UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2428

Geoffrey Scott Gaffney

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Waterloo
(6:17-cv-02011-LRR)

ORDER

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

October 23, 2019

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

/s/ Michael E. Gans

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-2428

Geoffrey Scott Gaffney

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Northern District of Iowa - Waterloo
(6:17-cv-02011-LRR)

JUDGMENT

Before LOKEN, GRUENDER, and ERICKSON, 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.

September 17, 2019

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

/s/ Michael E. Gans

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

GEOFFREY SCOTT GAFFNEY Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 17-CV-2011-LRR 13-CR-2035-LRR **JUDGMENT**

DECISION BY COURT. This action came before the Court and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED pursuant to the Order filed on June 14, 2019 (docket number 23): The movant's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C.§ 2255 is denied. A certificate of appealability is denied.

DATED this 14th day of June 2019.

ROBERT L. PHELPS, CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA

JH

By: Deputy Clerk

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

GEOFFREY SCOTT GAFFNEY,

Movant,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. C17-2011-LRR
No. CR13-2035-LRR

ORDER

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I. INTRODUCTION

This matter comes before the court on Geoffrey Scott Gaffney's motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255 ("motion"), which he filed on

March 2, 2017 (civil docket no. 1).[1] On March 17, 2017, the court directed the government to brief the claims that the movant asserted in the motion (civil docket no. 3). The court also directed counsel to file with the court an affidavit responding only to the movant's specific allegations of ineffective assistance of counsel (*id.*). Trial counsel timely complied with the court's order by filing her affidavit on April 26, 2017 (civil docket no. 4). The government filed a responsive brief on May 26, 2017 (civil docket no. 5). The movant, after obtaining an extension of time to file a reply (civil docket no. 18), filed his reply brief on December 7, 2018 (civil docket no. 21).

II. RELEVANT BACKGROUND AND PROCEDURAL HISTORY

A. Relevant Facts

The court agrees with the recitation of relevant facts as stated in the Eighth Circuit Court of Appeals' appellate opinion, *see United States v. Gaffney*, 789 F.3d 866, 867 (8th Cir. 2015).

Officer Albert Bovy was stopped at a red light. Directly in front of him, he saw the movant's vehicle approaching the intersection from the opposite direction. As the light changed to green, the vehicle, without slowing, moved through the intersection. The officer made a u-turn to follow it. The movant immediately braked hard and made a right turn. The officer turned on his lights. The vehicle stopped.

Officer Bovy approached and said he estimated the movant was driving 50 to 55 mph in a 35 mph zone. The movant replied, "I thought I was only going in the 40s." While he was looking for an insurance card, dispatch told the officer that the movant had a previous narcotics history and was still involved in illegal narcotics. Returning to the vehicle, the officer noticed the movant appeared nervous with beads of sweat on his forehead, a shaky voice and hands, and heavy breathing. The officer asked if he had any

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[1] The movant also filed a brief (civil docket no. 1-1) and an "Affirmation" (civil docket no. 1-2) in support of the motion.

drugs or weapons in the vehicle. The movant answered "no" but declined permission to search his vehicle. The officer ordered him to exit the vehicle to prepare for a dog sniff (the officer had the dog in his car). Conducting a pat-down search, the officer detected a long round object with a bulb on the end. He asked the movant about it. The movant said nothing was in his pocket. The object was a meth pipe. The officer arrested the movant and had the vehicle towed. An inventory search uncovered two large Ziploc bags with four pounds of ice meth.

B. Procedural History

On November 5, 2013, the government filed a one-count indictment charging the movant with possession with intent to distribute 500 grams or more of methamphetamine, a violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) (criminal docket no. 2). At arraignment, trial counsel was appointed to represent the movant, and the movant entered his plea of not guilty (criminal docket nos. 12 & 13). On December 19, 2013, trial counsel filed a motion to suppress any evidence from the traffic stop, challenging both the lawfulness of the stop and the pat-down search (criminal docket no. 21). After a suppression hearing (criminal docket nos. 32 & 37), the magistrate judge recommended the court deny the motion (criminal docket no. 34). On February 10, 2014, the movant entered a conditional plea of guilty to count 1 of the indictment pursuant to a plea agreement, reserving the right to appeal the suppression ruling (criminal docket nos. 45-47 & 71). On February 27, 2014, the court accepted the report and recommendation concerning the movant's guilty plea, adopted the report and recommendation regarding the motion to suppress and denied the motion to suppress (criminal docket nos. 49-50).

A presentence report was finalized on March 25, 2014 (criminal docket no. 54), and a sentencing hearing was held on April 25, 2014 (criminal docket no. 60). The presentence report calculated an advisory sentencing range of 292 to 365 months' imprisonment (criminal docket no. 54 at 27, ¶ 105). The court adopted the Guidelines calculations set forth in the presentence report (criminal docket no. 62; criminal docket

no. 72 at 4-5) and then sentenced the movant to 292 months' imprisonment (criminal docket no. 61). In addition, the court imposed a total of five years of supervised release and a $100 special assessment (*id.*).

The movant unsuccessfully appealed to the Eighth Circuit Court of Appeals. On direct appeal, the movant asserted that Officer Bovy (1) had neither reasonable suspicion nor probable cause for a traffic stop and (2) had no reason to suspect the movant was armed and dangerous and thus should not have conducted a pat-down search. The Eighth Circuit Court of Appeals upheld the court's denial of the movant's motion to suppress. *Gaffney*, 789 F.3d at 868-70. With respect to the validity of the traffic stop, the court held that the district court correctly concluded that Officer Bovy's belief that the movant was speeding was objectively reasonable. *Id.* at 870.

In the motion, the court understands the movant is asserting ineffective assistance of counsel claims. He claims that trial counsel was ineffective because she: (1) failed to investigate and discover evidence that would have showed the traffic stop was pretextual; and (2) failed to call the movant to testify at the suppression hearing (civil docket nos. 1, 1-1 & 1-2). The movant also argues that the cumulative effect of trial counsel's many errors prejudiced him (civil docket no. 1-1 at 15-16).

III. LEGAL STANDARDS

A. Standards Applicable to Motion Pursuant to 28 U.S.C. § 2255

A prisoner in custody under sentence of a federal court is able to move the sentencing court to vacate, set aside or correct a sentence. *See* 28 U.S.C. § 2255(a). To obtain relief pursuant to 28 U.S.C. § 2255, a federal prisoner must establish: (1) "that the sentence was imposed in violation of the Constitution or laws of the United States"; (2) "that the court was without jurisdiction to impose such sentence"; (3) "that the sentence was in excess of the maximum authorized by law"; or (4) "[that the judgment or sentence] is otherwise subject to collateral attack." *Id.*; *see also Hill v. United States*, 368 U.S. 424, 426-27 (1962) (listing four grounds upon which relief under 28 U.S.C. §

2255 may be claimed); *Watson v. United States*, 493 F.3d 960, 963 (8th Cir. 2007) (same); *Lee v. United States*, 501 F.2d 494, 499-500 (8th Cir. 1974) (clarifying that subject matter jurisdiction exists over enumerated grounds within the statute); Rule 1 of the Rules Governing Section 2255 Proceedings (specifying scope of 28 U.S.C. § 2255). If any one of the four grounds is established, the court is required "to vacate and set aside the judgment and [it is required to] discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate." 28 U.S.C. § 2255(b).

When enacting 28 U.S.C. § 2255, Congress "intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (en banc) (quoting *Davis v. United States*, 417 U.S. 333, 343 (1974)) (internal quotation mark omitted). Although it appears to be broad, 28 U.S.C. § 2255 does not provide a remedy for "all claimed errors in conviction and sentencing." *Id.* (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979)). Rather, 28 U.S.C. § 2255 is intended to redress constitutional and jurisdictional errors and, apart from those errors, only "fundamental defect[s] which inherently [result] in a complete miscarriage of justice" and "omission[s] inconsistent with the rudimentary demands of fair procedure." *Hill*, 368 U.S. at 428; *see also Sun Bear*, 644 F.3d at 704 (clarifying that the scope of 28 U.S.C. § 2255 is severely limited and quoting *Hill*, 368 U.S. at 428); *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996) ("Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." (citing *Poor Thunder v. United States*, 810 F.2d 817, 821 (8th Cir. 1987))). A collateral challenge under 28 U.S.C. § 2255 is not interchangeable or substitutable for a direct appeal. *See United States v. Frady*, 456 U.S. 152, 165 (1982) (making clear that a motion pursuant to 28 U.S.C. § 2255 will not be allowed to do service for an appeal). Consequently, "an error

that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Id.* (quoting *Addonizio*, 442 U.S. at 184).

The law of the case doctrine has two branches. *See Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002). The first branch involves the "mandate rule (which, with only a few exceptions, forbids, among other things, a lower court from relitigating issues that were decided by a higher court, whether explicitly or by reasonable implication, at an earlier stage of the same case)." *Id.* The second branch, which is somewhat more flexible, provides that "a court ordinarily ought to respect and follow its own rulings" throughout subsequent stages of the same litigation. *Id.*; *see also United States v. Bloate*, 655 F.3d 750, 755 (8th Cir. 2011) ("The [law of the case] doctrine applies only to actual decisions—not dicta—in prior stages of the case."); *Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 602 (8th Cir. 1995) ("Law of the case applies only to issues actually decided, either implicitly or explicitly, in the prior stages of a case."). "[R]ulings are the law of the case and will not be disturbed absent an intervening change in controlling authority." *Baranski v. United States*, 515 F.3d 857, 861 (8th Cir. 2008); *see also Davis*, 417 U.S. at 342 (observing that law of the case did not preclude relief under 28 U.S.C. § 2255 because of intervening change in the law).

Hence, in collateral proceedings based on 28 U.S.C. § 2255, "[i]ssues raised and decided on direct appeal cannot ordinarily be relitigated." *United States v. Wiley*, 245 F.3d 750, 751 (8th Cir. 2001) (citing *United States v. McGee*, 201 F.3d 1022, 1023 (8th Cir. 2000)); *see also Lefkowitz v. United States*, 446 F.3d 788, 790-91 (8th Cir. 2006) (concluding that the same issues that have been raised in a new trial motion and decided by the district court cannot be reconsidered in a subsequent collateral attack); *Bear Stops v. United States*, 339 F.3d 777, 780 (8th Cir. 2003) ("It is well settled that claims which were raised and decided on direct appeal cannot be relitigated on a motion to vacate pursuant to 28 U.S.C. § 2255." (quoting *United States v. Shabazz*, 657 F.2d 189, 190 (8th Cir. 1981))); *Dall v. United States*, 957 F.2d 571, 572-73 (8th Cir. 1992) (per

curiam) (concluding that claims already addressed on direct appeal could not be raised); *United States v. Kraemer*, 810 F.2d 173, 177 (8th Cir. 1987) (concluding that a movant could not "raise the same issues . . . that have been decided on direct appeal or in a new trial motion"); *Butler v. United States*, 340 F.2d 63, 64 (8th Cir. 1965) (concluding that a movant was not entitled to another review of his question). With respect to a claim that has already been conclusively resolved on direct appeal, the court may only consider the same claim in a collateral action if "convincing new evidence of actual innocence" exists. *Wiley*, 245 F.3d at 752 (citing cases and emphasizing the narrowness of the exception).

Further, movants ordinarily are precluded from asserting claims that they failed to raise on direct appeal. *See McNeal v. United States*, 249 F.3d 747, 749 (8th Cir. 2001); *see also Ramey v. United States*, 8 F.3d 1313, 1314 (8th Cir. 1993) (per curiam) (citing *Frady*, 456 U.S. at 167-68, for the proposition that a movant is not able to rely on 28 U.S.C. § 2255 to correct errors that could have been raised at trial or on direct appeal); *United States v. Samuelson*, 722 F.2d 425, 427 (8th Cir. 1983) (concluding that a collateral proceeding is not a substitute for a direct appeal and refusing to consider matters that could have been raised on direct appeal). "A [movant] who has procedurally defaulted a claim by failing to raise it on direct review may raise that claim in a [28 U.S.C. §] 2255 proceeding only by demonstrating cause for the default and prejudice or actual innocence." *McNeal*, 249 F.3d at 749 (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998)); *see also Massaro v. United States*, 538 U.S. 500, 504 (2003) ("[T]he general rule [is] that claims not raised on direct appeal may not be raised on collateral review unless the [movant] shows cause and prejudice."). "'[C]ause' under the cause and prejudice test must be something *external* to the [movant], something that cannot fairly be attributed to him." *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). If a movant fails to show cause, a court need not consider whether actual prejudice exists. *See McCleskey v. Zant*, 499 U.S. 467, 501 (1991). Actual innocence under the actual innocence test "means factual innocence, not mere legal insufficiency." *Bousley*, 523

U.S. at 623; *see also McNeal*, 249 F.3d at 749 ("[A movant] must show factual innocence, not simply legal insufficiency of evidence to support a conviction."). To establish actual innocence, a movant "must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623 (citation omitted) (internal quotation marks omitted).[2]

B. Standards Applicable to Constitutional Right to Counsel

The Sixth Amendment to the United States Constitution provides in pertinent part that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his [or her] defen[s]e." U.S. Const., amend. VI. Thus, a criminal defendant is constitutionally entitled to the effective assistance of counsel both at trial and on direct appeal. *See Evitts v. Lucey*, 469 U.S. 387, 393-96 (1985); *Bear Stops*, 339 F.3d at 780. By the same token, "ineffective assistance of counsel" could result in the imposition of a sentence in violation of the Constitution or laws of the United States. 28 U.S.C. § 2255; *Bear Stops*, 339 F.3d at 781 ("To prevail on a § 2255 motion, the [movant] must demonstrate a violation of the Constitution or the laws of the United States.").

The Sixth Amendment right to effective counsel is clearly established. *See Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court explained that a violation of that right has two components:

> First, [a movant] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [movant] by the Sixth Amendment. Second, [a movant] must show that the deficient performance prejudiced the defense.

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[2] The procedural default rule applies to a conviction obtained through trial or through the entry of a guilty plea. *See, e.g.*, *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997); *Thomas v. United States*, 112 F.3d 365, 366 (8th Cir. 1997); *Reid v. United States*, 976 F.2d 446, 448 (8th Cir. 1992).

Id. at 687; *see also Williams v. Taylor*, 529 U.S. 362, 390 (2000) (reasserting *Strickland* standard). Thus, *Strickland* requires a showing of both deficient performance and prejudice. However, "a court deciding an ineffective assistance claim [need not] address both components of the inquiry if the [movant] makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on grounds of lack of sufficient prejudice, . . . that course should be followed." *Id.*; *see also Apfel*, 97 F.3d at 1076 ("[A court] need not address the reasonableness of the attorney's behavior if the movant cannot prove prejudice.").

The "deficient performance" prong requires the movant to show that his or her "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the [movant] by the Sixth Amendment." *Strickland*, 466 U.S. at 687. That showing can be made by demonstrating that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688. There are two substantial impediments to making such a showing, however. First, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690. Second, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689; *see also United States v. Taylor*, 258 F.3d 815, 818 (8th Cir. 2001) (operating on the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" (quoting *Strickland*, 466 U.S. at 689)); *Sanders v. Trickey*, 875 F.2d 205, 210 (8th Cir. 1989) (broad latitude to make strategic and tactical choices regarding the appropriate action to take or refrain from taking is afforded when acting in a representative capacity) (citing *Strickland*, 466 U.S. at 694). The "reasonableness of counsel's challenged conduct [must be reviewed] on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. In sum, the court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." *Id.*

Even if counsel's performance was "deficient," the movant must also establish "prejudice." *See id.* at 692. To satisfy this "prejudice" prong, the movant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Thus, "[i]t is not enough for the [movant] to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693; *Pfau v. Ault*, 409 F.3d 933, 939 (8th Cir. 2005) (same).

IV. ANALYSIS

A. Request for Evidentiary Hearing

A district court is given discretion in determining whether to hold an evidentiary hearing on a motion under 28 U.S.C. § 2255. *See United States v. Oldham*, 787 F.2d 454, 457 (8th Cir. 1986). In exercising that discretion, the district court must determine whether the alleged facts, if true, entitle the movant to relief. *See Payne v. United States*, 78 F.3d 343, 347 (8th Cir. 1996). Accordingly, a district court may summarily dismiss a motion brought under 28 U.S.C. § 2255 without an evidentiary hearing "if (1) the . . . allegations, accepted as true, would not entitle the [movant] 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." *Engelen v. United States*, 68 F.3d 238, 240-41 (8th Cir. 1995) (citations omitted); *see also Delgado v. United States*, 162 F.3d 981, 983 (8th Cir. 1998) (stating that an evidentiary hearing is unnecessary where allegations, even if true, do not warrant relief or allegations cannot be accepted as true because they are contradicted by the record or lack factual evidence and rely on conclusive statements); *United States v. Hester*, 489 F.2d 48, 50 (8th Cir. 1973) (stating that no evidentiary hearing is necessary where the files and records of the case demonstrate that relief is unavailable or where the motion is based on a question of law). Stated differently, the court can dismiss a 28 U.S.C. § 2255 motion without a hearing

where "the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *accord Adejumo v. United States*, 908 F.3d 357, 361 (8th Cir. 2018); *Standing Bear v. United States*, 68 F.3d 271, 272 (8th Cir. 1995) (per curiam).

The court concludes that it is able to resolve the movant's claims from the record. *See Rogers v. United States*, 1 F.3d 697, 699 (8th Cir. 1993) (holding that "[a]ll of the information that the court needed to make its decision with regard to [the movant's] claims was included in the record" and, therefore, the court "was not required to hold an evidentiary hearing" (citing Rule Governing Section 2255 Proceedings 8(a) and *United States v. Raddatz*, 447 U.S. 667, 674 (1980))). The evidence of record conclusively demonstrates that the movant is not entitled to the relief sought. Specifically, it indicates that the movant's assertions are meritless and/or frivolous. As such, the court finds that there is no need for an evidentiary hearing.

B. The Movant's Arguments

With respect to the merits of the movant's claims set forth in his 28 U.S.C. § 2255 motion (civil docket no. 1), the court deems it appropriate to deny the motion for the reasons that are stated in the government's resistance because it adequately applied the law to the facts in the case. The government correctly asserted that trial counsel provided professionally competent assistance to the movant and did not make objectively unreasonable choices regarding the appropriate action to take or refrain from taking that prejudiced the movant's defense or sentencing. Trial counsel thoroughly explained her strategy in her affidavit (civil docket no. 4), and such explanation is consistent with what occurred during pre-plea and suppression proceedings.

The court begins with the movant's argument that trial counsel was ineffective for failing to investigate and discover evidence that would have showed the traffic stop was pretextual. Specifically, the movant argues that, before the traffic stop, an informant made a phone call to law enforcement notifying the officer that the movant was driving

in the area with drugs in his vehicle (civil docket no. 1-2 at 3). He asserts that this evidence would have demonstrated that the traffic stop was based on that "tip," and not on speeding, thus proving that the stop was pretextual. The movant asserts that, had trial counsel investigated the pretextual defense, there would have been a different outcome (*id.* at 4).

Trial counsel's strategic decisions are "virtually unchallengeable unless they are based on deficient investigation, in which case the 'presumption of sound trial strategy ... founders on the rocks of ignorance.'" *Link v. Luebbers*, 469 F.3d 1197, 1204 (8th Cir. 2006) (quoting *White v. Roper*, 416 F.3d 728, 732 (8th Cir.2 005)) (omission in original); *accord Forsyth v. Ault*, 537 F.3d 887, 892 (8th Cir. 2008). One of trial counsel's strategic decisions is that of "reasonably deciding when to cut off further investigation." *Forsyth*, 537 F.3d at 892 (quoting *Winfield v. Roper*, 460 F.3d 1026, 1034 (8th Cir. 2006)).

Trial counsel thoroughly explained in her affidavit why she did not investigate the alleged phone call made by an informant to law enforcement and instead challenged the validity of the traffic stop by attacking the officer's testimony that the movant had committed a speeding violation:

> A review of my file shows no notes that [the movant] and I ever discussed the existence of a phone call from an informant to law enforcement, or between the informant and [the movant]. Further, both my staff and I had multiple conversations with Tom Frerichs, [the movant's] attorney in state court, regarding the stop and search of [the movant's] vehicle. During these calls, Mr. Frerichs never mentioned the existence of the alleged call between an informant and law enforcement. Assuming, however, that such a call existed, obtaining cell phone records from [the movant] and the informant would not show the content of the call. It would simply show whether or not such a call took place. The existence of such a call would not have changed the fact that law enforcement claimed that [the movant] was speeding, and that was why his vehicle was stopped. Therefore, I determined that the best strategy for challenging the stop of [the movant's] vehicle was to discredit the officer's testimony that a speed violation had taken place.

(Civil Docket No. 4 at 3, ¶ 7.)

Even if the movant had mentioned the phone call to trial counsel, trial counsel's decision not to further investigate the issue, and to instead challenge the officer's testimony that the movant was speeding, was reasonable in light of Eighth Circuit case law. Indeed, a speeding violation supplies the necessary probable cause for an officer to make a stop, and as the Eighth Circuit Court of Appeals has said many times, such a stop does not violate the Fourth Amendment. *See, e.g.*, *United States v. Sallis*, 507 F.3d 646, 649 (8th Cir. 2007). This is true regardless of any subjective reason an officer may have had for stopping the vehicle. *See id.* (citing *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). Thus, trial counsel made a reasonable strategic decision to attack the articulated basis for the stop—the movant's speeding violation. Even if trial counsel had been able to uncover an alleged pretext, this evidence would not have changed the outcome of the motion to suppress. The district court and the Eighth Circuit Court of Appeals found that law enforcement had reasonable suspicion to stop the movant's car based on a speeding violation.[3] Any subjective reason the officer had for stopping the movant's vehicle would have been irrelevant to the validity of the stop. *See Sallis*, 507 F.3d at 649. Hence, the movant has failed to demonstrate how he was prejudiced by trial counsel's decision.

To the extent the movant faults trial counsel's investigation of the speeding issue, it is not well-taken. As trial counsel explained in her affidavit, "extensive investigation was undertaken regarding the stop of his vehicle":

> [M]y staff and I had several discussions with [the movant's] state court counsel concerning possible suppression issues. My office also contacted a retired Iowa State Trooper regarding testifying at the suppression hearing

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[3] The movant cannot relitigate this issue here as it has been decided on direct appeal. *See Wiley*, 245 F.3d at 751.

> as to the validity of the stop of [the movant's] vehicle. I subsequently had a phone call with this person, and determined that his testimony would be more detrimental to [the movant's] case than it would be helpful. My investigator made multiple trips to Waterloo, Iowa, to photograph, measure, and otherwise investigate the area of the stop, she talked to an employee of the Waterloo Police Department to obtain information regarding the recording devices used by the Department, and she also obtained weather information for the day [the movant's] vehicle was stopped.

(Civil Docket No. 4 at 4, ¶ 9.)

The court finds that trial counsel's account of her investigation is credible and consistent with the record. The suppression hearing transcript (criminal docket no. 37), the magistrate's report and recommendation (criminal docket no. 34) and the court's order (criminal docket no. 50) on the motion to suppress confirm that trial counsel thoroughly investigated the traffic stop and zealously challenged the traffic stop. The fact that trial counsel's argument and motion to suppress proved unsuccessful does not mean that she was ineffective. *See James v. Iowa*, 100 F.3d 586, 590 (8th Cir. 1996) ("Reasonable trial strategy does not constitute ineffective assistance of counsel simply because it is not successful."). The movant has failed to show that trial counsel's representation on this issue was deficient. Accordingly, the movant's ineffective assistance of counsel claim fails, as to this issue, under *Strickland*.

Next, the movant claims that trial counsel was ineffective for not calling the movant to testify at the suppression hearing (civil docket no. 1 at 7; civil docket no. 1-1 at 14). Trial counsel recounted in her affidavit the discussion she had with the movant regarding whether the movant should testify at the suppression hearing:

> [M]y file reflects that on December 23, 2013, we specifically discussed the possibility of [the movant] testifying at the suppression hearing. My notes further reflect that I advised [the movant] that I did not think he should testify unless it was necessary. I would have advised him that he could lose any acceptance of responsibility reduction if he testified, and that he could potentially receive an enhancement for obstruction of justice if his testimony was determined to not be credible. After this discussion, my notes indicate

> that [the movant] was fine with waiting to make a decision regarding his testifying until the time of the suppression hearing. I do not have a specific recollection of talking to [the movant] about his right to testify after the government finished its evidence at the suppression hearing, but my practice is to always discuss this with my clients before I conclude my presentation of evidence. If [the movant] had indicated that he wanted to testify, I would have again warned him about the dangers of doing so, but I would not have refused to let him testify.

(Civil Docket No. 4 at 3-4, ¶ 8.)

The court finds that trial counsel's account is credible and that her advice to the movant was sound strategy. In addition, the movant does not allege that he asked trial counsel to testify and she refused his request. As such, trial counsel's tactical decision not to call the movant as a witness at the suppression hearing should not be second-guessed in this collateral proceeding. Moreover, to the extent the movant would have testified regarding pretext based on the alleged "tip" from the informant to law enforcement, the record does not suggest that the court's ruling on the suppression motion would have been different based on this testimony. As previously stated, any "tip" would have been irrelevant to the court's determination whether an objectively reasonable officer would have had reasonable suspicion that the movant was speeding. Thus, the movant has not shown prejudice resulting from that alleged deficient performance, and accordingly he does not satisfy the second prong of the *Strickland* test.

The movant also asserts that the cumulative effect of trial counsel's many errors prejudiced him. In the Eighth Circuit Court of Appeals, an error must establish on its own that relief is warranted, and, therefore, a cumulative error theory cannot be relied upon in order to obtain relief under 28 U.S.C. § 2255. *See Hall v. Luebbers*, 296 F.3d 685, 692 (8th Cir. 2002) ("In our circuit a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test."). "But, even if a cumulative error review is undertaken, relief is not justified because the

sum of no prejudice at all from any of the alleged errors is still no prejudice at all in the aggregate." *Honken v. United States*, 42 F. Supp. 3d 937, 1193-94 (N.D. Iowa 2013).

Moreover, the court thoroughly reviewed the record and finds that dismissing the movant's claims comports with the Constitution, results in no "miscarriage of justice" and is consistent with the "rudimentary demands of fair procedure." *Hill*, 368 U.S. at 428; *see also Apfel*, 97 F.3d at 1076 ("Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised for the first time on direct appeal and, if uncorrected, would result in a complete miscarriage of justice." (citing *Poor Thunder*, 810 F.2d at 821)). No constitutional error occurred during pre-plea and suppression proceedings, and the court concludes that the movant knowingly and voluntarily pleaded guilty pursuant to a plea agreement. *See Walker v. United States*, 115 F.3d 603, 604 (8th Cir. 1997) ("[A] valid guilty plea forecloses an attack on conviction unless 'on the face of the record the court had no power to enter the conviction or impose the sentence.'"); *United States v. Jennings*, 12 F.3d 836, 839 (8th Cir. 1994) (a voluntary and unconditional guilty plea waives all defects except those related to jurisdiction). Further, the court's application of the advisory sentencing Guidelines, consideration of the parties' arguments and application of the factors under 18 U.S.C. § 3553(a) violated no constitutional right. *See United States v. Villareal-Amarillas*, 562 F.3d 892, 898 (8th Cir. 2009) (observing that a sentencing judge is only constrained by the statutory maximum and minimum for an offense and the factors included in 18 U.S.C. § 3553(a)). Given the record, it is evident that the court appropriately sentenced the movant to 292 months' imprisonment.

Additionally, it is apparent that the conduct of trial counsel fell within a wide range of reasonable professional assistance, *Strickland*, 466 U.S. at 689, and any deficiencies in her performance did not prejudice the movant's defense or sentencing, *id.* at 692-94, or result in the imposition of a sentence in violation of the Constitution or laws of the United States, *Bear Stops*, 339 F.3d at 781. Considering all the circumstances and

refraining from engaging in hindsight or second-guessing trial counsel's strategic decisions, the court finds that the record belies the movant's claims and no violation of the movant's constitutional right to counsel occurred.

V. CONCLUSION

In sum, the alleged errors that are asserted by the movant warrant no relief under 28 U.S.C. § 2255. The movant's claims are without merit. Based on the foregoing, the movant's 28 U.S.C. § 2255 motion shall be denied.

In a 28 U.S.C. § 2255 proceeding before a district judge, the final order is subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held. *See* 28 U.S.C. § 2253(a). Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. *See* 28 U.S.C. § 2253(c)(1)(A). A district court possesses the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). *See Tiedeman v. Benson*, 122 F. 3d 518, 522 (8th Cir. 1997). Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue only if a movant has made a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *Garrett v. United States*, 211 F.3d 1075, 1076-77 (8th Cir. 2000); *Carter v. Hopkins*, 151 F.3d 872, 873-74 (8th Cir. 1998); *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997); *Tiedman*, 122 F.3d at 523. To make such a showing, the issues must be debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings. *Cox*, 133 F.3d at 569 (citing *Flieger v. Delo*, 16 F.3d 878, 882-83 (8th Cir. 1994)); *see also Miller-El*, 537 U.S. at 335-36 (reiterating standard).

Courts reject constitutional claims either on the merits or on procedural grounds. "'[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy [28 U.S.C.] § 2253(c) is straightforward: the [movant] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Miller-El*, 537 U.S. at 338 (quoting *Slack v.*

McDaniel, 529 U.S. 473, 484 (2000)). When a federal habeas petition is dismissed on procedural grounds without reaching the underlying constitutional claim, "the [movant must show], at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *See Slack*, 529 U.S. at 484.

Having thoroughly reviewed the record in this case, the court finds that the movant failed to make the requisite "substantial showing" with respect to the claims that he raised in his 28 U.S.C. § 2255 motion. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b). Because he does not present a question of substance for appellate review, there is no reason to grant a certificate of appealability. Accordingly, a certificate of appealability shall be denied. If he desires further review of his 28 U.S.C. § 2255 motion, the movant may request issuance of the certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals in accordance with *Tiedeman*, 122 F.3d at 520-22.

IT IS THEREFORE ORDERED:

1) The movant's 28 U.S.C. § 2255 motion (civil docket no. 1) is **DENIED**.

2) A certificate of appealability is **DENIED**.

DATED this 14th day of June, 2019.

LINDA R. READE, JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA