

A P P E N D I X

" A "

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13398-D

JOHNNY ROY TARVER,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Johnny Roy Tarver moves to supplement the record, to pursue a certificate of appealability ("COA"), and for a COA in order to appeal the district court's denial of his 28 U.S.C. § 2255 motion to vacate. To merit a COA, Tarver must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Tarver's motion to pursue a COA is DENIED AS MOOT in light of the fact that he subsequently filed a motion for a COA that has been considered. Tarver's motion for a COA is DENIED because he failed to make the requisite showing. Tarver's motion to supplement the record is DENIED AS MOOT.

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

A P P E N D I X

" B "

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

CASE NO. 17-22534-CIV-DIMITROULEAS
(12-20914-CR-DIMITROULEAS)

vs.

JOHNNY ROY TARVER,

Defendant.

FINAL JUDGMENT AND ORDER DISMISSING/DENYING MOTION TO VACATE

THIS CAUSE is before the Court on Defendant's *pro se* June 21, 2017 Motion to Vacate [DE-1], and upon a review of the docket and Pre-Sentence Investigation Report (PSIR), and having presided over this case, the Court, finds as follows:

1. On December 11, 2012, Tarver was indicted and charged with two counts of Conspiracy to Possess with Intent to Distribute five (5) grams or more of Crack Cocaine and two counts of Possession with Intent to Distribute five (5) grams or more of Crack Cocaine. [CR-DE-3]. The crimes occurred from November 27, 2010, through August, 2012.

2. On January 29, 2013, Tarver pled guilty to one of the conspiracy counts [CR-DE-183] pursuant to a plea agreement. [CR-DE-184]. Tarver agreed that he had distributed approximately 72 grams of crack cocaine. [CR-DE-185, p. 5]. The PSIR indicated that Tarver qualified as a Career Offender. [CR-DE-293, pp. 31, 37].¹ The PSIR relied on five (5) prior felony controlled substance offenses [CR-DE-293, paragraph 27]:

A. Sell/Manufacture or Delivery of Cocaine in F04-23109B [CR-DE-293, para. 127].

B. Trafficking in Cocaine and Possession with Intent to Sell Marijuana in F05-36242D

[CR-DE-293, para. 129].

¹ The PSIR's recommended advisory guideline range was 188-235 months [DE-293, p. 44], which was a level 31 criminal history category VI. See [DE-627, p. 20].

- A. Possession of Cocaine or Cannabis with Intent to Sell, Manufacture or Deliver is a controlled substance offense. *U.S. v. Smith*, 775 F. 3d 1262, 1268 (11th Cir. 2014) cert. denied, 135 S. Ct. 2827 (2015); *U.S. v. Burton*, 564 Fed. Appx. 1017, 1019 (11th Cir. 2014)'
- B. Trafficking in Cocaine is a controlled substance offense. *Rodriguez v. U.S.*, 572 Fed. Appx. 884, 888 (11th Cir. 2014). Here, there was no allegation of purchase.
- C. There were no objections to the PSIR. The unobjected-to facts in the PSIR are binding for sentencing purposes. *U.S. v. Bennett*, 472 F. 3d 825, 833-34 (11th Cir. 2006):
 - (1). Paragraph 127 of the PSIR indicates that Tarver sold cocaine in F04-23109B.
 - (2). Paragraph 129 of the PSIR indicates that Tarver was observed among a group of individuals selling narcotics in F05-36242D.
 - (3). Paragraph 131 of the PSIR indicates Tarver sold narcotics and was found in possession of 11 baggies of marijuana and \$1314 in F07-23145.
 - (4). Paragraph 132 of the PSIR indicates Tarver conducted hand to hand narcotics transactions and was found in possession of two baggies containing crack cocaine and seventeen (17) baggies containing marijuana in F07-33248A.
 - 9%0. Paragraph 135 of the PSIR indicates that Tarver tossed an object on a roof, and it contained thirteen (13) small baggies of crack cocaine in F08-13718.

Wherefore, Tarver's Motion to Vacate [DE-1] is Dismissed as Time-Barred and alternatively Denied. The Clerk shall close this case and deny any pending motions as Moot.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JOHNNY ROY TARVER,

Movant.,

vs.

UNITED STATES OF AMERICA,

Respondent.

CASE NO. 17-22534-CIV-DIMITROULEAS
(12-20914-CR-DIMITROULEAS)

**FINAL JUDGMENT FOR RESPONDENT, ORDER DENYING
CERTIFICATE OF APPEALABILITY**

THIS CAUSE is before the Court upon the Final Judgment and Order Denying Motion to Vacate, signed today on July 7, 2017. Accordingly, pursuant to Rule 58(a), Fed. R. Civ. Proc. and Rule 11(a), Section 2255 Proceedings, it is

ORDERED AND ADJUDGED as follows:

1. Judgment is entered on behalf of Respondent, against the Movant, Johnny Roy Tarver.
2. On consideration of a Certificate of Appealability, the Court will deny such Certification as this Court determines that Petitioner has not shown a violation of a substantial constitutional right. This Court notes that pursuant to Rule 22(b)(1), Fed. Rules App. Proc., Petitioner may now seek a certificate of appealability from the Eleventh Circuit Court of Appeals.
3. The Clerk shall close this case and deny any pending motions as Moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 7th day of July, 2017.


WILLIAM P. DIMITROULEAS
United States District Judge