UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1275

Patrick Roger Brigaudin

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:19-cv-03342-MDH)

JUDGMENT

Before KELLY, ERICKSON, and KOBES, 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.

June 12, 2020

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

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

PATRICK R. BRIGAUDIN,	)	
	)	
Movant,	)	
	)	Civil No. 6:19-cv-03342-MDH
vs.	)	Crim. No. 6:16-cr-03039-MDH-1
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Movant pleaded guilty to conspiring to distribute methamphetamine and launder money. Movant was sentenced to 360 months' imprisonment. Now before this Court is Movant's pro se motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. Doc. 1. Because the Court finds that the motion, files, and record conclusively show that Movant is not entitled to relief, Movant's motion is DENIED. Furthermore, a Certificate of Appealability is DENIED and this case is DISMISSED.

I. Background

On September 28, 2016, a grand jury returned a 37-count second superseding indictment charging Movant with conspiracy to distribute 500 grams or more of a mixture of substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846 (Counts One and Four); with conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and (h) (Count Two); distributing methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) (Counts Six, Ten, and Eleven); distributing 50 grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) (Counts Twenty-Two and Thirty-Six); and money laundering, in violation of 18 U.S.C. §§ 2 and 1956(a)(1)(B) (Count Twenty-Seven). Crim. Doc. 107.[1] The indictment also included a forfeiture allegation under 21 U.S.C. § 853. *Id.*

Movant pleaded guilty, pursuant to a written plea agreement, to Counts One and Two of the second superseding indictment and admitted the forfeiture allegation. Crim. Doc 327, 328.

[1] Crim. Doc." refers to the docket number entries in Movant's criminal case, Case No 6:16-cr-03039-MDH-1. "Doc." refers to the docket number entries in Movant's civil case, Case No. 6:19-cv-03342-MDH.

Movant waived his constitutional right to a jury trial, and waived the right to appeal or collaterally attack his conviction or sentence. Crim. Doc. 328, p. 12-14. Movant acknowledged that his entry into the plea agreement was freely and voluntarily given, not the product of any threats or promises, and that he was satisfied with his defense counsel's performance. *Id.* at 17. Movant executed the plea agreement on August 1, 2017. *Id.* at 18; Crim. Doc. 554, p. 3.

At the change-of-plea hearing, Movant agreed that he was pleading guilty to Counts One and Two of the second superseding indictment and was admitting the forfeiture allegation. Crim. Doc. 554, p. 8, 13. Movant confirmed that he was competent to plead guilty and understood the terms of the plea agreement. *Id.* at 4-6. Movant stated that no coercion or promises outside of the promises in the plea agreement had induced the guilty plea and he believed the plea agreement was in his best interest. *Id.* 6-7. Movant acknowledged that because of his prior felony drug offense, upon pleading guilty to Count One that he faced no less than 20 years to life imprisonment and that under Count Two, he faced no more than 20 years' imprisonment. *Id.* at 9. Movant stated he understood that the district court would determine his actual sentence within the authorized statutory range, and he could be sentenced above or below his Sentencing Guidelines range. *Id.* at 9-10. Movant also affirmed understanding that he would be unable to withdraw his guilty plea if he was disappointed with the sentence he received. *Id.* at 11. Movant confirmed waiving his right to a jury trial. *Id.* at 11-12. Movant confirmed that he had read and understood the appeal-waiver provision of his plea agreement. *Id.* at 13-14.

On October 27, 2017, a presentence investigation report (PSR) was issued. Crim. Doc. 407. The PSR contained a recitation of the offense conduct. *Id.* at 4-42. The PSR calculated a base offense level of 38, under U.S.S.G. § 2D1.1, based on the drug quantity. *Id.* at 48. The PSR recommended several enhancements and a reduction to the offense level: a two-level enhancement for maintaining a premises for the purpose of manufacturing or distributing a controlled substance, pursuant to § 2D1.1(b)(12); a two-level enhancement for being directly involved with importing a controlled substance and pattern of criminal conduct as a livelihood, pursuant to § 2D1.1(b)(15)(C) and (E); a four-level enhancement for being an organizer or leader, pursuant to § 3B1.1(a); and a three-level reduction under § 3E1.1(a) and (b) for acceptance of responsibility, resulting in a total offense level of 43. *Id.* at 48-58. The PSR calculated a criminal history category of II, yielding an advisory Sentencing Guidelines range of life imprisonment. *Id.* at 97.

Movant's counsel made many objections to the PSR, including challenging all three offense level enhancements. *Id.* at 21. Movant's counsel also filed a sentencing memorandum that challenged all three offense level enhancements. Crim. Doc. 503.

Movant appeared for sentencing on March 21, 2018. Crim. Doc. 511. This Court sentenced Movant to a below-Guidelines sentence of 360 months on Count One and 240 months on Count Two, to run concurrently, followed by concurrent terms of 10 years' supervised release on Count One, and three years' supervised release on Count Two. Crim. Doc. 516.

Movant filed a timely notice of appeal on March 28, 2018. Crim. Doc. 519. His counsel moved to withdraw and submitted an *Anders* brief. *United States v. Brigaudin*, 744 Fed.Appx. 986 (8th Cir. 2018). Movant filed a pro se supplemental brief, arguing his guilty plea was involuntary, a speedy trial violation, that the district court erred by imposing a four-level leadership enhancement, and that the appeal waiver did not preclude appellate review. *Id.* The Eighth Circuit affirmed Movant's conviction and sentence in an unpublished per curiam opinion. *Id.* Crim. Doc. 615.

Movant has now filed a motion under § 2255 seeking to vacate his sentence. Crim. Doc. 627; Doc. 1.

II. Legal Standard

Title 28 U.S.C. § 2255 provides that an individual in federal custody may file a motion to vacate, set aside, or correct his or her sentence. A motion under this statute "is not a substitute for a direct appeal and is not the proper way to complain about simple trial errors." *Anderson v. United States,* 25 F.3d 704, 706 (8th Cir. 1994) (internal citations omitted). Instead, § 2255 provides a statutory avenue through which to address constitutional or jurisdictional errors and errors of law that "constitute[ ] a fundamental defect which inherently results in a complete miscarriage of justice." *Sun Bear v. United States,* 644 F.3d 700, 704 (8th Cir. 2011) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

"A § 2255 motion can be dismissed without a hearing if (1) the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Sanders v. United States*, 341 F.3d 720, 722 (8th Cir. 2003) (citation and quotation marks omitted). Additionally, a petition that consists only of "conclusory allegations unsupported by specifics [or] contentions that, in the face of the record, are wholly incredible," is

insufficient to overcome the barrier to an evidentiary hearing on a § 2255 motion. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

III. Analysis

Movant brings two grounds for relief: (1) ineffective assistance of counsel, and (2) prosecutorial misconduct. Doc. 1. In the first ground, Movant argues that ineffective assistance of counsel resulted in an involuntary guilty plea, failure to challenge the Sentencing Guidelines enhancements, and a failure to file an appeal. *Id.* In the second ground, Movant contends "direct threats by the prosecutor" precipitated his guilty plea. *Id.* Respondent argues that Movant's claims are conclusory, contrary to the record, and lack merit. Doc. 5.

A. Ground One: Ineffective Assistance of Counsel

A claim of ineffective assistance of counsel may be sufficient to attack a sentence under § 2255; however, the "movant faces a heavy burden." *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996); *see DeRoo v. United States*, 223 F.3d 919, 925 (8th Cir. 2000). To establish that counsel was ineffective, a movant must satisfy the *Strickland* test, that is Movant must "show that his '[] counsel's performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient performance prejudiced his defense.'" *Nave v. Delo*, 62 F.3d 1024, 1035 (8th Cir. 1995) (quoting *Lawrence v. Armontrout*, 961 F.2d 113, 115 (8th Cir. 1992)); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both prongs of the *Strickland* test must be established to be entitled to § 2255 relief; failure to establish either prong is fatal to a claim of ineffective assistance of counsel. *See Strickland*, 466 U.S. 697; *DeRoo*, 223 F.3d at 925 ("[i]f the defendant cannot prove prejudice, we need not address whether counsel's performance was deficient"); *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997).

Under the first prong of deficient performance, Movant must overcome a "strong presumption that counsel's conduct falls within the wide range of professionally reasonable assistance and sound trial strategy." *Garrett v. United States*, 78 F.3d 1296, 1301 (8th Cir. 1996) (citation omitted). Second, to establish prejudice, Movant must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see Palmer v. Clarke*, 408 F.3d 423, 444-45 (8th Cir. 2005) (citation omitted). In the context of a guilty plea, *Strickland*'s prejudice prong requires a showing of a "reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," *see Hill v. Lockhart*, 474 U.S. 52, 59 (1985), while in

a sentencing context, a § 2255 movant must show a "reasonable probability that his sentence would have been different but for the deficient performance." *Jeffries v. United States*, 721 F.3d 1008, 1014 (8th Cir. 2013). However, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Rather, a reasonable probability requires a "probability sufficient to undermine confidence in the outcome." *Jeffries*, 721 F.3d at 1014 (citing *Strickland*, 466 U.S. at 694); *see King v. United States*, 595 F.3d 844, 852-53 (8th Cir. 2010) (finding "little doubt" of prejudice where defendant "likely would have received a much shorter sentence" had counsel challenged the sentencing court's application of § 4B1.1).

Both prongs of this test must be established in order to be entitled to § 2255 relief; failure to establish either one of the prongs is fatal to a claim of ineffective assistance of counsel. *See Strickland*, 466 U.S. 697; *DeRoo v. United States*, 223 F.3d 919, 925 (8th Cir. 2000) ("[i]f the defendant cannot prove prejudice, we need not address whether counsel's performance was deficient").

In Ground One, Movant contends specifically that counsel was ineffective for (1) leading him to believe he would receive a lesser sentence upon pleading guilty and thereby rendering the plea involuntary, (2) purportedly failing to challenge certain Sentencing Guidelines enhancements this Court applied, and (3) failing to file an appeal. Doc. 1.

1. <u>Movant's Guilty Plea Was Not Involuntary</u>

In count one, Movant argues that defense counsel led him to believe a guilty plea would result in a 240-month sentence. Doc. 1. Movant argues that had he known he would receive a 360-month sentence, he would have opted for trial. *Id.* Moreover, Movant argues that due to his poor education, the "only thing he ... firmly believe[d]" was that counsel led him to believe he would be sentenced at the low end of his 240-292-month Sentencing Guidelines range.

However, the record clearly indicates Movant's knowing and intelligent compliance with this Court during the change of plea hearing, and statements made in court under oath "constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *see also Ingrassia v. Armontrout*, 902 F.2d 1368, 1370 (8th Cir. 1990) (representations made during the plea hearing "carry a strong degree of verity and pose a formidable barrier in any subsequent collateral proceedings").

Specifically, Movant stated that no coercion, threats, or promises had been made to induce a guilty plea. Crim. Doc. 554. Additionally, as Respondent noted, this Court pointedly informed Movant that dissatisfaction regarding his sentence would not be grounds to challenge it. *Id.* Movant's limited education did not negate his ability to understand the change of plea proceedings and voluntarily plead guilty, as evidenced by Movant's statement that he could read and write, fluently, in both English and French. *Id.* Movant fails to provide evidence sufficient to overcome the strong presumption that he knowingly and intelligently pleaded guilty, given the statements made in Court.

Notwithstanding the above, Movant contends he pleaded guilty only after receiving a promise from counsel that it would result in a lesser sentence. However, even if counsel made the purported promise, its violation does not constitute a cognizable § 2255 claim. "Inaccurate advice of counsel about the sentencing guidelines or likely punishment does not render involuntary a defendant's decision to plead guilty, so long as the defendant is informed of the maximum possible sentence permitted by statute and the court's ability to sentence within that range." *United States v. Quiroga*, 554 F.3d 1150, 1155-56 (8th Cir. 2009). "[A] defendant who pleads guilty has no right to be apprised of the sentencing options outside the statutory maximum and minimum sentences" and "a defendant's reliance on an attorney's mistaken impression about the length of sentence is insufficient to render a plea involuntary as long as the court informed the defendant of his maximum possible sentence." *United States v. Granados*, 168 F.3d 343, 345 (8th Cir. 1999) (per curiam).

Movant acknowledged his maximum sentence potential by responding affirmatively to the following question this Court stated: "The maximum penalty could actually be as much as life in prison and supervised release for life. ... [A]re you aware that is the authorized potential punishment for the crime ... committed?" Crim. Doc. 554, p. 9. Therefore, because Movant was informed regarding his maximum sentence potential prior to his guilty plea, this claim is denied.

2. <u>Defense Counsel Challenged the Guideline Enhancements</u>

Movant argues insufficient evidence existed to support both two-level enhancements this Court applied for maintaining a premise to distribute controlled substances and importing a controlled substance as a criminal livelihood. Doc. 1, p. 22. Thus, Movant argues, counsel was ineffective for failing to object to both. *Id.* However, the record indicates defense counsel clearly *did* challenge the enhancements.

Defense counsel objected to both enhancements in the PSR addendum. Crim. Doc. 407. Defense counsel challenged both enhancements in the sentencing memorandum. Crim. Doc. 503. And lastly, defense counsel objected to both during the sentencing hearing. Crim. Doc. 555. In all three instances, defense counsel advanced the same arguments Movant now bases his § 2255 motion upon. In all three instances, this Court overruled the objections. Crim. Doc. 555. Movant's dissatisfaction with this Court's determination does not constitute a proper § 2255 claim.

Challenges to the Sentencing Guidelines are not cognizable in a § 2255 motion. *Sun Bear v. United States*, 664 F.3d 700, 704 (8th Cir. 2011). Although § 2255 provides relief in cases in which a sentence is in excess of the maximum term allowed by law, § 2255 is not available to provide relief in cases which present "garden variety Sentencing Guidelines application issues." *Auman v. United States*, 67 F.3d 157, 161 (8th Cir. 1995).

Defense counsel acted effectively by challenging the relevant Guidelines enhancements. Movant cannot again challenge this Court's ruling on both via a § 2255 claim. Therefore, Movant's claim is denied.

3. <u>Defense Counsel Filed a Timely Notice of Appeal</u>

Lastly, Movant argues counsel was ineffective for failing to file an appeal. Again, however, the record contradicts Movant's claim. Defense counsel filed an *Anders* brief as well as a timely notice of appeal. Crim. Doc. 519. The Eight Circuit determined Movant's case contained no non-frivolous issues for appeal. Crim. Doc. 615, p. 2.

"Generally, when counsel submits an *Anders* brief, the court independently reviews the record for any nonfrivolous issues. If the court finds a nonfrivolous issue, it will direct counsel to more fully brief the issue. *United States v. Davis*, 508 F.3d 461, 464 (8th Cir. 2007) (internal citations omitted). In *Anders*, the Supreme Court instructed that it is "the duty of the court, and not counsel, to review the record and ultimately decide whether the case is wholly frivolous." *Id.* (citing *Anders v. State of Cal.*, 386 U.S. 738, 744 (1967)).

Therefore, defense counsel acted effectively by filing both a notice of appeal and an *Anders* brief. The Eighth Circuit's determination that no appealable issues existed does not constitute deficient performance. Movant's count three claim is denied. Accordingly, Movant's claims of ineffective assistance of counsel under Ground One are denied.

B. Ground Two: Prosecutorial Misconduct

Movant claims prosecutorial misconduct occurred, constituting a basis for Ground Two. However, Movant's motion contains no details or other factual allegations in support of this claim. "The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the facts of the record are wholly incredible." *Blackledge*, 431 U.S. at 74 (citing *Machibroda v. United States*, 368 U.S. 487, 495-96 (1962)). Therefore, because Movant has failed to provide specifics, his conclusory allegation of prosecutorial misconduct under Ground Two is denied.

IV. Certificate of Appealability

Because the Court finds Movant has failed to demonstrate a reasonable basis for his claims that his counsel was ineffective in his representation of Movant and prosecutorial misconduct occurred, Movant's motion to vacate his sentence is denied. Additionally, since the motions, files, and records conclusively show Movant is not entitled to relief, Movant's request for an evidentiary hearing is denied. *See Roundtree v. United States*, 751 F.3d 923, 925 (8th Cir. 2014) ("A Section 2255 movant is entitled to an evidentiary hearing . . . unless the motion, files, and record conclusively show he is not entitled to relief.").

Pursuant to Rule 11 of the Rules Governing Section 2255 Proceedings, the Court must issue or deny a certificate of appealability when it enters a final order adverse to Movant. A certificate of appealability may be issued "only if [Movant] has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because Movant has made no such showing, the Court declines to issue a certificate of appealability.

V. Conclusion

Accordingly, for the reasons explained above, Movant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is DENIED and a Certificate of Appealability is DENIED. This action is dismissed.

IT IS SO ORDERED.

/s/ Douglas Harpool
DOUGLAS HARPOOL, JUDGE
UNITED STATES DISTRICT COURT

Dated: January 15, 2020

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JUDGMENT IN A CIVIL CASE

PATRICK ROGER BRIGAUDIN,

Movant,

v. Case No. 19-03342-CV-S-MDH-P

UNITED STATES OF AMERICA,

Respondent.

O **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

x **DECISION OF THE COURT.**

IT IS ORDERED AND ADJUDGED: Movant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is DENIED and a Certificate of Appealability is DENIED. This action is dismissed.

Entered on: January 15, 2020

PAIGE WYMORE-WYNN
CLERK OF COURT

/s/ K. Willis
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1275

Patrick Roger Brigaudin

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:19-cv-03342-MDH)

ORDER

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

August 21, 2020

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

/s/ Michael E. Gans