UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1944

Antonio E. Wills

Movant - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:19-cv-01043-RK)

JUDGMENT

Before COLLOTON, 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 15, 2020

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

/s/ Michael E. Gans

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

ANTONIO E. WILLS,	)	
	)	
Movant,	)	
	)	Case No. 19-01043-CV-W-RK-P
vs.	)	Crim. No. 16-00104-01-CR-W-RK
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER DENYING MOVANT'S MOTION UNDER 28 U.S.C. § 2255, DENYING A CERTIFICATE OF APPEALABILITY, AND DISMISSING CASE

Movant, who is incarcerated at the USP Leavenworth in Leavenworth, Kansas, pursuant to a conviction and sentence entered in the above-cited criminal case, has filed a *pro se* motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Doc. 1. Respondent argues that Movant's grounds for relief are either not cognizable or are without merit. Doc. 4. Although this case was dismissed without prejudice due to Movant's failure to file a reply as ordered, Movant has since filed what appears to be his reply. Docs. 6, 8. As a result, this case will be reopened for purposes of this Order. Nevertheless, because this Court finds that the motion, files, and record show that Movant is not entitled to relief,[1] Movant's motion is denied, a certificate of appealability is denied, and this case is dismissed.

I. Background

On November 2, 2016, a superseding indictment was returned charging Movant with the following: possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C) (Count One); possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1) (Count Two); and felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Count Three). Crim. Doc. 29.[2] The Government filed an information,

[1] "A Section 2255 movant is entitled to an evidentiary hearing . . . unless the motion, files, and record conclusively show he is not entitled to relief. *Roundtree v. United States*, 751 F.3d 923, 925 (8th Cir. 2014) (citation and internal quotation omitted).

[2] "Crim. Doc." refers to the docket number entries in Movant's criminal case, Case No . 16-00104-01-CR-W-RK. "Doc." refers to the docket number entries in Movant's associated civil case, Case No 19-01043-CV-W-RK-P. Page number citations refer to the page numbers assigned by the CM/ECF electronic docketing system.

alleging that Movant had a prior felony drug conviction for possession with intent to distribute crack cocaine in the United States District Court for the District of Kansas. Crim. Doc. 58. As a result of the prior conviction, the statutory range of punishment on Count One became not more than 30 years' imprisonment. *Id.*

Movant appeared before this Court on February 9, 2018, and pleaded guilty to Counts One and Three pursuant to a plea agreement. Crim. Docs. 63, 64. The plea agreement contained a factual basis for the guilty plea and an agreement that this Court would determine the applicable Sentencing Guidelines range at sentencing, utilizing a preponderance of the evidence standard. Crim. Doc. 63, pp. 2, 4, 8. The parties stipulated to a base offense level of 34 and a criminal history category of VI. *Id.* at 7. At the change-of-plea hearing, Movant acknowledged understanding the procedure for calculating the Sentencing Guidelines, and the parties agreed that they had discussed the probability that Movant would be considered a career offender. Crim. Doc. 80, pp. 12-16, 26-27.

A Presentence Investigation Report ("PSR") was issued on May 2, 2018, which contained a recitation of the offense conduct and found that Movant was a career offender under U.S.S.G. § 4B1.1 because he had two prior convictions for distributing a controlled substance. Crim. Doc. 67, pp. 7-8 . The PSR cited a conviction for possession with intent to distribute a controlled substance in the Circuit Court of Buchanan County Missouri, Case No. CR694-190FX and a conviction for possession with intent to distribute cocaine base in the District of Kansas, Case No. 2:03CR20148-01-JWL. *Id.* This resulted in a total offense level of 32, after Movant received an acceptance of responsibility reduction under § 3E1.1(a). *Id.* at 8. The PSR calculated a criminal history score of 8, yielding a criminal history category of IV, but the career offender provision required a criminal history category of VI. *Id.* at 9-14. Accordingly, the PSR calculated an advisory Sentencing Guidelines range of 210 to 262 months' imprisonment. *Id.* at 22.

Defense counsel objected that Movant was not a career offender because he did not have two prior "controlled substance offenses." *Id.* at 25. Defense counsel argued that the Buchanan County conviction included behavior that was broader than the definition under § 4B1.2(b). *Id.* Prior to sentencing, Movant filed a *pro se* motion to withdraw his guilty plea, asserting that defense counsel had told him he would not be a career offender. Crim. Doc. 79.

Movant appeared before this Court for sentencing on December 20, 2018, where he continued to assert that he was told he would not be a career offender. Crim. Doc. 83; Crim. Doc. 92, pp. 4-5. The Court noted that the claim was contrary to the record of the plea, where the parties agreed that they had discussed the probability of Movant being a career offender. *Id.* at 5-6. Defense counsel noted that Movant's prior attorney also had informed Movant that he would be a career offender and that

Movant had "fired her because she told him that." *Id.* at 12.

This Court denied Movant's motion to withdraw his guilty plea. *Id.* at 16-20. This Court then denied defense counsel's objection that the Buchanan County conviction was overbroad. *Id.* at 20-23. After hearing arguments and considering the statutory sentencing factors under 18 U.S.C. § 3553(a), this Court imposed a sentence of 228 months on Count One and 120 months on Count Three, to be served concurrently. *Id.* at 23-28; Crim. Doc. 85.

Movant appealed, arguing in an *Anders* brief that he was not a career offender. The Eighth Circuit enforced the appeal waiver, found no non-frivolous claims, and dismissed the appeal. Crim. Doc. 94-1; *United States v. Wills*, 776 F. App'x 380 (2019). Movant now seeks relief under § 2255. Doc. 1.

II. 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)).

III. Discussion

Movant raises the following two grounds for relief in the present proceedings: (1) his prior state convictions do not meet the "4B1.2(b) enhancements distribution w/ intent in light of 6th Cir. Court *United States v. Havis* [927 F.3d 382 (6th Cir. 2019)];" and (2) defense counsel was ineffective for not having "attacked prior state case for 4B1.2(b)" because it was "over 15 years" and there was an "error of drug weight never mentioned." Doc. 1, pp. 4-5. Movant also raised a third claim for relief under the First Step Act, which this Court severed from the present § 2255 proceedings without prejudice, subject to the claim being refiled as a separate motion to reduce sentence in the above-cited criminal case. *Id.* at 5; Doc. 3. Respondent argues that Ground One is not cognizable and that Ground Two is without merit. Doc. 4.

A. Ground One is not cognizable.

In Ground One, Movant argues that the application of the career offender provision was erroneous under *Havis* because "the word distribution w/ intent does not meet the 4B1.2(b) enhancement on prior state crimes." Doc. 1, p. 4. This claim mirrors the claim Movant raised at sentencing and on appeal that the Buchanan County conviction is overbroad and cannot serve as a career offender predicate. Crim. Doc. 67, p. 25.

As set forth in the Eighth Circuit's direct appeal decision, such challenges fall within the scope of Movant's appeal waiver. *See* Crim. Doc. 94-1. Furthermore, such a challenge is not cognizable in a § 2255 motion. *See Sun Bear*, 644 F.3d 704 ("ordinary questions of guideline interpretation falling short of the 'miscarriage of justice' standard do not present a proper Section 2255 claim"). It is well-settled that claims of "a severer sentence than expected was received after a guilty plea" or "an excessive sentence when the sentence imposed is within the statutory maximum" are not cognizable. *Houser v. United States*, 508 F.2d 509, 516 (8th Cir. 1974). Notably, Movant's sentence of 228 months is not greater than the statutory range of punishment.

Even if Movant could seek relief under *Havis*, the Court notes that *Havis* does not entitle Movant to relief. In *Havis*, the Sixth Circuit held that the definition of "controlled substance offense" in the Sentencing Guidelines did not include attempt crimes. *Havis*, 927 F.3d at 387. Nevertheless, Movant's prior conviction in Buchanan County remains a predicate in light of Eighth Circuit precedent. *See United States v. Thomas*, 886 F.3d 1274, 1276-77 (8th Cir. 2018) (possession of a controlled substance with intent to distribute is a predicate controlled substance offense); *Untied States v. Reid*, 887 F.3d 434, 437 (8th Cir. 2018). *Havis* does not disturb the precedent in *Thomas*. Therefore, Ground One is denied.

B. Ground Two is without merit.

In Ground Two, Movant argues that defense counsel was ineffective for not having "attacked prior state case for 4B1.2(b)" because it was "over 15 years" and there was an "error of drug weight never mentioned." Doc. 1, p. 5.

"A guilty plea waives all defects except those that are jurisdictional." *United States v. Todd*, 521 F.3d 891, 895 (8th Cir. 2008) (internal quotation omitted); *see also Walker v. United States*, 115 F.3d 603, 604 (8th Cir. 1997) ("[A] valid guilty plea forecloses an attack on a conviction unless on the face of the record the court had no power to enter the conviction or impose the sentence.") (internal quotation omitted). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating

to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). Instead, such a Movant "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in [*McMann v. Richardson*, 397 U.S. 759 (1970)]." *Id.* Statements made by a defendant in court under oath should not be lightly set aside and "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").

"A guilty plea is invalid only if it does not represent a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Easter v. Norris*, 100 F.3d 523, 525 (8th Cir. 1996). Accordingly, "a defendant must have knowledge of the law in relation to the facts." *Id.* (citation omitted). However, "'[t]he rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision.'" *U.S. v. Gomez*, 326 F.3d 971, 975 (8th Cir. 2003) (quoting *Brady v. United States,* 397 U.S. 742, 757 (1970)).

To establish that counsel was ineffective, Movant must "show that his 'trial 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). To establish prejudice, 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." *Strickland,* 466 U.S. at 694. 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. *Id.* at 697.

Here, Movant fails to establish that his plea or sentence is invalid or that counsel was ineffective under the foregoing standard. Movant personally raised the issue concerning the conviction being "well over 15 years" during the sentencing hearing. Crim. Doc. 92, pp. 18-19. Movant's claim is contradicted by the record, in that Movant was placed on parole on March 27, 1998. Crim. Doc. 67, p. 10. His parole was revoked, and he was granted parole again on December 7, 2001. *Id.* The instant offense was committed on March 19, 2016. *Id.* at 5. Under U.S.S.G. § 4A1.1, App. N. 1, and § 4A1.2(e)(1), the instant offense was within 15 years of the 1994 offense. *See* § 4A1.1, App. N. 1 ("A sentence imposed more than fifteen years prior to the defendant's commencement of the instant offense

is not counted unless the defendant's incarceration extended into this fifteen-year period."). Movant similarly fails to meet his burden under any of his other conclusory allegations in Ground Two regarding drug weight. *See Kress v. United States*, 411 F.2d 16, 20 (8th Cir. 1969) ("In a § 2255 proceeding, the burden of proof with regard to each ground for relief rests upon the petitioner."). This Court would not have sustained any of the objections he raises therein. Consequently, Movant fails to establish that he was prejudiced by defense counsel's alleged failures in Ground Two.

Ultimately, none of Movant's arguments or claims establish that either his plea or sentence are invalid or were otherwise the result of ineffective assistance of counsel. Rather, the record before this Court indicates that Movant entered a knowing and voluntary plea and received an appropriate sentence within the statutory range of punishment. For these reasons and in light of the record before this Court, Movant's § 2255 motion is denied.

IV. Certificate of Appealability

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

For the foregoing reasons, this case is reopened; 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; and this case is dismissed.

It is so **ORDERED**.

/s/ Roseann A. Ketchmark
ROSEANN A. KETCHMARK
UNITED STATES DISTRICT JUDGE

Dated: March 16, 2020.