DLD-235 July 18, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **18-2587**

UNITED STATES OF AMERICA

VS.

KALLEN E. DORSETT, JR., Appellant

(E.D. Pa. Crim. No. 5:12-cr-00401-001)

Present: JORDAN, GREENAWAY, Jr., and NYGAARD, Circuit Judges

Submitted are:

(1) By the Clerk for possible dismissal due to a jurisdictional defect;

(2) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

We decline to dismiss the appeal as untimely, as the District Court granted Appellant's request for relief pursuant to Federal Rule of Appellate Procedure 4(a)(6). The foregoing request for a certificate of appealability is denied as Appellant has not made a "substantial showing of the denial of a constitutional right." See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 474, 484 (2000). Appellant has not shown that reasonable jurists would debate the District Court's determination that the collateral attack waiver in his plea agreement was entered into "knowingly and voluntarily." See United States v. Fazio, 795 F.3d 421, 425 (3d Cir. 2015). In addition, because his underlying claims lack merit, jurists of reason also would not debate whether enforcement of Appellant's

(continued)

collateral attack waiver would work a miscarriage of justice. See United States v. Mabry, 536 F.3d 231, 237-39 (3d Cir. 2008); Strickland v. Washington, 466 U.S. 668, 687 (1984).

By the Court,

s/ Richard L. Nygaard
Circuit Judge

Dated: September 3, 2019
Lmr/cc: Priya Desouza
Kallen E. Dorsett, Jr.

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2587

UNITED STATES OF AMERICA

vs.

KALLEN E. DORSETT, JR.,
Appellant

(E.D. Pa. Crim. No. 5-12-cr-00401-001)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and NYGAARD,* Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other

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* Pursuant to Third Circuit I.O.P. 9.5.3, Judge Richard L. Nygaard's vote is limited to panel rehearing.

available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Richard L. Nygaard
Circuit Judge

Dated: November 12, 2019
CJG/cc: Kallen E. Dorsett, Jr.
Priya Desouza, Esq.

Appendix B

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

KALLEN E. DORSETT, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

No. 5:12-cr-00401
No. 5:15-cv-01153

FILED
MAR 29 2018
KATE BARKMAN, Clerk
By _____ Dep. Clerk

FILED UNDER SEAL

ORDER

AND NOW, this 29th day of March, 2018, for the reasons set forth in the Opinion issued this date, **IT IS ORDERED THAT**:

1. The ineffective assistance of counsel claims in the Motion to Vacate Sentence Under 28 U.S.C. § 2255, ECF No. 71, are **DENIED**.

2. The Motion to Vacate Sentence Under 28 U.S.C. § 2255, ECF No. 71, is otherwise **DISMISSED**.

3. The Government's Motion to Dismiss § 2255 Motion, ECF No. 85, is **GRANTED**.

4. The Motion for Leave to Amend § 2255 Motion, ECF No. 90, is **DISMISSED**.

5. The Motion for Subpoena and In Camera Review, ECF No. 93, is **DISMISSED**.

6. The Supplemental § 2255 Motion, ECF No. 96, is **DISMISSED**.

7. The Government's Motion to Dismiss Motion for Subpoena, ECF No. 99, is **GRANTED**.

8. The Government's Motion to Dismiss Supplemental § 2255 Motion, ECF No. 104, is **GRANTED**.

9. A certificate of appealability is **DENIED**.

10. The Clerk of Court shall **CLOSE** the above-captioned actions.

BY THE COURT:

JOSEPH F. LEESON, JR.
United States District Judge

I. BACKGROUND

On August 8, 2012, an Indictment was filed against Dorsett charging him with two counts of distribution of cocaine base ("crack") in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C); with possession with intent to distribute more than 28 grams of cocaine base ("crack") in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B);[1] with possession with intent to distribute more than 28 grams of cocaine base ("crack") within 1,000 feet of a school in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and 860; with possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c); and with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). On December 3, 2012, Dorsett entered a guilty plea to all charges except Count Three: possession with intent to distribute more than 28 grams of cocaine base ("crack") in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B).[2]

A provision in the written Guilty Plea Agreement, which Dorsett signed on December 3, 2012, contains a waiver of Dorsett's right to collaterally attack his conviction and sentence. This provision reads as follows:

> 10. In exchange for the undertakings made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 29 U.S.C. § 2255, or any other provision of law.
>
> a. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.
>
> b. If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal but may raise only claims that:
>
> (1) the defendant's sentence on any count of conviction exceeds the statutory maximum for that count as set forth in paragraph 4 above;

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1 Count Three of the Indictment.

2 Count Three was subsequently dismissed upon motion of the Government.

(2) the sentencing judge erroneously departed upward pursuant to the Sentencing Guidelines; and/or

(3) the sentencing judge, exercising the Court's discretion pursuant to United States v. Booker, 543 U.S. 220 (2005), imposed an unreasonable sentence above the final Sentencing Guideline range determined by the Court.

Guilty Plea Agreement ¶ 10 ("GPA"), ECF No. 39. After conducting a colloquy with Dorsett pursuant to Rule 11 of the Federal Rules of Criminal Procedure, the trial court concluded that his guilty plea, as well as his collateral review waiver, was knowing and voluntary. *See* Transcript, Change of Plea Hearing, December 3, 2012, at 104:17 – 105:6 ("Plea N.T. __"), ECF No. 53.

On July 1, 2014, Dorsett was sentenced to a total term of 180 months (fifteen years) imprisonment, sixteen years of supervised release, and a $5,000 fine. *See* Transcript Sentencing Hearing, July 1, 2014, at 63:22 – 64:17 ("Sent. N.T. __"), ECF No. 84; Judgment, ECF No. 68. The term of imprisonment consists of 120 months each on Counts One, Two, Four, and Six, all to be served concurrently, and a consecutive term of 60 months on Count Five.[3] *Id.* Dorsett's sixteen-year term of supervised release consists of six years on each of Counts One and Two, sixteen years on Count Four, five years on Count Five, and three years on Count Six, all terms to run concurrently.

[3] The maximum possible term of imprisonment for Count Six was 120 months (ten years) and the maximum possible term of supervised release was three years. The maximum possible term of imprisonment for the remaining counts was between thirty years and life, and the remaining counts all carried a maximum possible term of lifetime supervised release. The Guilty Plea Agreement and the trial court advised Dorsett of the maximum possible sentences, and Dorsett stated that he understood. *See* N.T. 38:19 – 42:18; Guilty Plea Agreement ¶ 4.

Neither Dorsett nor the Government filed a direct appeal. But on March 3, 2015, Dorsett filed a Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255. Habeas Mot., ECF No. 71. Dorsett alleges that: (1) trial counsel was ineffective for failing to litigate Fourth Amendment claims,[4] (2) trial counsel was ineffective by negotiating a waiver regarding the difference between cocaine base and crack, (3) sentencing counsel[5] was ineffective by negotiating a waiver of the burden of proof, and (4) his sentence as an armed career criminal is unlawful based on the Supreme Court's decision in *Descamps*[6] and exceeded the statutory maximum.[7]

On August 18, 2015, the Government responded by filing a Motion to Dismiss, arguing that Dorsett waived his right to collaterally challenge the judgment and conviction. Dorsett opposed the Motion to Dismiss, claiming that the sentencing court invalidated the waiver provision of the Guilty Plea Agreement when it informed him that he had a right to file both a direct appeal and to collaterally attack his conviction.

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[4] Dorsett alleges that trial counsel failed to adequately investigate the "nexus" within the search warrant establishing probable cause to search 321 Pear Street, and that the affidavit was stale.

[5] Dorsett was represented by a different attorney at his guilty plea hearing and at the sentencing hearing.

[6] *Descamps v. United States*, 570 U.S. 254, 133 S. Ct. 2276 (2013) (holding that when determining whether a prior conviction qualifies as a predicate offense ("a crime of violence or drug trafficking crime") under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924, a sentencing court may look only to the elements of the defendant's prior conviction and not to the particular facts underlying those convictions).

[7] Dorsett also alleges as follows: "Movant avers that the factual dispute during defense counsel's representation now alleges deprivations (1) 'waiver' of constitutional right to trial." Mot. Vacate 9, ECF No. 71. It is not clear what Dorsett is alleging in this claim, *see United States v. Thomas*, 221 F.3d 430, 437 (3d Cir. 2000) (holding that the district court may dispose of "vague and conclusory allegations . . . without further investigation"), but the effectiveness of counsel and the voluntariness of Dorsett's guilty plea are both discussed below, *see United States v. Hopkins*, No. 1:06-CR-0064, 2013 U.S. Dist. LEXIS 69811, at *9 (M.D. Pa. May 16, 2013) (explaining that although the § 2255 petitioner's claim regarding his charges and the mandatory minimum was "rather confusing," because he was not improperly sentenced, the claim was denied).

While the Motion to Dismiss was pending, Dorsett filed several additional motions: a motion for leave to amend his § 2255 motion, a motion for subpoena and in camera review, and a supplemental § 2255 motion. *See* ECF Nos. 90, 93, 96. In his response to the Government's Motions to Dismiss and in the Motion for Leave to Amend, Dorsett raises additional habeas claims.[8] First, he broadly claims that, during the sentencing hearing, he was threatened by the Assistant United States Attorney into not withdrawing his guilty plea. *See* Resp. Mot. Dismiss 6, ECF No. 87. Second, he alleges that his guilty plea was not knowing and voluntary because he was not given an opportunity to plead guilty in state court to the mandatory minimum term of five years before federal authorities assumed prosecution of the case under Project Safe Neighborhoods. *See id.* at 3-4; Mot. Amend 3, 6, ECF No. 94. Third, Dorsett alleges that the Government withheld *Brady*[9] material until two weeks before sentencing. Mot. Amend 4-5, 7-8; Ex. to Resp. Mot. Dismiss.

The Government seeks dismissal of these motions as well. On October 11, 2017, this case was reassigned to the Undersigned. All motions are ripe for review.

II. STANDARDS OF REVIEW

A. Motion to Vacate under 28 U.S.C. § 2255

Motions filed under 28 U.S.C. § 2255 are the presumptive means by which federal defendants can challenge their convictions or sentences that are allegedly in violation of the Constitution or laws of the United States or are otherwise subject to collateral attack. *Davis v.*

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[8] To the extent that Dorsett repeats or supplements the claims previously mentioned, this Court does not identify them here as separate claims, but it has considered the arguments in all of his filings in support of all of his claims.

[9] *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

United States, 417 U.S. 333, 343 (1974); *O'Kereke v. United States*, 307 F.3d 117, 122-23 (3d Cir. 2002). Section 2255 "states four grounds upon which such relief may be claimed: (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;' and (4) that the sentence 'is otherwise subject to collateral attack.'" *Hill v. United States*, 368 U.S. 424, 426-27 (1962) (quoting 28 U.S.C. § 2255(a)). "A district court must 'accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record.'" *Johnson v. United States*, 294 F. App'x 709, 710 (3d Cir. 2008) (quoting *United States v. Booth*, 432 F.3d 542, 545-46 (3d Cir. 2005) (citations omitted)). But, "vague and conclusory allegations contained in a § 2255 petition may be disposed of without further investigation by the District Court." *Thomas*, 221 F.3d at 437.

B. Waiver of Right to Collateral Review

Federal defendants can waive their rights to collaterally attack their convictions under § 2555, "provided they do so voluntarily and with knowledge of the nature and consequences of the waiver." *United States v. Mabry*, 536 F.3d 231, 236 (3d Cir. 2008). "A waiver is enforceable if it was knowing and voluntary, and enforcing the waiver would not work a miscarriage of justice." *United States v. Laine*, 404 F. App'x 571, 573 (3d Cir. 2010). The reviewing court "strictly construe[s] the language of the waiver, but if [it] find[s] the waiver applies by its terms, it is the defendant's burden to show the waiver should not be enforced." *United States v. Morrison*, 282 F. App'x 169, 171 (3d Cir. 2008).

C. Ineffective Assistance of Counsel

To establish counsel's ineffectiveness, a petitioner must show: (1) counsel's performance fell below an objective standard of reasonableness; and (2) the performance was prejudicial to

the defense. *Strickland v. Washington*, 466 U.S. 668 (1984). There is a strong presumption that counsel is effective and the courts, guarding against the temptation to engage in hindsight, must be "highly deferential" to counsel's reasonable strategic decisions. *Id.* at 689 (explaining that courts should not second-guess counsel's assistance"); *Marshall v. Hendricks*, 307 F.3d 36, 85 (3d Cir. 2002). The mere existence of alternative, even more preferable or more effective, strategies does not satisfy the first element of the *Strickland* test. *Id.* at 86. To establish prejudice under the second element, the petitioner must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000) (quoting *Strickland*, 466 U.S. at 694). The court must consider the totality of the evidence, and the burden is on the petitioner. *Id.* at 687, 695.

III. ANALYSIS

A. Dorsett's waiver of his right to collaterally attack his conviction or sentence was knowingly and voluntarily made.

The collateral review waiver in the Guilty Plea Agreement clearly applies by its terms to all of Dorsett's habeas claims.[10] Dorsett signed the Guilty Plea Agreement, stating that he "voluntarily and expressly waives all rights to . . . collaterally attack [his] conviction [and] sentence. . . .," and signed the Acknowledgment of Rights, acknowledging "I understand that if I plead guilty, I have given up my right to appeal, except as set forth in the appellate waiver provisions of my plea agreement." GPA ¶ 10; Acknowledgement of Rights ¶ 6, ECF No. 39. At the change of plea hearing, Dorsett ensured the Court that he had read and signed both documents, and that he understood and agreed to everything in those documents. *See* Plea N.T.

[10] This Court notes that while one of Dorsett's habeas claims, that his sentence exceeds the lawful maximum, is excluded from the direct appeal waiver, this claim is not exempted from the collateral review waiver.

19:24 – 25:3. The agreements are therefore enforceable. *See Mabry*, 536 F.3d at 238-39 (enforcing appellate waiver after considering that the written plea agreement clearly applied to both direct appeal and collateral challenge rights and that the defendant signed the agreement, "acknowledging that he understood the terms of the agreement").

Furthermore, review of the trial court's colloquy at the change of plea hearing confirms that Dorsett's waiver was both knowing and voluntary. *See* Plea N.T. 104:18 – 105:6 (finding, *inter alia*, that Dorsett's guilty plea and waiver of his right to collateral attack was knowing and voluntary). Before advising Dorsett of his constitutional and statutory rights, the trial court first established that Dorsett read, wrote, and spoke the English language and that he had graduated from high school and completed one year of college. Plea N.T. 7:16-19, 13:1-3. The trial court determined that Dorsett had never been treated for a mental illness, that he had not had any drugs or alcohol within the previous twenty-four hours, and that he was feeling well at the time of the hearing. Plea N.T. 12:16-25. When the trial court asked Dorsett if he had discussed with his attorney the terms of the Guilty Plea Agreement and the rights he would be giving up by pleading guilty, with his attorney he responded "Yes." Plea N.T. 13:18 -14:6. Dorsett also responded "Yes" when asked "Do you fully understand all of those things at this time; that is, the nature of the charges against you, your trial rights, any defenses you might have, your guilty plea agreement, the rights you will be giving up by pleading guilty, the maximum and mandatory minimum punishments?" Plea N.T. 15:22 – 16:3. The trial court specifically advised Dorsett of the collateral review waiver. Plea N.T. 65:2-25. When the trial court asked, "Do you understand that?" Dorsett responded, "Yes." Plea N.T. 66:1-2.

Having determined that the guilty plea and waiver of rights was knowing, the trial court then engaged in the following discussion to satisfy itself that the guilty plea and waiver were voluntary:

> THE COURT: Did anyone use any force or violence or threats or coercion or intimidation or any other undue or improper influence to get you to plead guilty today?
>
> THE DEFENDANT: No.
>
> THE COURT: Are you pleading guilty voluntarily and of your own free will?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Did anyone put words in your mouth or tell you what to say, so to speak, today?
>
> THE DEFENDANT: No.

Plea N.T. 35:22 – 36:7. Accordingly, the record supports the trial court's finding that Dorsett's guilty plea and waiver of his collateral review rights was both knowing and voluntary. *See Morrison*, 282 F. App'x at 171 (enforcing the appeal waiver that "applie[d] by its terms" because the court's Rule 11 colloquy ensured that it was entered knowingly and voluntarily). Dorsett's suggestion to the contrary is wholly without support. *See Mabry*, 536 F.3d at 238-39 (finding that "the colloquy countermand[ed] any suggestion that the waiver was not knowing and voluntary" because the district court informed the defendant of the waiver provisions, determined that the defendant understood the waiver provisions, and assured itself that the defendant had not been coerced or misled into entering into the agreement).

Additionally, Dorsett's contention that the sentencing court invalidated the waiver by allegedly advising him that he had the right to collaterally attack his sentence is unsupported by the record. Rather, after pronouncing the sentence, the sentencing court recognized that Dorsett had given up the right to collaterally attack his conviction and sentence, and stated:

THE COURT: . . . In your Guilty Plea Agreement, you have given up entirely your right to file a collateral appeal. Therefore, even if your federal constitutional rights or other important federal rights were violated by my sentence or by your imprisonment, you cannot file a Petition for Writ of Habeas Corpus or any other collateral appeal concerning the ineffective assistance of your counsel or anything else.

However, you do not give up the right to assert any constitutional claims that the relevant law says cannot be given up.

Do you understand that?

THE DEFENDANT: Yes.

Sent. N.T. 96:23 – 97:11. The sentencing court reminded Dorsett that his direct appeal and collateral review waivers were contained in paragraph ten of the Guilty Plea Agreement, and again explained the limited exceptions to the direct appeal waiver. Sent. N.T. 98:7 – 99:16. Dorsett's contention that the sentencing court invalidated the waiver is therefore meritless.

Although the sentencing court, after reminding Dorsett of the limited exceptions to the direct appeal waiver, advised him that if he was thinking about appealing he needed to speak with counsel promptly because he could have as little as fourteen days to appeal, Sent. N.T. 100:12-23, this did not invalidate the waiver. *See United States v. Warner*, 301 F. App'x 137, 141 (3d Cir. 2008) (holding that the district court's post-sentencing statement, which advised the defendant that he had the right to appeal, did not void or modify the appellate waiver in the plea agreement). Rather, this statement is consistent with Rule 32 of the Federal Rules of Criminal Procedure, which provides: "After sentencing—*regardless of the defendant's plea*—the court must advise the defendant of any right to appeal the sentence." Fed. R. Crim. P. 32(j)(1)(B) (emphasis added).

This Court concludes that Dorsett's waiver of his right to collaterally attack his conviction and sentence was knowing and voluntary, and that the sentencing court did not invalidate this waiver.

B. Enforcement of Dorsett's waiver of his right to collaterally attack his conviction and sentence does not work a miscarriage of justice.

i. Dorsett's allegations of ineffective assistance of counsel lack merit.

This Court may enforce Dorsett's collateral review waiver if enforcing the waiver will not work a miscarriage of justice. *See Laine*, 404 F. App'x at 573. Dorsett claims that the waiver of his right to collaterally attack his conviction and sentence should not be enforced because it includes a waiver of his right to challenge the effectiveness of counsel. However, "a waiver does not become[] unenforceable simply because a defendant claims . . . ineffective assistance, but only if the record of the criminal proceeding revealed that the claim that the waiver was the result of ineffective assistance of counsel was meritorious." *United States v. Akbar*, 181 F. App'x 283, 286-87 (3d Cir. 2006) (internal quotations omitted); *United States v. Filter*, No. 10-902, 2010 U.S. Dist. LEXIS 110946, at *12 (W.D. Pa. Oct. 18, 2010) (holding that "mere allegations of ineffectiveness of counsel will not automatically invalidate a knowing and voluntary waiver of collateral rights" (citing *Mabry*, 536 F.3d at 243)). Upon review, this Court concludes that Dorsett's ineffective assistance claims lack merit and that enforcing the waiver will not work a miscarriage of justice.

First, this Court determines that because Dorsett decided to plead guilty to the charges, "counsel cannot be found ineffective for allowing [him] to enter a guilty plea where it was [Dorsett's] choice to accept responsibility for the crimes he committed." *Alston v. United States*, No. 05-332-1, 2008 U.S. Dist. LEXIS 104018, at *10 (E.D. Pa. Dec. 16, 2008) (denying the petitioner's ineffectiveness claim because his "plea was voluntarily and intelligently entered into"). As discussed above, the trial court conducted a thorough Rule 11 colloquy with Dorsett and found that his guilty plea and waiver of rights was knowingly and voluntarily entered. *See* Plea N.T. 104:18-24. The trial court also determined that the plea was supported by an

independent basis in fact containing the essential elements of the offenses. *Id.* At the guilty plea hearing,[11] Dorsett admitted that he was guilty of the charges in Counts One, Two, Four, Five, and Six. Plea N.T. 104:13-15. Because Dorsett admitted to the charges, a miscarriage of justice will not result from enforcement of the waiver. *See Laine*, 404 F. App'x at 573 (holding that the defendant's circumstances did not suggest a miscarriage of justice because he pled guilty and admitted to the charges).

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[11] During the sentencing hearing, Dorsett stated that he was "accepting [his] responsibilities for what happened and for the charges against" him, but also indicated that he might want to withdraw his guilty plea. In light of these potentially conflicting statements, the sentencing court informed Dorsett that if he wanted to attempt to withdraw his guilty plea, he would have a right to a hearing and the Court would appoint another attorney for him to handle the matter. *See* Sent. N.T. 41:3 – 47:6. After advising Dorsett of what could occur if he successfully withdrew his plea, the sentencing court inquired as follows:

> THE COURT: Do you understand those options as I've just laid them out for you?
> THE DEFENDANT: Yes.
> THE COURT: Okay. And what is it you're asking me to do?
> THE DEFENDANT: Accept my guilty plea.
> THE COURT: To accept it? Is that what you said?
> THE DEFENDANT: Yes.
> THE COURT: And to continue to finish the sentence --
> THE DEFENDANT: Yes.
> THE COURT: -- here this afternoon with Mr. Sletvold representing you?
> DEFENDANT: Yes.
> THE COURT: All right. . . .

Sent. N.T. 50:2-17. This colloquy was sufficient to satisfy the sentencing court's concerns regarding the possibility that Dorsett wanted to withdraw his plea. Further, there is nothing in the sentencing court's colloquy that could be construed as forcing Dorsett not to withdraw his plea. Rather, the court advised Dorsett of his rights and stated that it would appoint new counsel and hold a hearing if Dorsett wanted to withdraw his plea. *See United States v. Wilson*, 429 F.3d 455, 458 (3d Cir. 2005) ("This court has held that withdrawal of a guilty plea is not an absolute right."). To ensure that his decision was knowingly made, the sentencing court informed him of the potential consequences of successfully withdrawing the plea, including the likelihood that he would no longer be eligible for any departures and that the Government could withdraw their downward departure motion. This information was provided not to force Dorsett into not withdrawing his guilty plea, but to ensure that he made a knowing and informed decision. Dorsett's suggestion to the contrary is unsupported.

Second, this Court finds that Dorsett's claims that the affidavit was stale and that counsel was ineffective for failing to adequately investigate the "nexus" within the search warrant establishing probable cause to search 321 Pear Street are baseless. Initially, this Court finds that trial counsel filed a Motion to Suppress the search warrant. *See* ECF No. 15. This negates Dorsett's claim that counsel was ineffective for failing to investigate or challenge this evidence. Further, when Dorsett entered his guilty plea, the trial court advised him that "By pleading guilty you, in effect, would be withdrawing any pre-trial motions or requests to suppress any statements you may have made or to suppress the results of any search and seizure of your property by law enforcement officials." Plea N.T. 78:16-20. When the trial court asked: "Do you understand this?" Dorsett responded "Yes." Plea N.T. 78:21-22. Accordingly, it was Dorsett's actions, not counsel's alleged ineffectiveness, that waived the suppression arguments.

Moreover, this Court finds that because the search warrant (to search 321 Pear Street, Reading, Pennsylvania and the body of Dorsett) was supported by probable cause and was not stale,[12] Dorsett was not prejudiced by counsel's actions or inactions. *See Osarhieme Obayagbona v. United States*, No. 15-388, 2016 U.S. Dist. LEXIS 127924, at *8 (D.N.J. Sep. 19, 2016) (holding that because counsel's attempts to suppress would have proven fruitless, the petitioner had not demonstrated prejudice to support his ineffective assistance claim). The affiant signed the probable cause affidavit on February 1, 2012, and the warrant was issued the same day. The warrant was executed in the morning of February 3, 2012, within the deadline provided in the warrant. The affidavit of probable cause describes two occasions during which a confidential source ("CS") met with Dorsett inside 321 Pear Street and, at the direction of the Reading Police, purchased quantities of crack cocaine in exchange for United States currency.

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[12] This Court has independently reviewed the search warrant and affidavit of probable cause. *See* Warrant, ECF Nos. 26-1 and 87.

One of these drug transactions occurred on November 9, 2011, and the other within forty-eight hours prior to February 1, 2012.[13] The CS informed police that Dorsett was known to carry firearms and that he/she was recently told that Dorsett was in possession of two handguns. The affidavit of probable stated that the CS was reliable and that his/her information had led to the arrests and the conviction of other individuals. Reading Police determined that Dorsett had a criminal history that included convictions for felony drug and firearms charges, and that Dorsett's driver's license issued on October 1, 2011, and police reports as of January 29, 2012, listed Dorsett's home address as 321 Pear Street. Upon review of the affidavit, this Court finds that it established timely probable cause to search the residence at 321 Pear Street and the body of Dorsett.[14] *See United States v. Parker*, No. 3:13-07, 2014 U.S. Dist. LEXIS 78591, at *9 (W.D. Pa. June 10, 2014) (concluding that the affidavit, which described two drug transactions inside the place to be searched, the last of which occurred on the day before the search warrant was issued, "unquestionably provide[d] a substantial basis for finding probable cause to search"). Consequently, counsel cannot be deemed ineffective for failing to pursue suppression. *See United States v. Rashid*, No. 08-493, 2017 U.S. Dist. LEXIS 95316, at *5-6 (E.D. Pa. June 20, 2017) (concluding that because the suppression claim lacked merit, counsel was not ineffective for failing to investigate the issue). The ineffectiveness claim in this regard lacks merit and provides no basis not to enforce the collateral review waiver.

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[13] Dorsett complains that the Reading Police Report regarding these transactions was not provided to him until shortly before his sentencing hearing. However, the information in the report and affidavit are substantially the same. Regardless, because a probable cause determination is limited to review of the "facts contained in an affidavit" (also known as the "four corners" of the affidavit and warrant), the report would have had no impact on a motion to suppress. *See United States v. Conley*, 4 F.3d 1200, 1204 (3d Cir. 1993).

[14] In addition to the information described above, the affidavit of probable cause also includes a declaration by the affiant describing common conduct by drug traffickers that supports each of the items to be searched for listed in Appendix A. *See* Warrant USA00104- USA00105, USA00108.

Third, Dorsett asserts that trial counsel was ineffective by negotiating a waiver of the difference between cocaine base and crack. He does not, however, allege that the cocaine base he admittedly possessed was anything other than crack. Dorsett also fails to show that he was prejudiced by counsel's negotiation of a waiver of the difference. *See, e.g., DePierre v. United States*, 564 U.S. 70, 85-89 (2011) (holding that 21 U.S.C. § 841 does not distinguish between crack and other types of cocaine base). As previously discussed, Dorsett knowingly and voluntarily entered into the Guilty Plea Agreement. At the guilty plea hearing, the trial court questioned Dorsett about whether he understood the stipulation in paragraph nine of the Guilty Plea Agreement that he possessed 128 grams of "crack" cocaine. Plea N.T. 52:11-20. Dorsett responded "Yes." *Id.* There is no evidence that this stipulation was not knowingly and voluntarily made by Dorsett, or that Dorsett was prejudiced by counsel's negotiations in reaching this stipulation. Further, Dorsett admitted "that 128 grams of crack cocaine was possessed or distributed by [him]." Plea N.T. 52:21 – 53:1. Additionally, during the Government's summary of the facts at the guilty plea hearing, the Government stated that "[t]he defendant, Kallen Dorsett, sold crack cocaine to an undercover police officer on November 10 and 22, 2011," Plea N.T. 93:20-22; ". . .the defendant admitted that he threw approximately $500 worth of drugs out of his bedroom window[, which the police recovered in a bag and it] contained crack cocaine," Plea N.T. 94:-15; and "inside the safe [Dorsett alleged he was holding for someone else, but for which he had a key were numerous] baggies of crack cocaine," Plea N.T. 94:20 – 95:15. The trial court asked Dorsett if he heard all of these facts, if the Government attorney correctly summarized the facts as they applied to him, and if he "fully admit[ted] to all of those facts." Plea N.T. 97:9-20. Dorsett responded "Yes" to each of the trial court's questions. *Id.* Therefore, in light of Dorsett's numerous admissions that he possessed crack cocaine, trial

counsel cannot be deemed ineffective for negotiating a waiver of the difference between crack and other types of cocaine base.[15] The claim lacks merit and enforcing the collateral review waiver will work a miscarriage of justice.

Fourth, Dorsett alleges that sentencing counsel was ineffective by "negotiating a waiver of the burden of proof." It is unclear from these vague allegations to what Dorsett is referring.[16] The claim is denied, *see Thomas*, 221 F.3d at 437 (holding that the district court may dispose of "vague and conclusory allegations contained in a § 2255 petition . . . without further investigation"), and fails to show that enforcing the collateral review waiver will work a miscarriage of justice, *see United States v. Rankin*, No. 05-cr-00615, 2011 U.S. Dist. LEXIS 64430, at *32 (E.D. Pa. June 14, 2011) (holding that "[a]ppeal waivers would be meaningless if they were rendered unenforceable by purely conclusory allegations of ineffective assistance"). Moreover, this Court finds that the collateral review waiver had been negotiated and agreed to prior to sentencing counsel's involvement in the case, such that sentencing counsel's alleged ineffectiveness would not invalidate the waiver. *See Rosado v. United States*, No. 15-2152, 2016 U.S. Dist. LEXIS 1059, at *39-40 (D.N.J. Jan. 6, 2016) (concluding that "enforcing Petitioner's knowing and voluntary waiver of his collateral attack rights in spite of the alleged ineffective assistance of counsel at sentencing only would not work a miscarriage of justice").

Finally, this Court notes that the trial court engaged in the following discussion with Dorsett regarding his satisfaction with trial counsel's representation:

> THE COURT: So far, has your lawyer done everything for you that you have wanted him to do in this matter?

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[15] *See also* Warrant (indicating that the CS made arrangements to purchase crack cocaine from Dorsett prior to meeting him to complete the two uncharged drug transactions).

[16] To the extent Dorsett may be referring to the Government's burden regarding the type and quantity of drugs, this issue was discussed previously and rejected.

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with the services of your attorney in this case?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied that Attorney Cooper has given you effective assistance as your lawyer?

THE DEFENDANT: Yes.

Plea N.T. 19:13-23. Before making these statements, Dorsett took an oath to tell the truth and confirmed that he understood that if he answered any of the court's questions falsely, he could be prosecuted for perjury or making false statements. Plea N.T. 4:24 – 6:15. Dorsett also acknowledged in his signed Guilty Plea Agreement that he was satisfied with the representation by counsel. GPA ¶ 12.

This Court concludes that Dorsett's ineffectiveness claims lack merit and therefore enforcing the collateral review waiver will not work a miscarriage of justice.

ii. Dorsett's remaining claims are dismissed.

Because Dorsett knowingly and voluntarily waived his right to collaterally attack his conviction and sentence and because his ineffective assistance of counsel claims lack merit, his remaining habeas claims are dismissed. Without conducting a full merits review, this Court has determined that enforcing the collateral review waiver over the remaining claims will not work a miscarriage of justice.

First, Dorsett broadly claims that during the sentencing hearing, he was threatened by the Assistant United States Attorney into not withdrawing his guilty plea, but he offers no facts to support this allegation. *See United States v. Brown*, 369 F. App'x 388, 391 (3d Cir. 2010) (holding that the petitioner's "vague and unsupported allegations" that "the Government and his appointed counsel 'entered into some off-the-record agreement' that resulted in the dismissal of

his § 3582 motion" need not be credited). Second, Dorsett has not shown that there was a plea offer in the state court that the Government failed to honor[17] or that Project Safe Neighborhoods precluded his federal prosecution.[18] Third, Dorsett's *Brady* claim is based on a police report regarding two uncharged[19] drug transactions, which appears neither "favorable" nor "material either to guilt or to punishment." *See Brady*, 373 U.S. at 87. Fourth, Dorsett's sentence was within the Guidelines range and did not exceed the lawful maximum.[20] Finally, because Dorsett was not sentenced under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), *Descamps* is inapplicable.[21]

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17 Pennsylvania law requires the Commonwealth to provide a defendant with "reasonable notice" of its intent to invoke the mandatory minimum term of imprisonment set forth in 42 Pa. C.S. § 9712.1(c), without which the sentencing court does not have the authority to impose the mandatory minimum sentence. *See Commonwealth v. Good*, No. 715 WDA 2012, 2013 Pa. Super. Unpub. LEXIS 1193, at *10 (Mar. 18, 2013).

18 *See United States v. Wilson*, 413 F.3d 382, 389 (3d Cir. 2005), (holding that "Department of Justice guidelines and policies do not create enforceable rights for criminal defendants"); *Lowery v. United States*, No. 08-3571, 2009 U.S. Dist. LEXIS 30285, at *8-9 (E.D. Pa. Mar. 25, 2009) (concluding that Project Safe Neighborhoods "is not a sentencing provision or evidentiary rule[; r]ather, the Project is merely a funded initiative that aids in the exercise of prosecutorial discretion within the Department of Justice.").

19 The Report describes two dates that Dorsett allegedly sold crack cocaine to a CS. However, Dorsett was charged and convicted with selling drugs to an undercover police officer on two separate dates and with the drugs found during a search of his residence. *Cf.* Warrant, *with* Indictment, ECF No. 1 and Plea N.T. 93:16 – 97:20.

20 *See Laine*, 404 F. App'x at 573 (finding no miscarriage of justice where the defendant pled guilty and admitted to the charges, and "the sentence imposed was well below the advisory Guidelines range"); *Sanchez v. United States*, No. 07-3790 , 2008 U.S. Dist. LEXIS 2237, at *14 (D.N.J. Jan. 11, 2008) (concluding that the § 2255 petitioner waived his claim that his sentence exceeded the statutory maximum in light of his failure to raise the issue on direct appeal).

21 Without the ACCA, the maximum penalty for a violation of § 922(g) is ten years in prison, which is what Dorsett faced. *See Descamps*, 133 S. Ct. at 2282. But under the ACCA, "a person who violates section 922(g) . . . and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years. . . ." 18 U.S.C. § 924(e).

C. There is no basis for the issuance of a certificate of appealability.

"Under the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA'), a 'circuit justice or judge' may issue a COA [certificate of appealability] only if the petitioner 'has made a substantial showing of the denial of a constitutional right.'" *Tomlin v. Britton*, 448 F. App'x 224, 227 (3d Cir. 2011) (citing 28 U.S.C. § 2253(c)). "Where a district court has rejected the constitutional claims on the merits, . . . the petitioner 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). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, 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." *Id.*

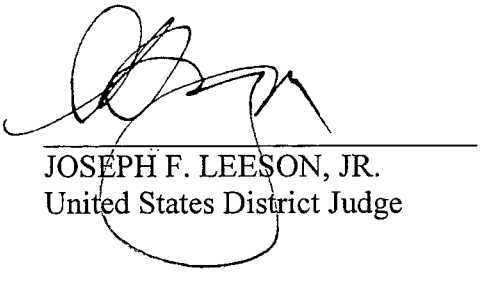
For the reasons set forth herein, Dorsett has not made a substantial showing of the denial of a constitutional right, nor would would jurists of reason find the Court's assessment debatable or wrong. *See United States v. McManus*, No. 17-2301, 2017 U.S. App. LEXIS 25506, at *1 (3d Cir. 2017) (denying the application for a certificate of appealability because the appellant waived his right to collaterally attack his sentence and jurists of reason would not debate the denial of his § 2255 motion because his "waiver was knowing and voluntary and enforcing it would not work a miscarriage of justice"); *United States v. Alvarez*, No. 2010-cr-00193, 2015 U.S. Dist. LEXIS 38811, at *1-2 (E.D. Pa. Mar. 25, 2015) (denying a certificate of appealability after finding that the collateral review waiver was valid and enforceable as to three habeas claims and after denying the fourth habeas claim for ineffective assistance on the merits).

IV. CONCLUSION

This Court has considered the habeas claims Dorsett raised in the § 2255 motion to vacate, ECF No. 71, as well as the supplemental and amended claims raised in his additional filings, *see* ECF Nos. 83, 87, 90, 9, 94, 96, and 107. For the reasons set forth herein, this Court concludes that Dorsett knowingly and voluntarily waived his right to collaterally attack his conviction or sentence. The waiver is enforced because Dorsett's ineffective assistance of counsel claims lack merit and because Dorsett has not shown that a miscarriage of justice will result. The ineffective assistance of counsel claims are denied on their merits, and all remaining claims are dismissed based on Dorsett's collateral review waiver. The Government's motions to dismiss are granted.

A separate Order follows.

BY THE COURT:



JOSEPH F. LEESON, JR.
United States District Judge