have occurred from November 2011 through February 7, 2013. On September 26, 2014, Tuttle was convicted, by jury verdict, as charged. ECF No. 66. The Court sentenced Tuttle to 97 months of imprisonment on January 5, 2015, and he appealed his conviction to the United States Court of Appeals, Second Circuit, which affirmed his conviction on April 13, 2016. *See United States v. Tuttle,* 646 F. App'x 120 (2d Cir. 2016). On November 23, 2016, Tuttle filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. After Tuttle submitted voluminous filings to supplement his original pleadings, the Court directed Tuttle to either (1) proceed on his original application or (2) file and

proceed on an amended petition. Tuttle elected to file the instant Petition on June 9, 2017, which alleges prosecutorial misconduct and ineffective assistance of counsel. ECF No. 128.

DISCUSSION

Section 2255 provides, in relevant part, that:

> 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.

28 U.S.C. § 2255(a). Accordingly, collateral relief is available "only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error or law or fact that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Bokum*, 73 F.3d 8, 12 (2d Cir. 1995) (internal quotations and citation omitted). A court may dismiss a Section 2255 motion without a hearing if the motion and the record conclusively show that the petitioner is not entitled to relief. *See, e.g.*, *Chang v. United States*, 250 F.3d 79, 85-86 (2d Cir. 2001).

I. Prosecutorial Misconduct

Tuttle contends that during the prosecutor's summation at trial, she improperly disparaged his credibility and argued to the jury that it should consider an October 15, 2011 seizure of a package containing MDPV sent to him from China as evidence of the charges, despite knowing that MDPV was not a Schedule I controlled substance on that date. The Government argues that the prosecutor's references to the October 15, 2011 seizure in her closing statement "merely demonstrated the fact that on two separate occasions, Tuttle received a package from China" containing MDPV despite his trial testimony "that he never knowingly imported any drug from China." ECF No. 140 at 10.

"Prosecutorial misconduct may provide a basis for § 2255 relief only when such conduct constitutes a denial of due process." *Minaya v. United States*, No. 10 CR. 1179 (JFK), 2017 WL 2276497, at *3 (S.D.N.Y. May 23, 2017) (quoting *Jones v. United States*, Nos. 92 CR. 925 (LBS), 99 Civ. 5738 (LBS), 2000 WL 987271, at *5 (S.D.N.Y. July 17, 2000)). The standard for prosecutorial misconduct in habeas proceedings "is whether the prosecution's behavior caused substantial prejudice to the defendant, thereby rendering the trial fundamentally unfair." *United States v. Barr*, 892 F. Supp. 51, 57 (D. Conn. 1995), *aff'd sub nom.*, *United States v. Preston*, 101 F.3d 681 (2d Cir. 1996) (citing *Garofolo v. Coomb*, 804 F.2d 201, 206 (2d Cir. 1986)). A movant is entitled to relief under Section 2255 "only if the claimed error is a 'fundamental defect which inherently results in a complete miscarriage of justice.'" *Id.* (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). Moreover, "[t]he error must be a jurisdictional or constitutional defect of the type cognizable under a writ of habeas corpus." *Id.* The question of whether a prosecutor's behavior was substantially prejudicial rests "largely on three factors: (1) the severity of the misconduct; (2) curative measures taken by the court; and (3) the certainty of conviction absent misconduct." *Id.* (citing *U.S. v. LaMorte*, 950 F.2d 80, 83 (2d Cir. 1991)).

The Court finds that Tuttle has procedurally defaulted his prosecutorial misconduct claim because it could have been raised previously on his direct appeal. A claim asserted by a habeas petitioner that was not raised on direct appeal is ineligible for review in a Section 2255 proceeding unless the petitioner can "first demonstrate either cause and actual prejudice, or that he is actually innocent." *Bousley v. United States*, 523 U.S. 614, 621, 622 (1998) (internal quotation marks and citations omitted) ("Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal.") (internal quotation marks omitted).

II. Ineffective Assistance of Trial Counsel

To prevail on his ineffective assistance of counsel claims, Tuttle must satisfy the two-part test set out by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the petitioner must show that: (1) counsel's representation "fell below an objective standard of reasonableness" and (2) counsel's deficient performance prejudiced the petitioner. *Id.* at 688, 694. "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 . . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

A. Prosecutor's Comments on Summation

To the extent that Tuttle's ineffective assistance of counsel claim for failing to object to the prosecutor's comments allows his prosecutorial misconduct claim to survive the procedural bar in a Section 2255 motion, it nonetheless fails. In his Petition, Tuttle references the following statements that the prosecutor made on summation: "First, the substance that the defendant was ordering, MDPV, was a Schedule I controlled substance that he was importing from another country, China, into the U.S." ECF No. 75 at 170 (Trial Transcript, p. 681). The prosecutor later argued that "the defendant had not one, but two packages seized that were being sent to him from China in his name, his address, where he lived and that the powder from both of those packages was tested by forensic chemists and both determined to be MDPV, not Sensa, but MDPV, a Schedule I controlled substance." ECF No. 75 at 187 (Trial Transcript, p. 698). Tuttle contends that because the first of the two referenced packages was seized on October 15, 2011, before MDPV was classified as a Schedule I substance, the prosecutor knowingly misled the jury by

implying that MDPV was a controlled substance when the package was seized on October 15, 2011. Tuttle asserts that his trial attorney erred by not objecting to the prosecutor's summation.

The Government argues that the prosecutor's statements were fair comments on Tuttle's defense that he did not knowingly ship drugs from China, but that he instead ordered the dietary supplement Sensa. The Government also points out that the prosecutor did not argue that the October 15, 2011 seizure should be considered evidence of any of the charges for which Tuttle was being tried.

The Court finds that the allegedly improper statements were appropriate comments on the evidence and that, in any event, trial counsel's failure to object to these statements is attributable to reasonable trial tactics. *See Cuevas v. Henderson*, 801 F.2d 586, 592 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987) (finding that where the prosecution's closing statement appropriately repudiated defendant's alibi testimony, counsel's failure to object did not constitute ineffective assistance of counsel). Moreover, there is no evidence establishing prejudice or any likelihood of acquittal in the absence of the prosecutor's comments. In fact, in affirming Tuttle's conviction, the Second Circuit found that "[t]here was more than sufficient evidence for any rational juror to find that Tuttle knowingly imported MDPV from China and attempted to possess with intent to distribute MDPV," including:

> (1) testimony from a special agent with Homeland Security Investigations ("HSI") that Tuttle accepted a package for delivery in 2013 that had contained MDPV, (2) testimony of Michael Garinger, an inmate at a state correctional facility, that he had purchased MDPV from Tuttle for almost two years prior to February 2013, (3) Tuttle's own statement made to an HSI agent that he was ordering MDPV from China, (4) emails from Tuttle's account to various suppliers in China explicitly referencing orders of and prices for MDPV, and (5) handwritten notes with price quotes for various amounts of MDPV found in Tuttle's home.

Tuttle, 646 F. App'x at 123.

B. Evidence Tampering

Tuttle contends that a discrepancy in trial testimony, where one Government witness testified that the color of the substance contained in the MDPV package intercepted on January 7, 2013, was "white," and another Government witness, who later received the same package, testified that the substance was "tan," indicates evidence tampering. Tuttle argues that defense counsel was ineffective for failing to challenge the resulting search of his residence by execution of a search warrant that was based on this purportedly tainted evidence. ECF No. 128 at 11-12. Tuttle asserts no factual basis for a tampering claim and nothing in the record or chain-of-custody evidence suggests that tampering occurred. Therefore, the Court finds that counsel's performance was not ineffective under the *Strickland* standard for declining to challenge the search warrant related to Tuttle's residence.

C. Tuttle's Written Statement

Tuttle contends that trial counsel was ineffective for failing to present inconsistencies between his written statement and the testimony of Special Agent Francis Zabawa, who interviewed Tuttle and took the statement. The Government argues that defense counsel entered Tuttle's written statement into evidence and used it to "thoroughly" cross-examine Special Agent Zabawa "for over an hour," including questioning about inconsistencies between the statement and Zabawa's prior testimony. ECF No. 140 at 21; *see also* ECF No. 140-1 at 387-97. The Court agrees with the Government and finds that the record wholly contradicts Tuttle's contention that trial counsel failed to cross-examine Zabawa with respect to the statement or compare it to Zabawa's prior testimony. Therefore, there is no basis to conclude that counsel was ineffective under the *Strickland* standard on this ground.

In sum, the Court finds that each of the above arguments for ineffective assistance of trial counsel fails to show that counsel's performance was objectionably unreasonable under the first *Strickland* prong. It is clear that "a reasonable lawyer confronted by these circumstances could have made the decisions Petitioner's counsel made, and so his actions fall 'within the wide range of reasonable professional assistance.'" *Jordan v. United States*, 190 F. Supp. 3d 331, 339 (W.D.N.Y. 2016) (quoting *Lindstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001)). Moreover, Tuttle has not identified any evidence or proffered any plausible reason why counsel's performance was prejudicial to his case. *Id.* at 338. Consequently, Tuttle has failed to demonstrate that a hearing is necessary on his ineffective assistance of trial counsel claim.

III. Ineffective Assistance of Appellate Counsel

Finally, Tuttle's argument that his appellate counsel was ineffective for not raising the above issues on direct appeal is also meritless. On appeal, appellate counsel challenged (1) the jury instructions as to Counts I and II in light of the Supreme Court's decision in *McFadden v. United States*, —— U.S. ——, 135 S.Ct. 2298 (2015), which held that, to convict a defendant of distributing an analogue drug, the Government must prove the defendant's knowledge that the drug was covered under the Controlled Substance Analogue Enforcement Act of 1986, 21 U.S.C. §§ 802, 813; (2) jury instructions as to Counts III and IV, given that MDPV's status as a controlled substance was "in flux" during the time period covered by the evidence; and (3) the sufficiency of the evidence supporting his conviction on Counts III and IV. *Tuttle,* 646 F. App'x at 121-23.

To establish ineffective assistance of appellate counsel for failure to raise specific arguments, "it is not sufficient for the habeas petitioner to show merely that counsel omitted a nonfrivolous argument, for counsel does not have a duty to advance every nonfrivolous argument that could be made." *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994), *cert. denied*, 513 U.S.

820 (1994). To show deficient performance, a petitioner must demonstrate that appellate "counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker." *Id.* at 533. To establish the prejudice component, a petitioner must show that "there was a 'reasonable probability' that [his] claim would have been successful before the [appellate court]." *Id.* at 534.

In accordance with the above analysis of the arguments raised in Tuttle's Section 2255 Motion, the Court finds no reasonable probability that those contentions would have been successful on direct appeal and, therefore, Petitioner cannot show that appellate counsel's omission prejudiced him. Because the arguments appellate counsel raised were not demonstrably weaker than the claims raised in the instant Petition, Tuttle cannot show that appellate counsel's action was objectively unreasonable.

CONCLUSION

Petitioner's application for a writ of habeas corpus is denied and his Petition (ECF No. 128) is dismissed. His outstanding Motions for Emergency Review, Stay of Review, and Emergency Dismissal are dismissed as moot. ECF Nos. 173, 175, 176. Because Petitioner has not "made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), the Court declines to issue a certificate of appealability. The Clerk of Court is directed to close case # 16-CV-6764-FPG.

IT IS SO ORDERED.

Dated: April 23, 2018
Rochester, New York

HON. FRANK P. GERACI, JR.
Chief Judge
United States District Court